

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER F-21-09**



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

and

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

Application for Participant Assistance/Cost Award Funding – Interim Awards

BEFORE: A.J. Pullman, Commissioner August 25, 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 seeking submissions from the parties on a number of issues before scheduling a Procedural Conferences; and
- E. On April 7, 2009 the Commission issued a letter scheduling a Procedural Conference on April 15, 2009; and

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- F. After the Procedural Conference the Commission by Order G-38-09 issued a Regulatory Timetable; and
- G. On June 25, 2009 counsel for Kwikwetlem First Nation ("Kwikwetlem") wrote to the Commission asking how the Commission proposes to deal with the outstanding matters on advance funding (interim award) for First Nation Intervenor, scheduling for submission of First Nation evidence and information requests, and scheduling for a hearing including the length of hearing that will be required. Hwlitsum First Nation ("Hwlitsum") and the Upper Nicola Band, the Okanagan Nation Alliance, and the Nlaka'pamux Nation Tribal Council (collectively "NNTC et al.") in their letters noted similar issues they would like addressed; and
- H. On June 30, 2009 the Commission by Order G-83-09 ruled on the admissibility of the Supplemental Evidence filed by BCTC. The Order also set out the Revised Regulatory Timetable including Participant Assistance/Cost Award Budget deadline for July 9, 2009. The NNTC et al. and Stó:lō Tribal Council ("STC") requested additional time to complete their Budget Estimates. The Commission granted them an extension to July 14, 2009; and
- I. The Commission received five requests for an accelerated approval process for Interim Awards. The five Intervenor requesting Interim Awards were Hwlitsum, Kwikwetlem, Coldwater, Cook's Ferry, Siska and Ashcroft Bands ("Nlaka'pamux Bands"), NNTC et al., and STC; and
- J. BCTC was requested to provide comments on the requests for Interim Awards. BCTC provided its comments on July 23, 2009. BCTC noted that it was concerned about the size of the NNTC et al. budget forecast; and
- K. The Commission requested a reply comment from NNTC et al. The NNTC et al. filed its reply comments in a letter dated August 6, 2009; and
- L. The Commission has reviewed the PACA Applications with regard to the criteria set out in the PACA Guidelines and has concluded that certain Interim Awards should be approved for participants in the proceeding in accordance with the Reasons for Decision that are set out in Appendix A to this Order.

NOW THEREFORE the Commission orders as follows:

1. Pursuant to section 118(1) of the Utilities Commission Act, the Commission awards interim funding to the following participants:

<u>Participant</u>	<u>Interim Award</u>
Hwlitsum	\$16,622.38
Kwikwetlem	27,182.00
Nlaka'pamux Bands	20,232.50
NNTC et al.	35,000.00
STC	<u>13,975.50</u>
TOTAL	<u><u>\$113,012.38</u></u>

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2. BCTC is directed to reimburse in a timely manner the above-noted participants by way of a cheque to each participant for the interim amount awarded.

DATED at the City of Vancouver, in the Province of British Columbia, this 25th day of August 2009.

BY ORDER

Original signed by:

A.J. Pullman
Commissioner

Attachment

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

Application for Participant Assistance/Cost Award Funding – Interim Awards

REASONS FOR DECISION

1.0 INTRODUCTION

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”). On August 5, 2008 the British Columbia Utilities Commission (“Commission”) issued its Decision accompanied by Order C-4-08 that granted BCTC the CPCN for the ILM Project subject to conditions.

The Court of Appeal for British Columbia released its decision in *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 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”

On March 23, 2009 the Commission issued Letter L-20-09 seeking submissions from the parties on a number of issues before scheduling a Procedural Conference. On April 7, 2009 the Commission issued a letter that scheduled a Procedural Conference on April 15, 2009. After the Procedural Conference the Commission by Order G-38-09 issued a Regulatory Timetable.

