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BRITISH COLUMBIA UTILITIES COMMISSION

ORDER NUMBER G-166-11

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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
Review of BC Hydro's Compliance Report to Commission Order G-15-11

BEFORE: A.J. Pullman, Panel Chair/Commissioner
P.E. Vivian, Commissioner
A.A. Rhodes, Commissioner

September 29, 2011

O R D E R

WHEREAS:

A. On November 5, 2007, the British Columbia Transmission Corporation (BCTC) applied for a Certificate of Public Convenience and Necessity (CPCN) for the Interior to Lower Mainland Transmission Project (the ILM Project) pursuant to sections 45 and 46 of the *Utilities Commission Act* (the Act);

B. In the course of hearing the application, the British Columbia Utilities Commission (Commission) determined that it need not consider the adequacy of the Crown's consultation and accommodation efforts with First Nations (Scoping Decision);

C. On August 5, 2008 the Commission issued its Decision accompanied by Order C-4-08, to grant BCTC the CPCN for the ILM Project subject to conditions;

D. Certain First Nations appealed the Scoping Decision to the Court of Appeal for British Columbia;

E. The Court of Appeal released its decision on the First Nations' appeal in *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 on February 18, 2009, which directed that the effect of the CPCN be suspended for the purpose of the Commission determining whether the Crown's duty to consult and accommodate the intervening First Nations had been met up to August 5, 2008;

F. The Commission held an Oral Public Hearing on the ILM Reconsideration in January 2010;

.../2

G. Over the course of 2010 two First Nation Interveners withdrew from the proceeding, comments were sought on the effect of the Supreme Court of Canada's decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, on the ILM Reconsideration, and BCTC merged with British Columbia Hydro and Power Authority (BC Hydro);

H. On February 3, 2011, the Commission issued Order G-15-11 and the accompanying Decision on the ILM Reconsideration. The Decision found that BC Hydro's consultation with certain First Nation Interveners had been inadequate and directed BC Hydro to consult further on specific issues set out in the Decision. BC Hydro was also directed to file a Compliance Report detailing the further consultation within 120 days of the date of the Order, to which the First Nation Interveners would have opportunity to respond. The Commission Panel also gave BC Hydro the opportunity to reply. If the Commission found consultation to be adequate it would lift the suspension of the CPCN;

I. BC Hydro filed its Compliance Report on June 3, 2011 and two Supplemental Compliance Reports on June 17 and July 28, 2011. First Nation Interveners' Responses were filed August 26, 2011;

J. On August 26, 2011, three First Nation Interveners - Nlaka'pamux Tribal Council, Okanagan Nation Alliance and Upper Nicola Indian Band - submitted letters stating they consent to the issuance of the CPCN in relation to the ILM Project and withdraw their intervention in the ILM Court of Appeal Reconsideration process;

K. BC Hydro filed its Reply Submission on September 2, 2011; and

L. The Commission has considered the evidence and submissions from the remaining First Nation Interveners and BC Hydro on whether the Crown's further duty to consult and accommodate the First Nations has been adequate as set forth in the attached Reasons for Decision.

NOW THEREFORE the Commission orders as follows:

1. BC Hydro's further consultation with the following First Nation Interveners on the outstanding issues identified by the Commission's directives in Order G-15-11 is adequate.

- Coldwater Indian Band
- Cook's Ferry Indian Band
- Siska Indian Band
- Ashcroft Indian Band
- Stó:lō Tribal Council
- Cheam First Nation
- Seabird Island First Nation
- Kwaw-kwaw-a-pilt First Nation
- Soowahlie First Nation
- Sumas First Nation
- Shxw'ow'hamel First Nation

2. The suspension of the ILM CPCN issued in Commission Order C-4-08 is lifted.

3. BC Hydro is directed to continue consulting with the potentially impacted First Nations until the ILM Project is complete.

4. BC Hydro is directed to include in its ILM Quarterly Progress Reports detailed reporting on First Nations consultation similar to the reporting in the Revelstoke Unit 5 Project Quarterly Progress Reports.

5. In its Final Report on the ILM Project BC Hydro is directed to include a comprehensive and detailed report on its consultation with First Nations.

DATED at the City of Vancouver, in the Province of British Columbia, this 29th day of September 2011.

BY ORDER

Original signed by:

A.J. Pullman
Panel Chair/Commissioner

Attachment

IN THE MATTER OF

BRITISH COLUMBIA TRANSMISSION CORPORATION
RECONSIDERATION OF THE
INTERIOR TO LOWER MAINLAND TRANSMISSION PROJECT
REVIEW OF BC HYDRO'S COMPLIANCE REPORT TO COMMISSION ORDER G-15-11

REASONS FOR DECISION

September 29, 2011

BEFORE:

A.J. Pullman, Panel Chair / Commissioner
A.A. Rhodes, Commissioner
P.E. Vivian, Commissioner

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1.0 BACKGROUND

1.1 ILM Reconsideration Decision and Directives

On February 3, 2011, the British Columbia Utilities Commission (Commission) issued Order G-15-11 and the attached Decision in its Reconsideration of the Interior to Lower Mainland Transmission Project (ILM Project). The Commission found that the Crown's duty to consult certain First Nations for the ILM Project was not met as of August 5, 2008[1] and by Order G-15-11 directed British Columbia Hydro and Power Authority (BC Hydro)[2] to comply with the directives set out in the Decision (Directives). The Directives are:

> "1. For those First Nation Interveners where the Commission Panel has found that BC Hydro/BCTC did not explain why the Non-Wires Options were removed from consideration and why BCTC selected 5L83 [New Transmission Line 5L83] over the UEC [Upgrade Existing Circuits] Alternative, BC Hydro is to explain, in writing, why BCTC chose 5L83 over the UEC Alternative and why the Non-Wires Options were removed from consideration. BC Hydro is also to offer to meet with those First Nation Interveners to discuss and respond to any concerns that may arise from BC Hydro's explanations" (Decision, p. 236) (Options Directive).

