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**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER F-15-12**

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

**and
Application for Participant Assistance/Cost Award
in the British Columbia Hydro and Power Authority Application
for a Certificate of Public Convenience and Necessity
to Construct and Operate the Ruskin Dam and Powerhouse Upgrade Project**

BEFORE: M.R. Harle, Panel Chair/Commissioner
N.E. MacMurchy, Commissioner July 27, 2012
A.W.K. Anderson, Commissioner

O R D E R

WHEREAS:

- A. On February 22, 2011, British Columbia Hydro and Power Authority (BC Hydro) filed pursuant to section 46(1) of the *Utilities Commission Act* an application for a Certificate of Public Convenience and Necessity to construct and operate the Ruskin Dam and Powerhouse Upgrade Project (the Project) as described in the Application;
- B. By Order G-34-11 dated February 24, 2011, the British Columbia Utilities Commission (Commission) established a Written Public Hearing process for the review of the Application;
- C. By Order C-5-12 dated March 30, 2012, the Commission granted a Certificate of Public Convenience and Necessity to BC Hydro for the Project;
- D. On May 17, 2012, the Kwantlen First Nation (KFN) filed its Participation Assistance/Cost Award (PACA) application in an amount of \$65,957.36;
- E. By letter dated June 4, 2012, BC Hydro commented on the KFN's PACA application;
- F. The Commission has reviewed the KFN's application for PACA funding with regard to the criteria and rates set out in the PACA Guidelines in Commission Order G-72-07 and has determined a cost award should be approved as set out in the Reasons for Decision attached as Appendix A to this Order.

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NOW THEREFORE pursuant to section 118(1) of the *Utilities Commission Act*, the Commission awards \$58, 500.00 to KFN with respect to its participation in the BC Hydro's Ruskin Dam and Powerhouse Upgrade Project proceeding. BC Hydro is directed to reimburse the KFN for the awarded amount in a timely manner.

DATED at the City of Vancouver, in the Province of British Columbia, this 30th day of July 2012.

BY ORDER

Original signed by:

M.R. Harle
Panel Chair/Commissioner

Attachment

Application for Participant Assistance/Cost Award
in an Application by British Columbia Hydro and Power Authority
for a Certificate of Public Convenience and Necessity
to Construct and Operate the Ruskin Dam and Powerhouse Upgrade Project

REASONS FOR DECISION

1.0 INTRODUCTION

On February 22, 2011, British Columbia Hydro and Power Authority (BC Hydro) filed pursuant to section 46(1) of the *Utilities Commission Act* (the Act) an application for a Certificate of Public Convenience and Necessity to construct and operate the Ruskin Dam and Powerhouse Upgrade Project (the Project) as described in the Application.

By Order C-5-12 dated March 30, 2012, the British Columbia Utilities Commission (Commission) granted a Certificate of Public Convenience and Necessity to BC Hydro for the Ruskin Project.

As set out in the Order that accompanies these Reasons for Decision, the Commission received an application from the Kwantlen First Nation (KFN), pursuant to section 118 of the Act, for Participant Assistance/Cost Award (PACA) funding for the Ruskin Project proceeding. Section 118 provides that the Commission Panel may make cost awards for participants in a proceeding. The Commission's PACA Guidelines (Guidelines) are set out in Appendix A to Order G-72-07 and include the following provisions:

"The Commission Panel will determine whether a Participant is eligible or ineligible for an award. In determining an award of all or any portion of a Participant's costs, the Commission Panel will first consider whether the Participant has a substantial interest in a substantial issue in the proceeding. If this criterion is not met, the Participant will typically not receive a cost award except, possibly, for out-of-pocket disbursement."

The Commission Panel will then consider the following:

- (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.

If the Commission Panel considers it to be an appropriate consideration in a proceeding, the Commission Panel may consider the Participant's ability to participate in the proceeding without an award."

2.0 PROCEEDING AND PREPARATION DAYS

Section 4 of the Guidelines states that proceeding days may include workshop days, negotiation days, pre-hearing conference days, hearing days, and oral argument days. The proceeding days for the Ruskin Dam and Powerhouse Upgrade Project were:

<u>Activity</u>	<u>Proceeding Days</u>
BC Hydro Workshop-February 28, 2011	0.5
Ruskin Site visit-April 26, 2011	0.5
Total Proceeding Days	1.0

The Guidelines provide that the Commission may award costs for preparation days on a ratio of up to two days per proceeding days, although after the proceeding the Commission may adjust this ratio with adequate justification from participants.

