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**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-170-10**

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

An Application for Reconsideration of Commission Decision in Letter L-69-10 Denying the Toquaht First Nation Application for Further Participant Assistance/Cost Awards in an Inquiry into British Columbia's Electricity Transmission Infrastructure and Capacity Needs for the Next 30 Years

BEFORE: L.A. O'Hara, Commissioner and Panel Chair
A.W.K. Anderson, Commissioner
D.A. Cote, Commissioner
M.R. Harle, Commissioner

November 23, 2010

O R D E R

WHEREAS:

- A. Pursuant to the former section 5(4) of the *Utilities Commission Act* (Act) the British Columbia Utilities Commission (Commission) was required to conduct an inquiry (Inquiry) to make determinations with respect to British Columbia's infrastructure and capacity needs for electricity transmission for the period ending 20 years after the day the Inquiry begins, or a different period if so specified by terms of reference issued by the Minister responsible for administration of the *Hydro and Power Authority Act*;
- B. On December 11, 2008, the Minister of Energy, Mines and Petroleum Resources (Minister) issued Terms of Reference for the Inquiry, which identified that the general purpose of the Inquiry was for the Commission to make determinations with respect to British Columbia's electricity transmission infrastructure and capacity needs for a 30-year period commencing from the date the Inquiry begins;
- C. By letter dated June 26, 2009 (Exhibit A-15), the Commission established a schedule for reviewing interim Participant Assistance/Cost Award (PACA) applications for funding up to the June 24, 2009 Procedural Conference. Additionally, in its letter, the Commission asked Participants requesting Participant assistance for the remainder of the Inquiry, and those who had not already submitted interim requests, to file their budgets by August 14, 2009;
- D. On August 17, 2009 by Order F-20-09, the Commission awarded a total of \$110,446.12 in interim funding to ten Participants based on applications totaling \$133,447.17 pursuant to section 118(1) of Act;
- E. On September 21, 2009 by Order F-26-09, the Commission awarded a total of \$11,944.02 in interim funding to two Participants based on applications totaling \$14,358.95 pursuant to section 118(1) of Act;

- F. By letter dated October 2, 2009 (Exhibit A-28), amended by Exhibit A-29, the Commission provided information to Participants on PACA funding for the remainder of the Inquiry whereby a bi-monthly approval process was outlined and organized into a number of Interim Funding Periods;
- G. By the October 15, 2009 deadline established for Interim PACA Period 2 funding, eleven Participants, including the Toquaht First Nation, had applied requesting a total of \$311,217.79 for Interim PACA Period 2 funding pursuant to section 118 of the Act. By Order F-32-09 dated October 26, 2009, the Commission awarded a total of \$154,902.92 to these Participants, inclusive of \$9,769.54 to the Toquaht First Nation;
- H. Following receipt of a letter dated December 15, 2009 from the Minister (Exhibit A-35), the Inquiry Panel issued Order G-167-09 (Exhibit A-37) suspending the Inquiry until May 31, 2009 and rescinding the schedule for Interim PACA funding beyond Period 3;
- I. By the December 15, 2009 deadline established for Interim PACA Period 3 funding, two Participants, including the Toquaht First Nation, had applied requesting a total of \$5,462.40 for Interim PACA Period 3 funding pursuant to section 118 of the Act. By Order F-34-09 dated December 23, 2009, the Commission awarded a total of \$5,385.40 to the two Participants, inclusive of \$2,613.40 to the Toquaht First Nation;
- J. On January 12, 2010, as a result of the suspension of the Inquiry, the Commission issued a letter to Participants inviting other Participants who may have wished to submit a PACA application for Interim PACA Period 3 funding, but who had not done so by the December 15, 2009 deadline, to do so by January 29, 2010;
- K. Nine Participants applied requesting a total of \$199,858.10 for PACA funding pursuant to section 118 of the Act. By Order F-8-10 dated March 11, 2010, the Commission awarded a total of \$179,037.39 to these Participants as final awards;
- L. On May 31, 2010, the Minister wrote to the Commission Chair to advise that the Inquiry was no longer required due to legislative changes that contemplated the repeal of sections 5(4) to (9) of the Act in conjunction with the introduction of the *Clean Energy Act*;
- M. By Order G-98-10 dated June 4, 2010, the Commission cancelled the Inquiry;
- N. On August 5, 2010, the Toquaht First Nation applied for recovery of costs incurred for its participation in the Inquiry from July 16, 2009 to June 4, 2010 of \$46,767.08;
- O. By Letter L-69-10 dated September 3, 2010, the Commission denied the funding request;