The Commission found the Options Directive applicable to Coldwater Indian Band (Coldwater), Cook's Ferry Indian Band (Cook's Ferry), Cheam First Nation (Cheam) and Seabird Island First Nation (Seabird Island) (Decision, pp. 234-235)[3].

> "2. For those First Nation Interveners where the Commission Panel has found that BC Hydro/BCTC did not present the HVDC Option for discussion, and for those First Nation Interveners not identified specifically, but who would be potentially impacted by the proposed capacitor station required for AC [Alternating Current] technology but not for HVDC [High Voltage Direct Current] technology, BC Hydro is to explain in writing to those First Nation Interveners (i) the potential adverse impacts of HVDC technology versus those of AC technology, and (ii) why it chose AC technology over HVDC. BC Hydro is also to offer to meet with the First Nation Interveners to discuss and respond to any concerns that may arise from BC Hydro's explanations" (Decision p. 236) (HVDC Directive).

The Commission found the HVDC Directive applicable to Coldwater, Cook's Ferry and any First Nations who could potentially be impacted by the location of the capacitor station required for AC technology but not HVDC technology. BC Hydro identified five potential locations for the capacitor station which would potentially impact Siska Indian Band (Siska), Ashcroft Indian Band (Ashcroft), Stó:lō Tribal Council (STC), Kwaw-kwaw-a-pilt First Nation(Kwaw-kwaw-a-pilt), Soowahlie First Nation (Soowahlie), Sumas First Nation (Sumas), Cheam, Seabird

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1 August 5, 2008 was the date the Commission issued the original Certificate of Public Convenience and Necessity (Order C-4-08) for the ILM Project.

2 British Columbia Transmission Corporation (BCTC) and BC Hydro merged pursuant to the *Clean Energy Act* on July 5, 2010.

3 At the time the Decision was written Nlaka'pamux Tribal Council, Okanagan Nation Alliance, and Upper Nicola Indian Band were also Interveners in the Proceeding but their withdrawal from the Proceeding is recounted in Section 1.3. Although the Decision included Directives that applied to these Interveners, due to their withdrawal they are not included for consideration or discussion of consultation in these Reasons for Decision.

Island First Nation (Seabird Island), and Shxw'ow'hamel First Nation (Shxw'ow'hamel). (Decision, pp. 234-5; Compliance Report, p. 12)

> "3. For those First Nation Interveners who raised the issue of revenue sharing, BC Hydro is to explain, in a meaningful manner, its ability to revenue share or make similar periodic payments, for the ILM Project, in the context of provincial government policy and BC Hydro's rate structures. BC Hydro is also to discuss and respond to any concerns that may arise from BC Hydro's explanations" (Decision, p. 236) (Revenue Sharing and Periodic Payments Directive).

The Commission found the Revenue Sharing and Periodic Payments Directive applicable to Coldwater, Cook's Ferry, Siska, Ashcroft, STC, Shxw'ow'hamel, and Seabird Island (Decision, pp. 234-5, and Corrigenda II).

The Commission's Decision also directed BC Hydro to "undertake the required consultation within a reasonable and flexible timeline, and to offer appropriate capacity funding to the affected First Nations" (Decision, p. 236).

Order G-15-11 also contained the following directives:

> "4. BC Hydro is directed to file a compliance report, containing a comprehensive and detailed description of its consultation in respect of the directives, within 120 days from the date of this Order. The First Nation Interveners for whom consultation was found to be inadequate will have 21 days from the date of the filing of the report to file a written response to the report, and BC Hydro will then have 7 days from the date of the filing of the First Nation Interveners' responses to file a written reply to the responses. The Commission will review the submissions and, if the deficiencies in consultation have been remedied to the Commission's satisfaction, will lift the suspension of the CPCN.
>
> 5. Commission Order C-4-08 included a directive on Quarterly Progress Reports. BC Hydro is directed to include in its Quarterly Progress Reports detailed reporting on First Nations consultation similar to the Revelstoke Unit 5 Project Quarterly Progress Reports.
>
> 6. Commission Order C-4-08 included a directive on a Final Report. If the ILM CPCN suspension is lifted, BC Hydro is directed to include in its Final Report a comprehensive and detailed report on its consultation with First Nations."

On May 6, 2011 by Order G-77-11, the Commission dismissed an application for reconsideration of Order G-15-11 brought by the Nlaka'pamux Nation Tribal Council (NNTC), Okanagan Nation Alliance (ONA) and Upper Nicola Indian Band (Upper Nicola) (jointly NNTC/ONA/Upper Nicola) and the additional grounds for reconsideration alleged by Coldwater, Cook's Ferry, Ashcroft and Siska (Coldwater *et al.*) and the Hwlitsum First Nation.

By Orders made on June 27, 2011, the British Columbia Court of Appeal granted NNTC/ONA/Upper Nicola, Coldwater *et al.,* STC and Seabird Island leave to appeal Order G-15-11.

In these Reasons for Decision the Commission Panel reviews BC Hydro's Compliance Report dated June 3, 2011 (Compliance Report), its June 17, 2011 Supplemental Report (June Supplement), its July 28, 2011 Supplemental Report (July Supplement), the First Nation Interveners' Responses and BC Hydro's Reply Submissions and determines that BC Hydro has remedied the deficiencies in consultation and that the suspension of the Certificate of Public Convenience and Necessity (CPCN) shall be lifted.

1.2 Chronology of Consultation after Order G-15-11

By letter dated February 14, 2011, BC Hydro contacted the First Nation Interveners, for whom the Commission Panel had found that the Crown's duty to consult had not been met, to provide information and arrange meetings.

On February 24, 2011, BC Hydro sent the applicable written explanations to each of those First Nation Interveners and provided capacity funding cheques for review of the materials (Compliance Report, p. 13).

Options Directive

Further to the Options Directive, BC Hydro prepared an 11-page document dated February 24, 2011 outlining the "Non-Wires Alternatives" of Coastal Generation, Demand-side Management (DSM) and imports from the U.S. which had been identified early on in ILM Project planning as alternative ways to meet the increasing load requirements forecast for the Lower Mainland. The document also states that BC Hydro rejected these alternatives during its initial screening because under the majority of planning scenarios the expected level of non-wire resources would not defer the need for new transmission beyond 2014.