In the case of the Ruskin Dam and Powerhouse Project proceeding, the Commission finds that the standard calculation of preparation days is not particularly helpful for a written process. The Commission determines that up to seven days of counsel time, up to seven days for consultants, and up to six days for a case manager will be the maximum eligible for PACA funding.

The summary of the days claimed by the KFN follows:

	Hours	Days Claimed¹	Maximum Days Eligible	Difference in Preparation Days
Legal Fees	116.5	14.6	7.0	+7.6
Consultant				
PGL	69.1	8.6		
Cordillera		14.4		
Visions	38.5	4.8		
Total Consultants		27.8	7.0	+20.8

¹ Based on an 8-hour day and taken from the application's detailed invoices

3.0 KFN PACA APPLICATION AND AWARD AMOUNTS

The KFN applied for PACA funding in the amount of \$65,957.36.

3.1 Contribution Analysis

- KFN was represented at the Workshop and the Ruskin site visit;
- KFN submitted numerous information requests and related responses through three rounds of written requests;
- KFN submitted a final submission which addressed multiple issues including strength of claim and environmental effects of the Project;
- KFN participated actively and constructively in the proceeding and appeared to do so in good faith and with reasonable diligence;
- KFN rates for counsel and one of its consultants, PGL, are not consistent with the PACA Guidelines;² and
- KFN substantially exceeded the number of eligible preparation days for both counsel and consultants.

3.1.1 Legal Fees

Invoices were submitted by Mandell Pinder for a total of 116.7 hours and \$35,403.69:

- Claire Ostrove 1.25 hours at \$325/hr
- Tim Howard 115.45 hours at \$250/hr

The maximum rate in the Guidelines for a senior counsel with ten years experience since call is \$1,800 per day based on an eight hour day. This results in a maximum hourly charge of \$225/hr. Therefore, the maximum legal counsel costs have been exceeded by:

Claire Ostrove

1.25 hrs (\$325/hr claimed - \$225/hr maximum) = 1.25 hrs x \$100=\$125.00

Tim Howard

115.45 X (\$250/hr claimed - \$225/hr maximum) = 115.45 hrs x \$25=\$2,886.25

Sub-Total	3,011.25
HST @ 12%	361.35
Total	<u>\$3,372.60</u>

² KFN's PACA Budget submitted on March 29, 2011 quotes estimated rates for legal counsel, consultants and case manager that all conformed to the maximum daily rates under the Guidelines; however, the costs for legal counsel and PGL's services were in excess of these amounts. Also, it is not clear as to which, if any, case manager duties were performed by Visions as all charges were at the \$1000/day (\$125/hr) rate.

Legal fees not directly attributed to the proceeding (extracted from detailed invoices):

1. Services for reviewing revenue sharing paper and preparing response to same - \$175;
2. Setting up a meeting with DFO; begin review of BCH consultation meeting minutes - \$350;
3. Review BCH response on revenue sharing; review statute regarding same - \$225;
4. Review notes of DFO meeting; respond to query regarding WUP - \$75;
5. Confer with client regarding negotiation strategy - \$250;
6. Revise Ruskin Negotiation framework; prepare notes for negotiation meeting; review IBA term sheet - \$400;
7. Drafting relationship agreement - \$250 and \$850;
8. Confer with T. Knott regarding negotiations; call C. Godsoe regarding evidence and negotiations - \$225;
9. Review draft relationship agreement with BCH - \$243.75;
10. Confer with C. Godsoe; email reporting same to client \$400 (note "same" is assumed to relate to the draft relationship agreement with BC Hydro).

The Commission Panel considers that the above charges are more appropriately charged to capacity funding i.e. revenue sharing, relationship/negotiation strategy on consultation and IBA agreement. It is not clear how or why meetings were required outside of the hearing structure between individual parties, specifically a meeting with DFO (counsel affirms that PGL subtracted these costs from its invoice, however it is not clear why legal fees and the services of Visions Financial were not similarly extracted) and consultation/IBA meetings with BC Hydro. The Commission Panel considers that these costs are not directly related to the review of the Application. Accordingly, the Commission Panel determines that these charges amount to 13.55 hrs at \$225/hr (since the hourly rate has already been adjusted above) or \$3048.75 plus HST @12% \$365.85 = \$3414.60.

The Panel finds that costs attributed to legal fees are in excess by \$6,787.20 i.e. \$3,372.60 for the hourly rate adjustment and \$3414.60 for charges not in scope.

Costs for legal fees should therefore be \$35,403.69 - \$6,787.20 = \$28,616.49.

3.1.2 Pottinger Gaherty Limited (PGL)

PGL submitted invoices for a total of \$14,495.95.