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P. By letter dated September 20, 2010, the Toquaht First Nation requested a reconsideration of the Commission's September 3, 2010 Decision;

Q. The Commission has considered the reconsideration application.

NOW THEREFORE the Commission orders, for the reasons set out in the Reasons for Decision attached as Appendix A to this Order, that the reconsideration application is denied.

DATED at the City of Vancouver, in the Province of British Columbia, this 23rd day of November 2010.

BY ORDER

Original signed by:

L.A. O'Hara
Panel Chair/Commissioner

Attachment



IN THE MATTER OF

**AN APPLICATION FOR
RECONSIDERATION OF COMMISSION DECISION IN LETTER L-69-10
DENYING THE TOQUAHT FIRST NATION APPLICATION FOR FURTHER
PARTICIPANT ASSISTANCE/COST AWARDS IN AN INQUIRY INTO BRITISH COLUMBIA'S
ELECTRICITY TRANSMISSION INFRASTRUCTURE AND CAPACITY NEEDS
FOR THE NEXT 30 YEARS**

REASONS FOR DECISION

NOVEMBER 23, 2010

BEFORE:

**L.A. O'Hara, Commissioner and Panel Chair
A.W.K. Anderson, Commissioner
D.A. Cote, Commissioner
M.R. Harle, Commissioner**

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1.0 INTRODUCTION

By application dated September 20, 2010, the Toquaht First Nation (also described as the Toquaht Nation in its filed materials and orders of the Commission) (hereafter, Toquaht Nation) seeks a reconsideration of the British Columbia Utilities Commission's (Commission) decision in Letter L-69-10 dated September 3, 2010 denying the Toquaht Nation's application for compensation for Participant Assistance/Cost Award (PACA) funding of \$46,767.08 for the legal work Woodward & Company performed on its behalf in connection with the Inquiry into British Columbia's Long Term Electricity Infrastructure (Inquiry). The request for PACA funding for the Toquaht Nation was denied primarily for being out of time and, in part, because it covered a period when the Inquiry had been suspended.

The Commission was of the view that adequate notice had been given to Participants regarding the dates by which cost awards had to be filed and what would be accepted in terms of funding once the Inquiry was suspended. The Commission further found that even if the application had been timely and did not, in part, cover the period that the Inquiry was suspended, insufficient evidence had been provided to allow the Panel to make a determination on the nature of the Inquiry work performed during the suspension period.

For the reasons that follow the reconsideration application is denied.

It should be noted that Commissioner R.K. Ravelli, who was the fifth member of the Inquiry Panel, resigned from the Commission in the summer of 2010 and, therefore, was not involved either in the September 3, 2010 Decision or this Reconsideration.

2.0 BACKGROUND

The Inquiry was legislatively mandated by section 5(4) of the *Utilities Commission Act*, R.S.B.C. 1996, c.473 (Act). Section 5(5) of the Act required that the Inquiry begin no later than March 31, 2009. Those and other subsections of section 5 relating to the Inquiry were repealed on June 3, 2010 as a result of amendments to the Act consequential to the coming into force of the *Clean Energy Act*, S.B.C. 2010, c.22.

On December 11, 2008 the Minister of Energy Mines, and Petroleum Resources (Minister) issued Terms of Reference for the Inquiry which directed, in part, that the Commission publish its draft report on its determinations on or before June 30, 2010.