The document also provides a summary of BC Hydro's detailed comparison of the two transmission options: 5L83 and Upgrade Existing Circuits (UEC) and the criteria used to assess the two options, including: technical attributes (such as thermal capacity), the net present value of the forecast cost of each alternative, First Nation and heritage resource considerations, stakeholder considerations, environmental considerations, and property and right-of-way requirements. The document states that BC Hydro had selected 5L83 because:

- although 5L83 had a higher capital cost, when energy loss savings were factored in, 5L83 was substantially less costly than UEC;
- the capacity of UEC was limited by voltage stability and, as a result, UEC would provide significantly lower transfer capacity than 5L83; and
- the First Nations risk was assessed to be equivalent for 5L83 and UEC.

(Compliance Report, pp. A2-109 to119)

HVDC Directive

Further to the HVDC Directive, BC Hydro prepared a three-page document dated February 24, 2011, entitled "HVDC technology vs. AC technology and why AC technology was chosen over HVDC technology for reinforcing the ILM system." The document described HVDC technology and the HVDC alternative, compared the physical impacts of the two alternatives in terms of right-of-way, converter stations and series capacitor station, described the analysis performed and the reasons for choosing AC technology (Compliance Report, pp. A1-013 to 015.)

Revenue Sharing and Periodic Payments Directive

In response to the Revenue Sharing and Periodic Payments Directive, BC Hydro prepared a four-page document, entitled "BC Hydro's explanation of its ability to revenue share or make similar periodic payments" outlining its position and the restraints imposed by government policy and regulation. BC Hydro identified four different payment modalities that could result in periodic payments to First Nations, namely:

1. profit sharing or a share in BC Hydro's revenues;
2. land rent;
3. sharing of provincial revenues; and
4. periodic payments over time.

BC Hydro states that it does not have the ability to share "profits" with First Nations, and that "generating 'profits' over and above total costs, including the allowed return on equity, at an additional cost to ratepayers", would require the approval of both the Province and the Commission.

BC Hydro states that for new projects on Crown lands, it attempts to avoid, minimize or mitigate impacts on asserted Aboriginal rights or title. Where there is the potential for residual effects after these steps have been taken, BC Hydro may attempt to further accommodate First Nations interests through financial and other benefits, such as employment, training and contracting opportunities and, where appropriate, financial payments, including periodic payments. BC Hydro states that it "has been and continues to be prepared to discuss with First Nations the possibility of providing financial benefit over a period of time as part of an Impact Benefits Agreement, where the negotiation of an Impact Benefits Agreement is appropriate."

BC Hydro states that the sharing of provincial revenues related to BC Hydro's operations, including the ILM Project, was not authorized by the Province during the period under consideration and has not been authorized to date (Compliance Report, pp. A1-016 to 019).

To present the various written explanations, BC Hydro met with the First Nation Interveners on the following dates:

- April 7 and June 14, 2011 - Coldwater, Cook's Ferry, Siska and Ashcroft
- March 10, 2011 – STC
- March 25, 2011 – STC and Cheam
- April 19, 2011 – Seabird Island
- May 5, 2011 – STC, Kwaw-kwaw-a-pilt, Soowahlie, and Sumas
- May 31, 2011 – Shxw'ow'hamel

At each meeting, (other than the June 14, 2011 follow-up meeting with Coldwater, Cook's Ferry, Siska and Ashcroft) BC Hydro gave a PowerPoint presentation comprising 15 pages to address in graphic format the documents it had prepared in compliance with the Directives (Compliance Report, pp. A1-065 to 079).

BC Hydro filed its Compliance Report on June 3, 2011 and stated in the cover letter that it would file updates regarding Coldwater, Cook's Ferry, Siska and Ashcroft. These were the June Supplement and the July Supplement filed by BC Hydro on June 17, 2011 and July 28, 2011 respectively.

By letter dated August 4, 2011 the Commission requested the First Nation Interveners provide their written responses on the Compliance Report and supplemental reports by August 26, 2011 and directed BC Hydro to provide its written reply by September 2, 2011.

On August 26, 2011 the Commission received responses from Coldwater *et al.* - Coldwater, Cook's Ferry, Siska and Ashcroft and from STC, Seabird Island, Cheam, Kwaw-kwaw-a-pilt, Soowahlie, Sumas, and Shxw'ow'hamel. BC Hydro filed its Reply Submission on September 2, 2011.

1.3 Withdrawal of NNTC/ONA/Upper Nicola Intervention

The NNTC, ONA, and Upper Nicola had intervened in the ILM Reconsideration Proceeding and BC Hydro was directed in Order G-15-11 to consult further with each group.

On August 26, 2011, the Commission received letters from each of NNTC, ONA and Upper Nicola stating that they "consent to the issuance of the CPCN in relation to the ILM Project and withdraw [their] intervention in the ILM Court of Appeal Reconsideration process."

On September 6, 2011, the NNTC/ONA/Upper Nicola filed a Notice of Settlement abandoning their appeal of Order G-15-11.

Accordingly, the adequacy of consultation with these Interveners is not considered in these Reasons for Decision.

2.0 CONSULTATION WITH COLDWATER, COOKS FERRY, SISKA AND ASHCROFT

BC Hydro met with Coldwater, Cooks Ferry, Siska and Ashcroft on two occasions - April 7, 2011 and June 14, 2011. In addition, there was correspondence between the parties relating to the meetings.

April 7, 2011 Meeting

BC Hydro's meeting notes for the April 7, 2011 meeting with Coldwater *et al.* record that Melissa Holland, the ILM Project Manager, provided additional background relating to the decision to reject the non-wires alternatives. She explained that no new generation was foreseen in the Lower Mainland area and that it was, in fact, understood that a block of generation would be lost as Burrard Thermal would not be available as a reliable source of power. She explained that even aggressive DSM targets would not be able to satisfy the forecast additional demand for power. She also explained that the Province's self-sufficiency policy would not permit increased imports from the U.S.