2.0 PARTICIPANT ASSISTANCE/COST AWARD FUNDING AND INTERIM AWARDS

Subsection 118(1) of the Act states: “The commission may order a participant in a proceeding before the commission to pay all or part of the costs of another participant in the proceeding.” The Commission provides costs awards to participants to allow them to bring information to the Commission Panel that is relevant, useful, and of value for the Commission Panel to make an informed decision. The Commission’s Participant Assistance/Cost Award Guidelines (“PACA Guidelines”) attached as Appendix A to Order No. G-72-07 provides the participant eligibility and procedures of application for a cost award and interim award.

The PACA Guidelines in Section 3 Interim Award states:

“In exceptional circumstances, the Commission Panel may approve the costs of retaining a consultant, Expert Witness/Specialist, or lawyer by a Participant under an accelerated approval process. If an accelerated approval process is approved, one of the following reimbursement alternatives may be ordered.

- (a) reimbursement of a consultant’s, Expert Witness/Specialist’s, or lawyer’s approved invoice, or a portion thereof, that has been received after the regulatory proceeding has begun, but may be before the proceeding has concluded; or
- (b) advance payment(s) not to exceed fifty percent of the higher of the amount actually paid by the Participant and the Budget Estimate net of those items that may not be funded as per the advice from Commission staff pursuant to section 2.

In the case of 3(b) above, the Participant would also be required to file an application under Section 2 at the conclusion of the hearing, and the approved award, net of the advance payments, would be payable as per Section 2.”

3.0 REQUESTS FOR AN ACCELERATED APPROVAL PROCESS FOR INTERIM AWARDS

On June 30, 2009 the Commission by Order G-83-09 determined the admissibility of the Supplemental Evidence filed by BCTC. The Order also set out the Revised Regulatory Timetable including Participant Assistance/Cost Award Budget deadline for July 9, 2009. The Upper Nicola Band (“UNB”), the Okanagan Nation Alliance (“ONA”), and the Nlaka’pamux Nation Tribal Council (“NNTC”) (collectively “NNTC et al.”) and Stó:lō Tribal Council (“STC”) requested additional time to complete their Budget Estimates. The Commission granted them an extension to July 14, 2009.

The Commission received five requests for an accelerated approval process for Interim Awards. The five Intervenors requesting Interim Awards were the Hwlitsum First Nation (“Hwlitsum”); Kwikwetlem First Nation (“Kwikwetlem”); Coldwater, Cook's Ferry, Siska and Ashcroft Bands (“Nlaka’pamux Bands”); NNTC et al.; and STC.

BCTC was requested to provide comments on the requests for Interim Awards. BCTC provided its comments on July 23, 2009. BCTC noted that it was concerned about the size of the NNTC et al. budget forecast. The Commission requested a reply comment from NNTC et al. The NNTC et al. filed its reply comment in a letter dated August 6, 2009.

3.1 Hwlitsum First Nation

Hwlitsum submits it qualifies for an Interim Award under the PACA Guideline’s accelerated approval process as they have limited resources and it would provide them with certainty related to funding. Hwlitsum’s Budget Estimate is \$33,244.75 consisting of legal fees, consulting costs, and disbursements. Hwlitsum seek an interim cost award of \$22,829.93 for invoices for March to June 2009.

The Commission Panel finds that 50 percent of the Hwlitsum Budget Estimate or \$16,622.38 is an appropriate advance payment in this proceeding.

The Commission approves an Interim Award of costs to the Hwlitsum of \$16,622.38. The Hwlitsum will need to justify all its costs in its final application to ensure it meets the criteria stated in the PACA Guidelines. The final award by the Commission will be based on the total submission of costs that conform to the PACA Guidelines including the total maximum funding days allowed. In the event that the final award amount is less than the total approved Interim Award amount, the participant is required to reimburse the difference back to the utility.

3.2 Kwikwetlem First Nation

Kwikwetlem submits it qualifies for an Interim Award under the PACA Guideline's accelerated approval process. The Kwikwetlem's Budget Estimate is \$54,405.68 consisting of legal fees and disbursements. However, the sum of the legal fees of \$53,900 and disbursements of \$464 total \$54,364.00. Ratcliff & Company LLP has submitted invoices to June 2009 totalling \$15,513.09. Kwikwetlem submits it is a small Band with very limited resources and the submission is made for "exceptional circumstances". Kwikwetlem requests reimbursement of \$15,513.09 to pay the invoices received.