A Preliminary Workshop and the first Procedural Conference took place on April 17 and April 27, 2009 respectively. At the Procedural Conference, several Participants raised concerns relating to the ability of many Participants to fund their involvement in the Inquiry, particularly in view of the fact the Inquiry was expected to last until at least mid 2010. As a result, by letter dated May 5, 2010, the Panel advised Participants that it would make interim cost awards consistent with the PACA Guidelines attached to Order G-72-09 for assistance required up to and including the Procedural Conference on Scoping of Issues scheduled for June 24, 2009. The Panel further advised that it would consider some form of alternative PACA Guidelines for the remainder of the Inquiry, including the payment of further interim awards. The Panel also advised that "[a]ny alternative guidelines might give recognition to the different nature of the Inquiry, the complexity of the issues, the likely range of participants, the likely locations of meetings and conferences and the protracted time frame involved." (Exhibit A-8)

By Order G-47-09 dated May 4, 2009, the Commission established the dates for a second Workshop and second Procedural Conference to take place on June 18 and 24, 2009 respectively, as well as a Preliminary Inquiry Schedule for the balance of the Inquiry. The Preliminary Schedule provided for, among other things, the filing by British Columbia Hydro and Power Authority (BC Hydro), the British Columbia Transmission Corporation (BCTC) and FortisBC Inc. (Fortis) of their base data, initial scenarios and transmission implications of those scenarios by September 18, 2009. It also contemplated an Oral Hearing commencing in early March, 2010 (Exhibit A-7).

By letter dated June 8, 2009, the Commission advised Participants to expect the Panel's decision on interim cost awards sometime in July.

The second Workshop and the Procedural Conference on Scoping of Issues took place on the dates scheduled.

By letter dated June 26, 2010, the Panel established a schedule for submitting and reviewing applications for Participant assistance for the period to June 24, 2009 and requested those Participants requesting Participant assistance who had not yet filed their budgets to do so by August 14, 2009. The Panel also determined that it would allow a Participant the opportunity to respond to comments of the utilities on that Participant's cost award request. This opportunity was not specifically provided for in the PACA Guidelines (Exhibit A-14).

By letter dated June 30, 2009, the Panel established a process which included written submissions and a further Procedural Conference scheduled for August 18 and 19, 2009 to address First Nations issues relating to the duty to consult (Exhibit A-16).

By Order G-86-09 dated July 9, 2009 with Reasons for Decision attached, the Panel issued its Scoping Document for the Hearing. The Order excepted First Nations issues which were the subject of the August Procedural Conference and allowed Participants to seek leave after September 18, 2009 to add issues (Exhibit A-18).

By letter dated August 13, 2009, the Toquaht Nation filed its request for actual incurred expenses up to August 13, 2009 in the sum of \$9,725.00 and a proposed budget until the completion of the Inquiry in the sum of \$141,827.50, for a total of \$151,552.50. Specific details were provided of the expenses incurred for the period from July 16 to August 13, 2009. The proposed budget was filed subject to revision after the third Procedural Conference.

By Order F-20-09 dated August 17, 2009 with Reasons for Decision attached, the Panel made its first interim awards totalling \$110,486.12. In Section 4.0 of its Reasons for Decision, the Panel provided the following advice to Participants on the level of detail it would require in PACA applications:

All Participants need to understand that the Commission Panel requires sufficient detail in the PACA applications to provide the Panel with a foundation upon which it can base the exercise of its discretion under section 118 of the Act. In the Panel's view, this need not prejudice a Participant's position, particularly considering that the requested disclosure is after the activity has taken place. For example, disclosing that one has spent x number of hours preparing a submission for a proceeding in which one is participating, does not say anything about the party's strategy that has not already been made evident by the submission. Consequently, the Panel will continue to require a sufficient level of detail in future PACA applications. A Participant remains free to choose the level of detail it wishes to provide in support of its application. Ultimately, the burden rests with the Participant to persuade the Panel of the Participant's entitlement to the PACA award it seeks (p. 4/4).