Charges of Susan Wilkins

The Guidelines provide a maximum daily rate for a consultant with 10+ years of related experience of \$1250/day based on an eight hour day or \$1,250/8 = \$156.25/hour. Ms. Wilkins hourly rate of \$240/hr exceeds the Guidelines by \$240/hr - \$156.25/hr = \$83.42/hr.

In addition, no explanation was provided as to the rationale for the 1.04 times multiplier. In any event, the hourly rate charged by Ms. Wilkins exceeds the Guidelines.

The hours detailed on PGL's invoices show Ms. Wilkins charged 33.25 hours in total. In Mr. Howard's affidavit Exhibit "B" of the application, he indicates "that \$1397.76 of the billing shown on the June 14, 2012 invoice was related to the meeting with DFO, and that the revised invoice total, with that amount subtracted, is \$2,054.71 for services specific to the Ruskin CPCN Application." Consequently, since the majority of costs were attributed to Ms. Wilkins time (12.0 hrs out of a total 12.6 hours charged on this invoice) and no further breakdown was

provided, the Panel assumes that the reduction of \$1,397.76 is solely attributed to Ms. Wilkin's charges. The Panel finds that 5 hours (calculated from 5 hr X \$240/hr x 1.04 x 1.12 = \$1,397.76) is in excess of her 33.25 hrs bringing the revised total to 28.25 hours eligible for funding.

Accordingly, the maximum eligible amount charged by Ms. Wilkins equates to 28.25 hrs x \$156.25/hr = \$4,414.06+ HST@12% or \$529.68 = \$4,943.75.

Charges of Matthew Hammond

Mr. Hammond's charges are within the Guidelines and amount to 39.85 hrs x \$140/hr x 1.04 multiplier = \$5,802.16 + HST@12% or \$696.26 = \$6,498.42.

Charges of Mandy Ostrom

Ms. Ostrom's charges are within the Guidelines and amount to 1.0 hour x \$60/hr x 1.04 multiplier = \$62.40 + HST@12% or \$7.49 = \$69.89.

The Panel finds that PGL's maximum charges under the Guidelines should be:

Ms. Wilkins' services	\$4,943.75
Mr. Hammond's services	\$6,498.42
Ms. Ostrom's services	<u>\$69.89</u>
Total	\$11,512.06

Costs for PGL's fees should therefore be \$11,512.06.

3.1.3 Cordillera

Cordillera submitted invoices for a total of \$11,245.22.

The Panel finds the amounts claimed by Cordillera conform to the Guidelines.

3.1.4 Visions Financial

Visions submitted invoices for a total of 38.5 hours and \$4,812.50.

The Panel notes the following charges for:

- DFO meeting (2 hrs);
 - BCH meeting (3 hrs); and
 - Ruskin Site Tour/Welcome (3 hrs)³
- Total 8 hours x \$125/hr = \$1,000.00

The Panel considers that the above entries are not applicable for PACA funding and should be more appropriately charged to capacity funding

³ Section 4 on page 6 of the Guidelines excludes town hall meetings from eligible costs.

3.2 BC Hydro's Assessment of Amount claimed

In its letter dated June 4, 2012, BC Hydro offered its support of the amount sought by the KFN noting that the proceeding was lengthy and complex covered a myriad of issues, KFN filed evidence and that BC Hydro is not surprised that KFN's funding request exceeded its original estimate.

3.3 Summary of Costs

	Amount Claimed	Amount Eligible
Mandell Pinder	\$35,403.69	\$28,616.49
PGL	14,495.95	11,512.06
Cordillera	11,245.22	11,245.22
Visions	4,812.50	3,812.50
Total	\$65,957.36	\$55,186.27

The summary of costs not eligible for a PACA award fall into two categories:

- Rates in excess of the Guidelines - \$3,372.60 for legal costs and \$2,983.89 for PGL for a sub-total of \$6,356.49;
- Costs for items not in the scope of the review - \$3,414.60 for legal costs and \$1,000.00 for Visions for a sub-total of \$4,414.60.

The total of both categories amounts to \$10,771.09.

Commission Determination

The Commission has reviewed KFN's application for PACA funding with regard to the criteria and rates set out in the PACA Guidelines in Commission Order G-72-07, considered BC Hydro's comments on the application and weighed the contribution and relevance of its submissions in contributing to a better understanding of the issues by the Commission and determined that an award of \$58,500.00 (\$7,457.36 less than claimed) is a reasonable amount for the KFN's participation in the Ruskin Dam and Powerhouse Upgrade Project proceeding.