The Commission Panel finds that 50 percent of the re-calculated Kwikwetlem Budget Estimate or \$27,182.00 is an appropriate advance payment in this proceeding.

The Commission approves an Interim Award of costs to the Kwikwetlem of \$27,182.00. Kwikwetlem will need to justify all its costs in its final application to ensure it meets the criteria stated in the PACA Guidelines. The final award by the Commission will be based on the total submission of costs that conform to the PACA Guidelines including the total maximum funding days allowed. In the event that the final award amount is less than the total approved Interim Award amount, the participant is required to reimburse the difference back to the utility.

3.3 Nlaka'pamux Bands

The Nlaka'pamux Bands submit they qualify for an Interim Award under the PACA Guideline's accelerated approval process as they are a small First Nation with very limited resources. The Bands' submission is made for "exceptional circumstances". The Nlaka'pamux Bands' Budget Estimate is \$40,465.00 consisting of legal fees and disbursements. Ratcliff & Company LLP has submitted invoices to June 2009 totalling \$9,950.70. The Nlaka'pamux Bands request reimbursement of \$9,950.70 to pay the invoices received.

The Commission Panel finds that 50 percent of the Nlaka'pamux Bands Budget Estimate or \$20,232.50 is an appropriate advance payment in this proceeding.

The Commission approves an Interim Award of costs to the Nlaka'pamux Bands of \$20,232.50. The Nlaka'pamux Bands will need to justify all its costs in its final application to ensure it meets the criteria stated in the PACA Guidelines. The final award by the Commission will be based on the total submission of costs that conform to the PACA Guidelines including the total maximum funding days allowed. In the event that the final award amount is less than the total approved Interim Award amount, the participant is required to reimburse the difference back to the utility.

3.4 NNTC et al.

The Upper Nicola Band (“UNB”), Okanagan Nation Alliance (“ONA”) and Nlaka’pamux Nation Tribal Council (“NNTC”) submit they qualify for an Interim Award under the PACA Guideline’s accelerated approval process as they have limited resources and it would provide them with certainty related to funding. The NNTC et al. are seeking an interim cost award of 50 percent of their Budget Estimate. The Budget Estimate requests the amount of \$178,481.19 which is calculated by adding up the various components although the total amount is not expressly stated in the request.

The detailed costs included in the budget estimate are:

Item	Amount
Estimate of Legal Fees: 48 days + Disbursements and other costs	\$66,900.00
UNB Case Manager	\$15,287.32
ONA Case Manager	\$16,610.19
NNTC Case Manager	\$15,909.67
UNB Consultants	\$9,920.00
ONA Consultants	\$16,184.75
NNTC Consultants	\$33,801.90
Disbursements	\$3,867.36
UNB \$1,256.78	
ONA \$1,359.68	
NNTC \$1,250.90	
Total Budget Estimate	\$178,481.19
Request for 50 percent of Budget Estimate as Interim Award	
Total Interim Award Request	\$89,240.60

BCTC was provided a copy of the requests for interim awards. On July 23, 2009 BCTC provided its comments on the five requests for interim funding. BCTC provided general comments on the all five applications and some specific comments related to the NNTC et al. application. BCTC noted the different approaches to interim funding by the STC, Hwiltsum, Kwikwetlem, and Nlaka’pamux Bands. BCTC takes no issue with any of the conceptual approaches used by the various applicants.

BCTC in its comment letter goes on to state:

“BCTC is concerned, however, with the size of the cost forecast submitted by the UNB, ONA and NNTC. BCTC remains mindful that it is the ratepayers of BCTC and BC Hydro that must bear the cost of these proceedings in front of the Commission. The forecast budget of the UNB, ONA and NNTC is significantly larger than the forecast budgets of the other applicants. A review of their

application appears to indicate they are contemplating a substantial effort in gathering evidence, involving 3 case managers and 8 consultants. While BCTC recognizes that some new evidence may be necessary or helpful, it should not be overlooked that the task of this proceeding is to assess the adequacy of consultation that has already taken place. Accordingly, BCTC respectfully suggests that the Commission seek further clarification from the UNB, ONA and NNTC to justify the level of expenditures that they have forecast.”