The third Procedural Conference took place on August 18 and 19, 2009 as scheduled. By Order G-108-09 dated September 16, 2009 with Reasons for Decision attached, the Panel determined that:

- (1) it was functioning in a quasi judicial capacity for the purposes of the Inquiry and did not have an independent duty to consult with and, if necessary, accommodate First Nations;
- (2) even if it was not fulfilling a quasi-judicial role in the context of the Inquiry, it did not owe an independent duty to consult; and
- (3) it would provide First Nations with a meaningful opportunity to engage in the Inquiry and bring their concerns and their perspectives to bear on the analysis and conclusions and to encourage their participation through a variety of means as discussed Section 3.0 of the Reasons.

(Exhibit A-21)

In Section 3.0 of the Reasons for Decision under the heading “Participant Assistance Cost Awards (‘PACA’), the Panel had this to say, in part, in response to submissions it had received that the normal practice for PACA funding creates a barrier to effective participation by First Nations in the Inquiry:

The Inquiry Panel wishes to overcome these barriers [no financial resources to pre-fund technical resources, funding for participation of legal counsel and case managers, and for the development of studies and evidence] to effective participation in the Inquiry. It is considering an expedited PACA approval process and given the unique circumstances of this Inquiry, the Inquiry Panel will also consider detailed requests to pre-fund necessary studies in support of relevant evidence to be submitted to the Inquiry. The Inquiry Panel will provide more detailed comments soon in response to the PACA budgets filed by Participants in August (pp. 15-16).

The Panel also established October 7, 2009 as the date for submissions on a First Nations Phase and for the identity of a potential First Nations consultant or consultants and October 14 as the date for First Nations to submit proposals on the terms of reference of a First Nations Advisory Panel (pp. 15-16/17).

By Order G-111-09 dated September 17, 2009 the Commission established a schedule for Regional Sessions beginning October 14, 2009 through November 25, 2009 and for a fourth Procedural Conference to take place on October 28, 2009 (Exhibit A-22).

Further, beginning on September 17, BC Hydro and BCTC began to request extensions for the date for filing the evidence originally due on September 18, 2009.

By Order F-26-09 dated September 21, 2009 with Reasons for Decision attached, the Panel made interim awards to two additional Participants totalling \$11,944.02. In Section 4 of its Reasons for Decision, the Panel again provided the same advice to Participants as it had in its Reasons for Decision to Order F-20-09 on the level of detail it would require in PACA applications

By letter dated October 2, 2009, the Panel advised Participants that it agreed it had the latitude under the PACA Guidelines “to pre-fund activities by Participants in exceptional circumstances and intends to use that latitude in the unique circumstances of the Inquiry.” The letter went on to provide information on an expedited bi-monthly approval process according to a schedule provided in a table (Exhibit 28).

By letter dated October 7, 2009, the Panel provided the form of affidavit it would require and corrected the schedule in the table (Exhibit 29).

On October 8, 2009, the Panel granted a delay in the filing of submissions on the First Nations Phase until the Procedural Conference set for October 28 (Exhibit A-30).

On October 8, 2009, the Commission staff responded to the Toquaht Nation’s letter of August 13 regarding its PACA budget for the Inquiry.

On October 9, 2009, due to the series of delays in the filing the BC Hydro and BCTC evidence, the Panel postponed, for rescheduling at a later date, the first four Regional Sessions (Exhibit A-31).

By letter dated October 15, 2009 counsel for the Toquaht Nation applied for a Period 2 (July 16-September 30, 2009) bi-monthly PACA interim award in the sum of \$31,822.54. The application contained a very short, general summary of the services performed in Period 2.