Melissa Holland then went on to review the two transmission options. She explained the work required if the UEC option were selected. She reviewed considerations such as reliability, capacity, cost, and land requirements for the two alternatives. She confirmed that both projects would affect a significant number of First Nations and that the UEC alternative required work on 14 reserves whereas the new line alternative could, for the most part, avoid crossing any reserves (Compliance Report, pp. A2-080 to 083).

In the discussion that took place on the Options Directive, the following issues were raised:

- The value of line losses used in the analysis;
- The criteria used in the strength of claim assessments that BC Hydro carried out in the selection of 5L83 over UEC; and
- Whether there had been any subsequent amendments to those assessments.

BC Hydro's PowerPoint presentation included four slides that covered the following:

1. description of the HVDC alternative;
2. the physical impacts of HVDC vs. AC;
3. diagrams of the Nicola and Meridian substations and comparisons of HVDC and AC; and
4. an explanation of why HVDC was rejected.

Discussion at the meeting centered on whether the presentation had included any additional detail not previously provided and on the potential locations of the American and Ruby Creek capacitor stations (Compliance Report, pp. 21-083 to 084).

Geoff Higgins, a member of BC Hydro's regulatory department who attended the meeting, made a presentation on BC Hydro's methodology for the calculation of its revenues, as part of the PowerPoint presentation. On this issue, the meeting notes include discussions on the following:

- BC Hydro's rate-setting methodology;
- BC Hydro's Community Development Fund;
- Impact Benefits Agreements;
- BC Hydro's mandate to share revenues;
- The concept of rent and other periodic payments; and
- Water rentals.

(Compliance Report, pp. A2-084 to 087)

The items arising from the meeting for BC Hydro's follow-up were as follows:

- to "get someone from the Province" to speak to the Province's policy on sharing provincial revenues; and
- a request for BC Hydro to fund a study of revenue sharing in different jurisdictions as part of Coldwater's ongoing consultation with the Province.

(Compliance Report, pp. A2-087 to 092)

Coldwater *et al.* undertook to provide a letter a clarifying their issue, namely how aboriginal rights and title were considered in the choice of 5L83 over UEC (Compliance Report, p. A2-092).

On April 26, 2011, counsel for Coldwater *et al.* wrote to BC Hydro expressing concern about, among other things, BC Hydro's response to the issue of the extent to which Aboriginal title claims were considered in its analysis of the two transmission alternatives (Compliance Report, pp. A2-133 to 137).

By letter dated May 19, 2011, BC Hydro responded to the April 26th letter from counsel for Coldwater and Cook's Ferry (Compliance Report, pp. A2-145 to 148). BC Hydro stated: "[t]o be clear, BC Hydro acknowledges that Coldwater, Cook's Ferry, Siska and Ashcroft assert Aboriginal title to an area in the vicinity of the Project-this is one of the primary foundations upon which BC Hydro engaged with these First Nations." BC Hydro took the position that this issue was one which had been determined by the Commission Panel in the ILM Decision but that it would provide additional clarification in "the spirit of cooperation." BC Hydro then reviewed some of its answers to Information Requests from the Proceeding and explained that its conclusion that "the 'Consultation Risk' for both the 5L83 and UEC alternatives was 'manageable'" was based in part on its review of the following three factors for both transmission alternatives:

(a) the number of Aboriginal groups with whom consultation is required;

(b) the level of impact the project has on Aboriginal rights; and

(c) the ability to avoid or mitigate these impacts on Aboriginal rights.

BC Hydro also noted that the reference to "Aboriginal rights" includes "Aboriginal title" given that title is a specific manifestation of aboriginal rights.

It also reiterated its position that the UEC alternative would involve work on 14 reserves whereas the new line 5L83 would likely avoid reserves altogether and that First Nations' issues were only one of a large number of factors which were considered in making the choice between the two transmission options (Compliance Report, pp. A2-145 to 148).

June 14, 2011 Meeting

BC Hydro's notes for this meeting with Coldwater *et al.* record that there was again discussion of the decision to proceed with 5L83 and the fact that BC Hydro recognized that First Nations had interests in both transmission options. Melissa Holland advised that BC Hydro did not make a decision on Aboriginal title but made a decision on building a new line, taking into account, as one of a number of criteria, the potential impact on First Nations. She acknowledged that once that decision was made, BC Hydro sought to gain a greater understanding of the First Nation interests which would be affected. BC Hydro also noted that both options under consideration had impacts on asserted Aboriginal title (July Supplement, pp. S2C-11 to 20).

Glenn Ricketts of the Ministry of Aboriginal Relations and Reconciliation attended this meeting and presented a paper dated June 9, 2011 entitled "Sharing of Provincial Revenues". The thrust of his presentation is summarized in the following paragraph of his paper:

> "More recently, the BC Government has considered the issue of energy infrastructure such as transmission lines. Under the Clean Energy Act, the Province will be sharing with First Nations land and water rents paid by third parties associated with Independent Power Projects. In the case of public infrastructure, such as transmission lines built by BC Hydro,

> the government has determined that it would not expand the current approach of providing payments to First Nations whose reserves are traversed by power lines. Since such publicly funded investments are for the benefit of all British Columbians and there is no equivalent third party rental payable to the Province for the use of land or resources as is the case in other situations, any revenue sharing from BC Hydro would serve to increase electricity rates paid by all of the province's citizens."
>
> (July Supplement, p. S2C -21)

The discussion that followed Glenn Ricketts' presentation included:

- payments to First Nations under the *Clean Energy Act*;
- the timing of the government's policy;
- the rationale for the policy;
- the need for a study of other jurisdictions and industries; and
- Impact Benefits Agreements.

(July Supplement, pp. S2C-12 to 17)

Glenn Ricketts could not speak to the rationale for the policy and he allowed that obtaining any change in the policy would have to involve direct negotiations with the government. He is quoted as saying "[h]e respects Chief's [Chief Fred Sampson, Siska] position on going to government and asking for a change in that decision. Appropriate to do so if they wish" (July Supplement, p. S2C-15).