The NNTC et al. was given an opportunity to respond to the BCTC comments. The Commission also requested further clarification on the level of expenditures in the Budget Estimate. The NNTC et al. provided its comments in a letter dated August 6, 2009.

The NNTC et al. letter advises that two clients, Okanagan Nation Alliance and the Nlaka’pamux Nation Tribal Council, are tribal organizations representing several First Nation communities and the collective interests of their respective Nations. The letter explains the extent of the evidence required. NNTC et al. notes that the B.C. Court of Appeal directed the Commission to review the adequacy of consultation and accommodation to the point of its decision on BCTC’s CPCN application. In order to assess the adequacy of BC Hydro’s and BCTC’s efforts, the Commission must first consider the scope of consultation and accommodation necessary to fulfill the Crown’s obligations. The NNTC et al. submit that to make this determination the Commission will require evidence on the NNTC et al.’s aboriginal title and rights and the possible adverse effects of the ILM on the title and rights.

The NNTC et al. state that gathering and presenting evidence on Aboriginal title and rights, even to make no more than a prima face case, as well as evidence on the diverse and varied possible impacts on these interests is a major undertaking requiring significant resources. The NNTC et al. submit that the scope of the duty to consult and accommodate regarding the ILM project includes the adverse effects due to the existing transmission lines, right-of-way and infrastructure. The NNTC et al. submit for the Commission to fully consider this fundamentally important issue, the NNTC et al. require adequate participant funding to be able to gather evidence regarding impacts due to both the existing transmission lines, right-of-way and infrastructure and the proposed ILM line, as well the relation between existing facilities and the proposed new line. The NNTC et al. submit that a reduction in the NNTC et al.’s Budget Estimate would handicap the efforts of the NNTC et al. to present their case to the Commission and indirectly advantage BC Hydro and BCTC’s position on this issue before the Commission. The NNTC et al. state that given the breadth and scale of evidence required to ensure the Commission has the necessary evidence to make a considered and informed decision on an important Constitutional issue before it for the first time, the Budget Estimate is reasonable and cost effective.

The BCTC reply submission dated April 6, 2009 (Exhibit B-2) on pages 1 and 2 stated a number of Intervenor appeared to have differing views regarding the scope of the issues that need to be addressed to determine whether the Crown’s duty to consult and, if necessary, accommodate has been met to the Commission’s decision point.

The large funding request by NNTC et al. appears to presume a lengthy review process with additional evidence being filed. The Commission Panel, in Order G-83-09, allowed BCTC to file supplemental evidence existing up to August 5, 2008. The purpose of the ILM Reconsideration proceeding is for the Commission Panel to receive evidence and submissions regarding the adequacy of BCTC’s consultation efforts regarding First Nations up to the point of the decision. The Commission Panel’s task is to assess the adequacy of consultation and, if necessary, accommodation efforts as of August 5, 2008.

To perform its task, the Commission Panel expects to receive evidence and submissions from the parties related to how BCTC identified and notified the affected First Nations, the issues and concerns raised by those First Nations, the prima facie strength of the asserted claims, the nature of the infringement of those claims if the project is approved, the consultation process, and accommodation efforts, if necessary. The Commission Panel also anticipates receiving submissions on where the duty to consult lies on the Haida spectrum and whether that duty has been fulfilled.

The Commission Panel is concerned with the large difference between the NNTC et al. Budget Estimate compared to other Intervenor. The large difference appears to arise from the greater use of consultants and paid case managers. The Commission Panel recognizes the need for consultant costs but is concerned with the level of anticipated work to be performed by the case managers and consultants. The Commission Panel is also concerned that the large size of the Budget Estimate may indicate that NNTC et al. is contemplating the production of evidence that was not in existence as of August 5, 2008.