As a result of continuing delays in the filing the evidence originally to be filed on September 18, 2009, the Commission by Order G-124-09 dated October 16, 2009 with Reasons for Decision attached:

- (1) postponed the remaining Regional Sessions to a date to be fixed;
- (2) postponed the fourth Procedural Conference to a date to be fixed;
- (3) varied the dates provided in the Reasons for Decision attached to Order G-108-09 for the filing of submissions and proposals regarding a First Nations phase, the identity of a potential First Nations consultant or consultants and the terms of reference for First Nations Advisory Panel and postponed them to a date to be fixed.

(Exhibit A-33)

By Order F-32-09 dated October 26, 2009, the Panel made Period 2 Interim Awards totalling \$154,902.92 including the sum of \$9,769.54 to the Toquaht Nation. In recognition that the preparation of written and oral arguments in advance of the third Procedural Conference “was uniquely complex and time consuming”, the Panel awarded preparation at a ratio of 3:1 preparation days for each conference day compared to the 2:1 ratio it used for the first period awards (p. 2 of 5).

In making its awards, the Panel agreed with the British Columbia Sustainable Energy Association and the Sierra Club of British Columbia (BCSEA, *et al.*) that it was possible under the cumulative bi-monthly PACA process for time not reimbursed in earlier periods to be brought forward as preparation for the main hearing if, during the period in which the main hearing occurred, the number of proceeding days would yield a number of reimbursable days that exceeds the number of lawyer, case manager and expert days invoiced during that period alone (p. 3 of 5).

The Panel concluded its Reasons with the following statement:

Participants are again reminded that these are interim awards, and costs above this approved budget amount may be applied for at the end of the oral hearing. Final awards will be based on the contribution and value provided by a PACA applicant to the Inquiry, as well as other criteria established by the Guidelines (p. 5 of 5).

By letter dated November 2, 2009, counsel for the Toquaht Nation filed a revised budget submission increasing its budget to \$212,060.04 which he submitted was due, in part, to the estimated 10 day Oral Hearing Phase and, in part, to the anticipated significant expansion in First Nations' engagement.

By letter dated November 9, 2009, the Minister sought input from the Commission on a reasonable extension to the public review period prescribed in the Minister's Terms of Reference (Exhibit A-34).

By letter dated December 15, 2009 counsel for the Toquaht Nation applied for a Period 3 (October 1- November 30, 2009) bi-monthly PACA Interim Award in the sum of \$2,690.40. The application contained a very short, general summary of the services performed in Period 3.

By letter dated December 17, 2009, the Commission forwarded to Participants a copy of a letter from the Minister dated December 15 in which he advised the Commission that he would be issuing revised Terms of Reference for the Inquiry and that it would not be productive to continue with the Inquiry before May 31, 2010. The Commission's letter advised Participants that the Panel would shortly issue an Order suspending the Inquiry until May 31, 2010 (Exhibit A-35).

By Order G-167-09 dated December 17, 2009, the Commission:

- (1) suspended the Inquiry until May 31, 2010;
- (2) advised it would not be accepting submissions on Inquiry issues, other than those required for administrative purposes to suspend the Inquiry; and
- (3) rescinded the schedule for accepting and processing interim Participant Assistance Cost Awards it had previously established, beyond those for the third interim period that ended November 30, 2009.

(Exhibit A-37)

On December 21, 2009, the Commission responded to an inquiry from Chief Lydia Hwitsum of the Cowichan Tribes advising that as the review process was being suspended until May 31, 2010, pursuant to the December 15, 2009 letter from the Minister, the Commission Panel was not in a position to either approve or deny the request for capacity funding.

By Order F-34-09 dated December 23, 2009 with Reasons for Decision attached, the Panel made Period 3 Interim Awards totalling \$5,385.40 including the sum of \$2,613.40 to the Toquaht Nation.

On January 12, 2010, the Commission sent a letter to all Participants stating that due to the suspension of the Inquiry, there would not be a subsequent bi-monthly award for Interim Period 3, and consequently parties who had not submitted a cost award for that period by the December 15 deadline would be allowed to do so by January 29, 2010.