Coldwater *et al.* reiterated the need for a funded study of revenue sharing in different jurisdictions. Melissa Holland stated that BC Hydro would not fund a study on the sharing of revenues when there was no mandate from the Province to share revenues (July Supplement, p. S2C-17).

BC Hydro agreed to provide details on its Community Development Fund as a follow up item, which it did on June 16, 2011.

On July 22, 2011, counsel for Coldwater *et al.* wrote to BC Hydro stating that his clients had relied on BC Hydro's written and verbal explanations that:

> "1) the HVDC line would require a similar amount of right-of-way as a new AC transmission line using delta towers and clearing would be the same;
>
> 2) the HVDC line would require 17-24 acres of new land at the Nicola substation for a converter station; and
>
> 3) that the HVDC option is considered infeasible because of both its high cost relative to an AC line and the requirement to take two of the existing four 500 kV circuits from the interior to the lower mainland to undertake a conversion to HVDC."

Counsel further submitted that his clients had identified documents in BC Hydro's Compliance Report that "constituted new information that may cast doubt on representations made by BC Hydro in the materials upon which Coldwater *et al.* relied", noting that NNTC/ONA/Upper Nicola's consultants had questioned all three

assertions, and had also identified a number of additional benefits to the HVDC option that did not appear to have been considered by BC Hydro or shared with his clients (July Supplement, pp. S2C-29 to 32).

In the same letter, counsel for Coldwater *et al.* stated that, since Glenn Ricketts was not at the June 14 meeting "to engage in discussion," no consultation had taken place. Counsel repeated his clients' need for a study "of how similar arrangements are handled in other jurisdictions and other industries"… "to ensure we are speaking the same language." He also submitted that "until our clients have the opportunity to engage in interactive consultation with someone who has the ability to do more than explain that they have no mandate, the Crown's obligation will remain unfulfilled" (July Supplement, p. S2C-25).

By letter dated July 27, 2011 to counsel for Coldwater *et al.,* BC Hydro responded that the data had been filed on June 3, 2011 and that waiting until July 22 to share his clients concerns with BC Hydro was not "consistent with the spirit of the Commission's Directives." Nevertheless, it stated that while NNTC/ONA/Upper Nicola's consultants raised questions concerning BC Hydro's response to the HVDC Directive, BC Hydro had had a number of discussions with the consultants and was of the view that many of their original comments were based on an incomplete understanding of BCTC's original analysis. In addition BC Hydro attached a further exchange of materials between it and NNTC/ONA/Upper Nicola's consultants, and concluded that "BC Hydro does not believe that [NNTC/ONA/Upper Nicola's] consultants have raised any material issues with BC Hydro's response" (July Supplement, pp. S2C-36 to 38).

In the same letter BC Hydro responded that it had provided a full explanation of its ability to revenue share and make periodic payments and had brought Mr. Ricketts to explain the Province's position on revenue sharing. BC Hydro also stated that BC Hydro had declined to fund the study for the reasons given at the June 14, 2011 meeting, and suggested that "we can apparently continue to agree to disagree."

BC Hydro also stated "[w]e are, however, as we have indicated, willing to engage in discussions with Coldwater *et al.,* in relation to BC Hydro's ability to make other similar periodic payments in the context of the residual effects of the ILM Project" (July Supplement, pp.S2C-35 to 39).

On July 13, 2011 Chief Aljam wrote to the BC Minister of Energy, Minister Coleman, on behalf of Coldwater *et al.*, and stated that consultation had reached a "stalemate". He stated that "we have sought to consult on the issue of revenue sharing as a form of accommodation for the interference with our aboriginal title and rights"….and... "[w]e should receive a return on the equity we hold in our aboriginal title lands."

He requested an opportunity to consult on this issue directly with the Minister or "another member of government who had a mandate to discuss in a meaningful way the province's position on this issue and engage in interactive consultation on this aspect of the project and its impacts" (July Supplement, pp. S2C-1-3) (emphasis in original).

On July 22, 2011 David Cobb, the President of BC Hydro, wrote to Minister Coleman and outlined BC Hydro's position on the "stalemate". He added "however, BC Hydro has also indicated to the Coldwater group that it is prepared to engage in further discussions about its ability to make similar periodic payments in the context of the residual effects of the ILM Project and post-CPCN discussions" (July Supplement, pp. S2C-5 to 6).

Coldwater *et al.*'s Submissions

Options Directive

Coldwater *et al.* complain that BC Hydro did not adequately explain how the elements of Aboriginal title were actually considered in taking the decision to proceed with new line 5L83. They feel that the title issue would be more acute for the new line alternative, which involved taking up additional right-of-way, than for the UEC option, which involved existing infrastructure (Coldwater *et al.* Submission, para. 28.)

HVDC Directive

Coldwater *et al.* describe the exchange on HVDC as "another indication of BC Hydro's impoverished view of what the duty of consultation entails."

Coldwater *et al.* submit that during the consultation process the duty is on the Crown to provide new information as it arises, and that BC Hydro has declined to engage in any discussion with Coldwater *et al.* in response to concerns it set out in its July 22, 2011 letter and thus failed to comply with the Commission's Directive (Coldwater *et al.* Submission, para. 28).

Revenue Sharing and Periodic Payments Directive

Coldwater *et al.* submit that neither BC Hydro nor Glenn Ricketts, on behalf of the Province, has done anything with respect to further consultation on the issue of revenue sharing except to explain that BC Hydro has no mandate to revenue share, and that "this cannot be sufficient to comply with either the Crown's obligations or the Commission's directive."

Coldwater *et al.* submit that the duty of consultation lies with the Crown, and cannot be relieved by the fact that BC Hydro lacks a mandate to engage in consultation on the important issue of revenue sharing. They conclude "the suspension of the CPCN cannot be lifted until the Crown's duty is met. The fact that BC Hydro has taken this matter as far as it can within its limited mandate does not fulfill the Crown's obligation or uphold the honour of the Crown" (Coldwater *et al.* Submission, para. 21-22).

