



ORDER NUMBER
G-262-21

IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

FortisBC Energy Inc.
Application for a Certificate of Public Convenience and Necessity
for the Okanagan Capacity Upgrade Project

BEFORE:

R. I. Mason, Panel Chair
D. A. Cote, Commissioner
A. K. Fung, QC, Commissioner

on September 7, 2021

ORDER

WHEREAS:

- A. On November 16, 2020, FortisBC Energy Inc. (FEI) submitted an application to the British Columbia Utilities Commission (BCUC) for, among other things, a Certificate of Public Convenience and Necessity pursuant to sections 45 and 46 of the *Utilities Commission Act* (UCA) for the Okanagan Capacity Upgrade Project (Application);
- B. By Order G-335-20 dated December 16, 2020, the BCUC established a public hearing for the review of the Application in accordance with the regulatory timetable set out in Appendix A of the order;
- C. By Order G-166-21 dated May 28, 2021, the BCUC established a further regulatory timetable, which included submissions from FEI and interveners on further regulatory process;
- D. By letter dated July 5, 2021, FEI submits the evidence on the record for the proceeding warrants moving to final argument;
- E. By July 9, 2021, interveners filed submissions on further process. Penticton Indian Band (PIB) submits that it intends to file evidence in the proceeding, and proposes a further regulatory timetable including the filing of written and oral evidence;
- F. By letter dated July 14, 2021, FEI submits the regulatory timetable should accommodate PIB's request to file written evidence, followed by a round of information requests, and an opportunity for FEI and interveners to file rebuttal evidence if required. FEI suggests submissions from parties should be exchanged or a procedural conference should be held, to determine the scheduling of the PIB's oral evidence and further procedural matters;

- G. By Order G-223-21 dated July 23, 2021 the BCUC established a further regulatory timetable, which included a procedural conference and the filing of written evidence by PIB;
- H. The Procedural Conference was held on August 23, 2021, and submissions were made by PIB, FEI, BC Sustainable Energy Association, B.C. Old Age Pensioners' Organization et al., Commercial Energy Consumers Association of BC, and Residential Consumer Intervener Association; and
- I. The BCUC considers establishing a further regulatory timetable is warranted.

NOW THEREFORE for the reasons outlined in Appendix B to this order, the BCUC establishes a further regulatory timetable, as set out in Appendix A to this order.

DATED at the City of Vancouver, in the Province of British Columbia, this 7th day of September 2021.

BY ORDER

Original signed by:

R. I. Mason
Commissioner

Attachment

FortisBC Energy Inc.
Application for a Certificate of Public Convenience and Necessity
for the Okanagan Capacity Upgrade Project

REGULATORY TIMETABLE

Action		Date (2021)
PIB to file Written Evidence		Monday, September 27
PIB submission on confidentiality of Oral Evidence		Monday, September 27
FEI and intervener responses to PIB's submission on confidentiality of Oral Evidence		Monday, October 4
PIB reply submission on confidentiality of Oral Evidence		Tuesday, October 12
BCUC Information Request (IRs) on PIB Written Evidence		Tuesday, October 12
FEI and intervener IRs on PIB Written Evidence		Tuesday October 19
PIB responses to BCUC, FEI and Interveners IRs		Tuesday, November 9
BCUC confirmation of cross-examination of PIB's experts		Friday, November 19
Oral Evidence of PIB/ testing of Oral Evidence*		Tuesday, November 23
BCUC, FEI and intervener IRs on PIB Oral Evidence		Tuesday, December 7
PIB responses to BCUC, FEI and intervener IRs on Oral Evidence		Thursday, December 23
Action		Date (2022)
FEI and interveners to provide notice of their intent and proposed timing for the filing of rebuttal evidence		Wednesday, January 5
	If rebuttal evidence	If no rebuttal evidence
Filing of Rebuttal Evidence	To be determined	N/A
IRs on Rebuttal Evidence	To be determined	N/A
Response to IRs	To be determined	N/A
FEI Final Argument	To be determined	Wednesday, January 26
Intervener Argument	To be determined	Wednesday, February 16
FEI Reply Argument	To be determined	Wednesday, March 9

* To be held virtually, timing and meeting link to be confirmed in due course.