By Order F-8-10 dated March 11, 2010 with Reasons for Decision attached, the Panel made the balance of its Period 3 Interim Awards totalling \$179,037.39 from total awards applied for of \$199,858.10. Order F-8-10 also summarizes the Panel's treatment of the prior Interim Awards it had made during the Inquiry.

On May 31, 2010, the Minister wrote the Commission Chair to advise that the Commission led Inquiry was no longer required due to legislative changes that contemplated the repeal of sections 5(4) to (9) of the Act (Exhibit A-38).

On June 3, 2010, the *Clean Energy Act* received Royal Assent. Those parts of section 5 of the Act providing for the Inquiry were repealed as a result of consequential amendments to the Act.

By letter dated August 5, 2010, the Toquaht Nation applied to the Commission for recovery of \$46,767.08 in costs for participation in the Inquiry for the period from June 16, 2009 to June 4, 2010.

By Letter L-69-10 dated September 3, 2010, the Panel denied the claim for costs for the reasons set out in the Introduction to these Reasons.

3.0 JURISDICTION

The Commission's jurisdiction to award costs to participants in proceedings before it is found in section 118(1) of the Act, which provides as follows:

118(1) 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.

By Order G-72-07 dated July 5, 2007, the Commission approved the Participant Assistance/Cost Award Guidelines attached as Appendix A to the Order. Under Section 1 of the PACA Guidelines, the Panel considers the following criteria in determining the amount to be awarded:

- (i) Will the Participant be affected by the outcome?
- (ii) Has the Participant contributed to a better understanding of the issues by the Commission?
- (iii) Are the costs incurred by the Participant for the purposes of participating in the proceeding fair and reasonable?
- (iv) Has the Participant joined with other groups with similar interests to reduce costs?
- (v) Has the Participant engaged in any conduct that tended to unnecessarily lengthen the duration of the proceeding? (This criterion will not, by itself, disqualify a Participant for pursuing a relevant position in good faith and with reasonable diligence)

- (vi) Any other matters appropriate in the circumstances.

Section 2 provides information on submitting a budget estimate and how to make an application for a final cost award. It also allows a Participant to seek reconsideration of its award within 10 working days. Section 3 of the Guidelines provide for Interim Awards in exceptional circumstances. Section 4 describes what is eligible for reimbursement.

4.0 THE GROUNDS FOR RECONSIDERATION

The Toquaht Nation summarizes its reconsideration request as follows:

1. All of the expenses incurred and now being applied for were incurred based on its understanding that at the conclusion of the Inquiry, it would make an application for outstanding expenses not reimbursed through the expedited bi-monthly cost throughout the Inquiry.
2. As of January 29, 2010, it had exhausted all applications for interim funding based on the schedule provided in BCUC Exhibit A-29.
3. It was not provided with notice at the cancellation of the Inquiry to deal with a final application for costs.
4. The unique and special circumstances of First Nations ought to be considered in approving its request for final funding.

This request for reconsideration is addressed in further detail below.

4.1 Ground 1 - The Toquaht Nation Understood It Could Make an Application for Outstanding Expenses at the Conclusion of the Inquiry

The submission on this Ground basically covers Ground 3 in its summary as well. The submissions on these grounds are that the Commission never provided “clear notice” about the cancellation of the Inquiry and the impact it had on the deadline for final PACA funding. Alternatively, if notice was provided, it was not received by counsel for the Toquaht Nation. The present request for funding is for PACA funding that is over and above the funding permitted for the interim periods. The application for funding apparently seeks almost a full recovery of costs.

On December 17, 2009 Participants were advised that the Panel would shortly issue an Order suspending the Inquiry in view of the letter it had received from the Minister.

On December 21, 2009, Order G-167-09 (misdescribed as Order G-157-09 in Letter L-69-10) suspended the Inquiry until May 31, 2010 and rescinded the schedule for accepting and processing interim Participant Assistance Cost Awards previously established, beyond those for the third interim period that ended November 30, 2009.