The Commission Panel is not persuaded that the NNTC et al. Budget Estimate for the level of consultant and case manager costs is reasonable or necessary at this point in time. The purpose of this proceeding is to hear evidence on the adequacy of consultation up to the point of the decision of August 5, 2008. The Commission Panel will be receiving evidence on what happened and what did not happen as of that date. The Commission Panel is not persuaded at this point in time that estimated significant consultant time for research, report writing, and interviews is required to ascertain what happened as of August 5, 2008. The Commission Panel is of the view that an overall budget estimate of \$70,000 is reasonable at this point in time. **Consistent with other interim awards in this proceeding, the Commission approves an Interim Award of costs to NNTC et al. of \$35,000.00.** The NNTC et al. will need to justify all its costs in its final application to ensure it meets the criteria stated in the PACA Guidelines. The final award by the Commission will be based on the total submission of costs that conform to the PACA Guidelines including the total maximum funding days allowed. The Commission Panel may be persuaded as a result of reviewing the final application that the consultant and case manager costs which were not approved in this Interim Award, if actually incurred, were reasonably incurred and therefore subject to reimbursement in the final cost award. In the event that the final award amount is less than the total approved Interim Award amount, the participant is required to reimburse the difference back to the utility.

3.5 Stó:lō Tribal Council

The STC submits it qualifies for an Interim Award under the PACA Guideline's accelerated approval process. On July 13, 2009 the STC requested for the period May 15 – June 5, 2009 an award for costs for legal services of \$4,200. Also, on July 13, 2009 the STC requested a second Interim Cost Award for the period covering July 10 – September 21, 2009 that amounted to \$24,801.

The costs of the invoice and budget estimate are summarized below:

Item	Amount
<u>First Request (May 15 – June 5, 2009)</u> Request for Legal Services 2.33 days x \$1800/day = \$4,200. Invoice received for legal services: 14 hours x \$300/hour = \$4,200 Invoice dated July 2, 2009	\$4,200.00
Total First Request	\$4,200.00
<u>Second Request (July 10 – September 21, 2009)</u> Legal Services: \$13,500 2 Consultants and 1 Coordinator: \$8,750 Honoraria for Steering Committee Members \$2,000 Disbursement (food and travel): \$551	\$24,801.00
Total Second Request	\$24,801.00
Total Interim Award Request	\$29,001.00

The Commission is not prepared to issue an interim award for STC's costs as claimed to September 21, 2009. The Commission Panel notes that the legal fees incurred and claimed were for 14 hours. The Commission usually reimburses fees paid to senior lawyers at \$225/hr (equivalent to \$1800/day). Fourteen hours of legal fees at \$225/hr equals \$3,150.00. The Commission does not normally award rates above the PACA Guidelines and declines to do so at this time.

The Commission Panel finds that 50 percent of the modified STC Budget Estimate or \$13,975.50 is an appropriate Interim Award in this proceeding.

The Commission approves an Interim Award of costs to STC of \$13,975.50. The STC will need to justify all its costs in its final application to ensure it meets the criteria stated in the PACA Guidelines. The final award by the Commission will be based on the total submission of costs that conform to the PACA Guidelines including the total maximum funding days allowed. In the event that the final award amount is less than the total approved Interim Award amount, the participant is required to reimburse the difference back to the utility.

4.0 FINAL AWARDS

The Commission Panel in providing the Interim Awards has not disallowed any costs at this time. However, each participant should be mindful of justifying all the costs in the final application based on the criteria stated in the PACA Guidelines and take into consideration the Commission staff letter providing comments or concerns on the funding request. The Commission generally awards costs for legal and consulting based on the number of proceeding days plus preparation days. The Commission expects participants to provide information of value that would be helpful in the Commission Panel in making its decision. This should be done in a reasonable and cost effective manner. Participants should make the effort to minimize costs where possible.

The final awards by the Commission will be based on the total submission of costs that conform to the PACA Guidelines. In the event that the final award amount is less than the total approved Interim Award amount, the participant is required to reimburse the difference back to the utility.