BC Hydro's Reply

Options Directive

BC Hydro submits that it made every effort to explain its Options Decision to Coldwater *et al.* but that Coldwater *et al.* appear simply to not accept the explanation (BC Hydro Reply, p. 18).

HVDC Directive

BC Hydro points out that in the course of consultation with Coldwater *et al.*, Coldwater *et al.* effectively showed no interest whatsoever in the HVDC Directive and submits that the duty to consult does not require the Crown to provide First Nations with every piece of information or document related to a project, but rather that the Crown provide "all relevant information upon which proposals are based". BC Hydro submits that it has ensured that Coldwater *et al.* were provided with all of the relevant information that it relied on regarding its HVDC analysis.

On the issue of NNTC/ONA/Upper Nicola's consultant's report, BC Hydro points out that:

- it was not relied on by BC Hydro in making its decision regarding the feasibility of HVDC technology nor was it created by BC Hydro or any of its consultants;
- BC Hydro had identified a number of concerns with the report when it was first provided, including that its authors had not reviewed and did not understand some of the underlying information and documents describing the basis on which BC Hydro's HVDC decision was based;
- while some of these concerns were subsequently addressed in a supplemental report from the consultants, BC Hydro still identified a number of further concerns with the document; and
- there was nothing in the supplemental report that would have caused any reconsideration of BC Hydro's HVDC analysis.

(BC Hydro Reply, pp.14-16)

Revenue Sharing and Periodic Payments Directive

BC Hydro submits that in direct response to the Revenue Sharing and Periodic Payments Directive, it explained its ability to revenue share in the context of government policy and its regulated revenue structure , and also explained its ability to make other similar periodic payments (BC Hydro Reply, pp. 7-8).

Commission Determination

The Commission Panel finds that BC Hydro has fulfilled its consultation obligations to Coldwater *et al.* in respect of the Options Directive. The Commission Panel finds that BC Hydro explained clearly how it considered First Nations' issues for both transmission alternatives in arriving at its decision and responded to questions on the specific topics raised by the First Nations in the meetings which were held. Cold water *et al.* appear not to agree with BC Hydro's position on revenue sharing but the Commission Panel is of the view that Coldwater *et al*. have been consulted on this issue.

The Commission Panel considers that BC Hydro adequately explained in writing the adverse impacts of HVDC versus AC and why BCTC chose AC over HVDC. In the Commission Panel's view the written material was comprehensive and sufficient to explain the reason why the HVDC option was rejected, and the PowerPoint presentation and resulting discussion provided a reasonable forum for dialogue.

Regarding the specific concerns about HVDC that Coldwater *et al*. raised in its letter of July 22, 2011, the Commission Panel finds that BC Hydro adequately responded to the further concerns that Coldwater *et al*. expressed after reading the NNTC/ONA/Upper Nicola's consultant's report by identifying its concerns with the consultant's original report and enclosing further correspondence it had had with the consultants.

In addition, the Commission Panel has considered Coldwater *et al.*'s submission that the duty is on the Crown to provide new information as it arises. In this instance, it agrees with BC Hydro that it is not necessarily required to share a report commissioned by other parties for their own purposes. In this case, the fact that the report commissioned by NNTC/ONA/Upper Nicola for their use was not shared with Coldwater *et al*. is not determinative of inadequacy because once Coldwater *et al*. requested the report, it was shared and responded to.

The Commission Panel considers that BC Hydro has addressed the deficiencies in its consultation concerning the issue of revenue sharing as part of consultation by setting out its views in writing, having a "financial person" attend meetings with First Nations, and responding to First Nations questions and concerns, including making available a senior government official to explain Provincial policy.

The Commission Panel finds that BC Hydro is not obliged to fund the review study requested by Coldwater *et al.* In the Commission Panel's view such a study would be generic in nature to assist Coldwater *et al.* to pursue the broader issue of revenue sharing at a policy level with the Provincial government. The Commission Panel considers that such an activity would not constitute consultation on the Options Decision and that BC Hydro should not be required to provide capacity funding for it.

The Commission Panel is of the view that BC Hydro took the issue of "revenue sharing" as far as it could, and does not agree with Coldwater *et al.* that it was incumbent on BC Hydro to force further discussion between First Nation Interveners and government representatives in order to achieve "adequate consultation" in this proceeding. The Panel notes that consultation is a continuing process and encourages the parties to continue to examine the issues surrounding the possible periodic payments to First Nations including the entering into of Impact Benefits Agreements.

Consultation with STC, Cheam, Kwaw-kwaw-a-pilt, Soowahlie, Sumas, Shxw'ow'hamel and Seabird Island

BC Hydro met with the STC First Nation Interveners on the following dates:

- March 10, 2011 – STC
- March 25, 2011 – STC and Cheam
- April 19, 2011 – Seabird Island
- May 5, 2011 – STC, Kwaw-kwaw-a-pilt, Soowahlie, and Sumas
- May 31, 2011 – Shxw'ow'hamel

March 10, 2011 Meeting

BC Hydro's meeting notes for this meeting with STC record that the Melissa Holland gave the PowerPoint presentation on the relevant Commission Directives. The main issue raised at the meeting was electromagnetic fields (EMF). Further details of EMF and HVDC were sent to Otis Jasper of the STC by BC Hydro on March 23, 2011.

Geoff Higgins made BC Hydro's presentation on revenue sharing. There was considerable discussion on the export of electricity, domestic load requirements and the role of Powerex as well as discussion on how BC Hydro's rates were set and on BC Hydro's Community Development Fund (Compliance Report, pp. D1-031 to 038).

March 25, 2011 Meeting

BC Hydro's meeting notes for this meeting with representatives of Cheam and the STC, which took place at the offices of the STC, record that Melissa Holland explained the three non-wires alternatives were rejected as insufficient to meet forecast demand growth. She noted the loss of Burrard Thermal as a reliable resource and

the absence of any new generation planned for the Lower Mainland or Vancouver Island. She advised that DSM would not save enough power and that purchases from the U.S. would be based on coal or gas-fired generation which was not necessarily readily available and was not consistent with the Province's goal of self-sufficiency. There was also a discussion about the role of Powerex and the greening of the Port of Vancouver and its impact on load.