The Commission's January 12, 2010 letter advised all Participants that there would not be a subsequent bi-monthly award for Interim Period 3, and consequently parties who had not submitted a cost award for that period by the December 15 deadline would be allowed to do so by January 29, 2010.

The Inquiry was cancelled by Order G-98-10 dated June 4, 2010. The Commission provided electronic notification of the December 17, 2009 letter, the Orders and the January 12, 2010 letter to all Participants. The affidavits sworn in support of the original application and the reconsideration application do not deny that the letters and Orders were received by, or on behalf of, the Toquaht Nation.

While the Reasons for Decision to Order F-32-09 refer to final awards, the reference to final awards contemplated the Oral Hearing taking place. Further, in agreeing with the BCSEA, *et al.* interpretation of the concept of the cumulative bi-monthly PACA process in its Reasons for Decision to Order F-32-09, all the Panel was agreeing to was that there may be an opportunity for reimbursement of costs incurred, but not awarded under the process, if the Oral Hearing took place and the number of Hearing days resulted in reimbursable days that exceeded the number of lawyer, case manager and expert days in that period alone.

The Toquaht Nation submits that adequate notice would have been similar to the notice provided in Exhibit A-29 which included a revised schedule for accepting and processing interim PACA Awards. Order G-167-09 rescinded that schedule. Following the cancellation of the Inquiry, there was no need in the Panel's view to advise Participants further, because the potential for recovery of additional awards for the interim periods based on the number of Oral Hearing days no longer existed. In the Panel's view, the Toquaht Nation should have understood that if the Inquiry was cancelled and there was no Oral Hearing, the potential for reimbursement for costs not awarded for the interim periods would no longer exist.

The Toquaht Nation submits that all of the work done was done in good faith, based on the Commission's advanced approval for expedited bi-monthly cost awards up to \$151,552. Commission staff's letter dated October 8, 2009 approving the Toquaht Nation's budget for expedited bi-monthly cost awards from June 25, 2009 until the end of the Oral Hearing up to a maximum of \$151,552 was based on a formula that assumed a number of proceeding days, including workshops, regional sessions, pre-hearing conferences and Oral Hearing days. It is expressly stated to be non-binding on the Participant or on the Inquiry Panel. It was not a guarantee of full recovery.

In addition to considering a formula for any particular application, the Commission Panel applies its judgement when deciding what is fair and reasonable especially when comparing the awards to various parties vis-à-vis their contribution. Like the Commission staff letter, the PACA Guidelines also do not guarantee full recovery of all costs incurred by a Participant.

The Panel concludes from its review of the record that the Toquaht Nation should have understood that there would not be a final award if there was no Oral Hearing and there was never any guarantee of a full recovery of costs.

4.2 Ground 2 – As of January 29, 2010 the Toquaht Nation Had Exhausted All Applications for Interim Funding Based on the Schedule Provided in BCUC Exhibit A-29

This Ground can be dealt with on the same basis as the first Ground was dealt with in part. The fact that the Toquaht Nation had exhausted its entitlement to interim funding based on the schedule provided in BCUC Exhibit A-29, only allowed it to claim for costs not awarded for the interim periods if an Oral Hearing took place

and the number of Oral Hearing days resulted in reimbursable days that exceeded the number of lawyer, case manager and expert days in that period alone. That situation did not occur.

Under this Ground, the Toquaht Nation also refers to a “detailed summary [which] includes dates that the work was done but excludes any detail that would breach solicitor client privilege”. It states that the Panel on two previous occasions approved funding based on bills in similar format.

First, the Panel notes that no such summary of the dates the work was done accompanied the application which was the subject matter of Letter L-69-10.

Secondly, while the Panel approved Interim Award funding based on bills in a similar format when it made its Period 2 and Period 3 Interim Awards to the Toquaht Nation, the Period 2 Award was based on the formula used for all Period 2 Awards. The Period 3 Award was based on the PACA Guidelines and was for a small amount. While there were no official proceeding days in Period 3, the date for a fourth Procedural Conference had been set, although it was subsequently postponed. In the circumstances the Panel concluded it was reasonable to provide compensation for preparation work for the planned Procedural Conference, especially where the amounts requested were not excessive. The only adjustment made reflected the experience level of counsel.