Melissa Holland then explained the two transmission alternatives and what was entailed in the two potential projects. BC Hydro also explained its methodology and criteria for assessing impacts for Impact Benefits Agreements – the criteria being mainly proximity to communities and reserves but that Traditional Use studies were also helpful. BC Hydro also fielded questions relating to the availability of maps and studies relating to First Nations' interests (Compliance Report, pp. D1-095 to 100).

Melissa Holland gave the PowerPoint presentation on the feasibility of HVDC (Compliance Report, p. D1-100). Geoff Higgins addressed the issue of revenue sharing. He explained that BC Hydro's rate structure was based on recovery of its costs, and that its revenue requirement applications determine what it can recover from ratepayers. There was also discussion about business opportunities for First Nations around ILM procurement. Councillor Ernie Victor spoke of the need to find "new ways of doing business" (Compliance Report, pp. D1-093 to 105).

BC Hydro responded to the follow up items concerning power imports and exports to the U.S. and the shift to green power at the Port of Vancouver by emails dated April 4 and 11, 2011 (Compliance Report, pp. D1-118 to 122).

April 19, 2011 Meeting

BC Hydro's meeting notes for this meeting with Seabird Island record that Melissa Holland explained the non-wires options considered. She explained the lack of coastal generation related to the loss of Burrard Thermal Generating Station and the fact that a gas-fired generation plant at Sumas had not been approved. She also advised that demand-side measures were already in place and to increase their targets would be unrealistic. She further advised that importing from the U.S. was not an option given the Province's requirement for British Columbia to become self-sufficient in power. There was also a discussion about the power produced by independent power projects and its use and sufficiency (Compliance Report, pp. E-101 to 102).

Melissa Holland noted the sag problem in the existing circuits in the area of Seabird Island and that the upgrade option would address sagging by raising towers or recontouring the ground. She also explained that additional generation would be available from the interior – Mica/Revelstoke – and that the new line option would have more capacity and better reliability than the upgrade option. She explained the criteria reviewed including cost, reliability, energy losses, input from First Nations and stakeholders and the involvement of BC Hydro's consultant Golder and Associates in the assessment process. There was also discussion about tower configuration and the ability of towers to withstand storms (Compliance Report, pp. E-102 to 106).

The presentation on HVDC was followed by discussion on a number of issues including:

- Width of the right-of-way ;
- Comparison of AC and DC;
- The possibility of replacing existing AC assets with DC;

- Independent Power Producer (IPP) interconnection agreements; and
- Underwater cabling.

(Compliance Report, pp. E-107 to 113)

Geoff Higgins explained the BC Hydro "normal utility model" for determining its revenue requirements based on cost recovery. Alternate models of revenue sharing were discussed as they applied to different industries, including the forestry industry (Compliance Report, pp. E-097 to 118).

BC Hydro provided a written response to the 10 follow up items raised by Seabird Island on May 19, 2011 including:

- definitions of various terms used by BC Hydro;
- energy loss savings;
- loadings on existing lines;
- statement of claim assessments;
- explanation of net present value;
- differences between AC and DC grounding and EMF;
- history of various capacitor stations; and
- IPP interconnection agreements.

(Compliance Report, pp. E-154 to 355).

May 5, 2011 Meeting

BC Hydro met with STC, Kwaw-kwaw-a-pilt, Soowahlie, and Sumas on May 5, 2011 to discuss the HVDC Directive. Melissa Holland gave the PowerPoint presentation. The main issues raised at this meeting were: (i) transmission line losses on conversion, and (ii) EMF and health issues. Written responses to a number of outstanding items were sent to the participants by BC Hydro on May 13, 2011 (Compliance Report, p. D6-042).

May 31, 2011 Meeting

BC Hydro's meeting notes for this meeting with Shxw'ow'hamel, which took place at the Band Office, record discussions on HVDC and revenue sharing.

Melissa Holland explained the context of the meeting and the Directives and gave the HVDC PowerPoint presentation. Discussion centred on tower design, the Community Development Fund and Impact Benefits Agreements, project mapping and herbicides/pesticides.

Geoff Higgins made a presentation about revenue sharing. Discussion centred on IPPs and whether some reserves got free power. BC Hydro followed up with a letter on June 1, 2011 that there were no such reserves (Compliance Report, pp. D4-097 to 104).

STC/Seabird Island Submissions

Options Directive

STC/Seabird Island do not appear to take issue with the explanation of why BC Hydro chose the new line alternative over the upgrade option, but take the position that BC Hydro did not engage in additional consultation as required by the Commission Directives, since it simply "came out here and told us some stuff" (STC/Seabird Island Submissions, p.3).

HVDC Directive

STC/Seabird Island submit that it is difficult for them "to understand the point of this additional exercise if they were not able to have any meaningful input or influence over the decision taken by BC Hydro with respect to the selection of alternatives."

STC/Seabird Island point out the NNTC/ONA/Upper Nicola's consultant's report on the HVDC option was not provided or discussed with them and submit that they should not be required to ask for production of information germane to the subject matter of the additional consultation, which the Commission has directed BC Hydro to undertake.

STC/Seabird Island point out that their significant and oft-repeated concerns with EMF exposure could have been included in a revised analysis of the HVDC versus AC decision (STC/Seabird Island Submissions, p. 2).

Revenue Sharing and Periodic Payments Directive

STC/Seabird Island submit that BC Hydro's activities since February 3, 2011 do not constitute interactive or meaningful consultation, since, in respect of revenue sharing, BC Hydro simply repeated its oft-stated position that it did not have a "mandate" to discuss revenue sharing.

STC/Seabird Island state that they have become aware of a consultant's report on revenue sharing prepared as part of the additional consultation process with NNTC/ONA/Upper Nicola, which BC Hydro did not share or discuss with them. They submit BC Hydro's response that "STC and Seabird did not ask for it" was not consistent with a "meaningful consultation process or the honour of the Crown" (STC/Seabird Island Submissions, pp. 1-2).

BC Hydro's Reply

Options Directive

BC Hydro notes that STC and Seabird Island "showed very little interest" and did not take issue with its consultation efforts for the Options Decision (BC Hydro Reply, p. 34).

HVDC Directive

BC Hydro submits that it has remained open to reconsidering the Options Decision should it be advised of a "showstopper" during the consultation process, but that to date no First Nation has demonstrated an impact that cannot be avoided, mitigated or otherwise accommodated. (BC Hydro Reply, p. 24)

On the issue of EMF, BC Hydro submits that it responded to STC and member Bands' concerns at the various meetings it held with them. Furthermore, the entire issue of EMF was fully addressed in the Environmental Assessment Office (EAO) process, where the EAO concluded that the ILM Project would not cause significant adverse health effects due to EMF (BC Hydro Reply, pp. 25-29).

Revenue Sharing and Periodic Payments Directive

BC Hydro submits that in direct response to the Revenue Sharing and Periodic Payments Directive, BC Hydro explained its ability to revenue share in the context of government policy and its regulated revenue structure – and also explained its ability to make other similar periodic payments (BC Hydro Reply, p. 21).

BC Hydro submits that, for the same reasons described above regarding Coldwater *et al.'s* complaint about the NNTC/ONA/Upper Nicola's HVDC consultant's report, there is no merit to STC/Seabird Island's submission concerning the NNTC/ONA/Upper Nicola's consultant's report on revenue sharing. BC Hydro submits that none of STC, the STC communities or Seabird Island ever suggested any interest in what was being discussed with other First Nation Interveners on the topic of revenue sharing (BC Hydro Reply, p. 23).

Commission Determination

The Commission Panel finds that BC Hydro has fulfilled its consultation obligations to STC/ Seabird Island in respect of the Options Directive. The Commission Panel finds that the Options Directive document explained clearly the issues BC Hydro considered in making the Options Decision and that BC Hydro presented comprehensive information on how it considered First Nations' issues for both transmission alternatives and responded to the First Nations' questions on a number of topics in the meetings which were held.

The Commission Panel further finds that BC Hydro has fulfilled its consultation obligations to STC/ Seabird Island on the issue of the HVDC Directive. The Commission Panel considers that BC Hydro adequately explained in writing the adverse impacts of HVDC versus AC, why BCTC chose AC over HVDC, and responded to questions.

Regarding the specific concerns that STC/Seabird Island raised in its submission, the Commission Panel has addressed the obligation to share other Interveners' consultants' reports in response to Coldwater *et al.*'s HVDC issues. As well, the Commission Panel finds that BC Hydro did present comprehensive information in its documents and PowerPoint presentations but it also responded to the specific concerns of STC/Seabird Island as documented in the meeting notes.

As for the issue of EMF, the Commission Panel considers that STC/Seabird Island's questions and concerns were adequately addressed through the meeting process in accordance with the Commission's HVDC Directive.

The Commission Panel considers that BC Hydro has addressed the deficiencies in its consultation concerning the First Nations' desire to raise the issue of revenue sharing as part of consultation by setting out its views in writing, having a "financial person" attend meetings with First Nations, and responding to First Nations questions and concerns.

As for STC/Seabird Island's submission that BC Hydro should have shared the NNTC/ONA/Upper Nicola's consultant's report on revenue sharing with them, the Commission Panel has addressed this issue in its findings concerning Coldwater *et al.*, and does not consider that there was any obligation upon BC Hydro to make the NNTC/ONA/Upper Nicola's consultant's report available to other Interveners in this instance.

3.0 SUMMARY

Coldwater *et al.* submit that BC Hydro has failed to comply with each of the Commission's three Directives as they relate to them, with the result that the suspension of the CPCN for the ILM Project should remain suspended "unless and until BC Hydro is able to establish that is has fully complied with each of the Directives" (Coldwater *et al*. Submission, para. 34).

STC /Seabird Island submit that BC Hydro simply engaged in an administrative exercise to demonstrate "paper compliance" with the Commission's Directives. They quote Brian Jones of Seabird Island "[t]his wasn't consultation. You came out here and told us some stuff." They conclude that BC Hydro's efforts cannot be properly construed as meaningful compliance with the Commission's Directives, and request that the suspension of the CPCN continue (STC/Seabird Island Submission, p. 3).

In Reply, BC Hydro submits that its Compliance Report and its June and July Supplements demonstrate that it has adequately responded to the Commission's Directives with respect to Coldwater *et al.* and STC/Seabird Island and requests that the suspension of the ILM CPCN be lifted.

Commission Determination

The Commission Panel has considered the Compliance Report, the June and July Supplements, and the submissions of Coldwater *et al.*, STC/Seabird Island and BC Hydro elsewhere in these Reasons for Decision and has concluded that each of its three Directives have been complied with.

The Commission's Decision also directed BC Hydro to undertake the required consultation within a reasonable and flexible timeline, and to offer appropriate capacity funding to the affected First Nations. The Commission Panel finds that BC Hydro contacted the First Nations' in a timely way as they made initial contact by letter February 14, 2011; 11 days after the Commission issued Order G-15-11. As well, on February 24, 2011, BC Hydro sent the written explanations to the First Nations and provided capacity funding.

As the Commission Panel has concluded that the deficiencies in consultation identified in the Reasons for Decision for Order G-15-11 have been remedied to its satisfaction, and that BC Hydro addressed the Directives in a timely way and offered capacity funding, the Commission Panel accordingly orders that the suspension of the CPCN is lifted and the CPCN granted by Order C-4-08 is reinstated under the same terms and conditions set out in that Order with the following additional directives:

1. The Commission Panel directs BC Hydro to continue consulting with the potentially impacted First Nations until the ILM Project is complete.

2. The Commission Panel directs BC Hydro to include in its ILM Quarterly Progress Reports a detailed reporting on First Nations consultation similar to the reporting in the Revelstoke Unit 5 Project Quarterly Reports.

3. The Commission Panel directs, as provided for in Order G-15-11, that BC Hydro include a comprehensive and detailed report on its consultation with First Nations in the Final Report contemplated by Commission Order C-4-08.