Finally, in its Reasons for Decision to Orders F-20-09 and F-26-09, the Panel provided the level of detail it would require from Participants submitting requests for PACA funding. The most recent bill provided by the Toquaht Nation provides no basis upon which the Panel can exercise its discretion, even if the Toquaht Nation had succeeded on Grounds 1 and 3. Allowable funding based on proceeding days and preparation days has already been awarded to the Toquaht Nation. In Order F-8-10, a Participant’s claim for disbursements was reduced in the absence of invoices and any explanation by the Participant for the disbursements.

The Panel also observes that the application upon which the Panel based its decision to deny funding was for the period July 16, 2009 through June 4, 2010 in the case of the Toquaht Nation. There were no proceeding days in that period other than those for which Interim Awards had already been made. The Toquaht Nation did not advise in that application that it was seeking to recover costs not previously reimbursed or restricted to the periods for which Interim Awards have already been made. The reconsideration application now seeks funding for the period July 16 to December 17, 2009. However, it applies for the same amount claimed in the original application.

The Panel concludes that even if the Toquaht Nation had succeeded on Grounds 1 and 3, both its original application and the reconsideration application do not meet the requirements the Panel established for the level of information necessary for the Panel to exercise its discretion, particularly when the award sought is substantial.

4.3 Ground 3 – The Toquaht Nation Was Not Provided with Notice at the Cancellation of the Inquiry to Deal With a Final Application for Costs

This Ground has been dealt with in the discussion on Ground 1.

4.4 Ground 4 – Unique and Special circumstances of First Nations Ought to be Considered in Approving the Toquaht Nation’s Request For Final Funding

Under this Ground, the Toquaht Nation made a number of submissions, including:

- (a) the unique situation of First Nations Participants should afford First Nations special consideration with regard to PACA funding;
- (b) the existing PACA Guidelines did not facilitate meaningful participation of the First Nations in Commission proceedings and created an uneven playing field between First Nations and entities such as BC Hydro and BCTC;
- (c) the Guidelines were developed before the Commission was required to address First Nations consultation issues in its proceedings;
- (d) the nature of First Nations participation in an Inquiry which addresses Crown consultation and aboriginal rights and title was fundamentally different than the participation of traditional interveners involved in Commission proceedings as First Nations legal issues are detailed, complex and require more funds than other interveners;
- (e) the Inquiry was a proceeding where First Nations presented a fundamentally different conception of, and approach to First Nations Participation than that advanced by BC Hydro and BCTC as reflected by the lengthy and complex legal evidence and arguments filed and delivered by the First Nation Participants in the summer of 2009; and
- (f) First Nations, unlike other traditional interveners, [or Crown corporations like] BC Hydro and BCTC, do not have the funding mechanisms or financial resources in place to participate in Inquiries.

The Panel recognized that there were funding barriers primarily for First Nations when it took the unusual step of establishing a bi-monthly approval process for PACA applications for the Inquiry. This is apparent from the Panel's comments in Section 3.0 of the Reasons for Decision to Order G-108-09 and its letter dated October 2, 2009.

Further, in specific recognition of First Nations issues, the Panel devoted its third Procedural Conference to First Nations scoping issues, agreed that the Inquiry would be conducted in phases which would include a specific phase focussed on transmission and other issues important to First Nations and was prepared to engage a First Nations consultant or consultants to assist the Commission staff and Panel to engage First Nations so as to better understand First Nations issues.

The Panel concludes that the actions it took in response to First Nations issues were sufficient for the purposes of this Inquiry. It is of the view that no further special considerations should be afforded the Toquaht Nation.

5.0 COMMISSION DETERMINATION

The Panel has considered the reconsideration application and has concluded against the Toquaht Nation on each of the four Grounds raised by it. The reconsideration application is denied.