FortisBC Energy Inc.
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REASONS FOR DECISION

1.0 Introduction

On November 16, 2020, FortisBC Energy Inc. (FEI) submitted an application to the British Columbia Utilities Commission (BCUC) for, among other things, a Certificate of Public Convenience and Necessity pursuant to sections 45 and 46 of the *Utilities Commission Act* (UCA) for the Okanagan Capacity Upgrade Project (Application). By Order G-335-20 dated December 16, 2020, the BCUC established a public hearing for the review of the Application in accordance with the regulatory timetable set out in Appendix A of that order.

By Order G-166-21 dated May 28, 2021, the BCUC established a further regulatory timetable, which included a third round of information requests to FEI, and submissions from FEI and interveners on a further regulatory process for the proceeding, with further process to be determined. By letter dated July 9, 2021, Penticton Indian Band (PIB), an intervener in this proceeding, submitted that it intends to file evidence, and proposed a further regulatory timetable including the filing of written and oral evidence. By letter dated July 14, 2021, FEI submitted that the regulatory timetable should accommodate PIB's request to file written evidence, followed by a round of information requests (IR), and an opportunity for FEI and interveners to file rebuttal evidence if required. FEI suggested allowing submissions from the parties or scheduling a procedural conference (Procedural Conference) to determine the scheduling of the PIB's oral evidence and further procedural matters. By Order G-223-21 dated July 23, 2021, the BCUC established a further regulatory timetable, which included the Procedural Conference and the filing of written evidence by PIB.

These reasons for decision outline parties' submissions at the August 23, 2021 Procedural Conference, and the Panel's determination on next steps for the regulatory timetable for the review of the Application.

2.0 Procedural Conference

In its reasons for decision attached to Order G-223-21, the Panel outlined the matters to be addressed at the Procedural Conference are as follows:

- With respect to the proposed oral evidence to be submitted by PIB:
 - The topics the PIB proposes to cover in its oral evidence;
 - Whether there is any overlap with the written evidence, the time required to present the oral evidence; and
 - Parties' submissions on the appropriate way to test the oral evidence.
- Parties' comments on the further draft timetable below for the remainder of the proceeding:¹

¹ Exhibit A-11, Appendix B, pp. 3-4.

Action	Date (2021)	
BCUC Information Requests (IRs) on Written Evidence	Tuesday, October 12	
FEI and intervener IRs on Written Evidence	Tuesday October 19	
PIB Responses to IRs	Tuesday, November 9	
Oral Evidence of PIB/ testing of Oral Evidence	To be determined	
Further process regarding oral evidence (if any)	To be determined	
Action	If rebuttal evidence	If no rebuttal evidence
Filing of Rebuttal Evidence	To be determined	N/A
IRs on Rebuttal Evidence	To be determined	N/A
Response to IRs	To be determined	N/A
FEI Final Argument	To be determined	To be determined
Intervener Argument	To be determined	To be determined
FEI Reply Argument	To be determined	To be determined

The following parties made submissions at the Procedural Conference:

- PIB;
- FEI;
- BC Sustainable Energy Association (BCSEA);
- BC Old Age Pensioners' Organization et al. (BCOAPO);
- Commercial Energy Consumers Association of BC (the CEC); and
- Residential Consumer Intervener Association (RCIA).

The parties' main positions are outlined below.

2.1 PIB

PIB submits an oral component of this hearing is necessary to satisfy the BCUC's procedural fairness obligations, in order to meet the Crown's duty to consult PIB on the OCU Project, and to give effect to the rights afforded by the *Declaration on the Rights of Indigenous Peoples Act*. PIB's proposed oral evidence will comprise expert evidence of Virgil Hawkes and Dr. Chris Joseph, and evidence from PIB leadership and traditional knowledge holders. The reports of Mr. Hawks and Dr. Joseph will be filed in advance as written evidence. PIB acknowledges there will be an overlap with the written and oral evidence, but submits this is not uncommon in oral hearings and will be of benefit to all parties.²

PIB states that its member evidence and leadership evidence will set out PIB's positions on its jurisdiction over the project and its concerns with the project proceeding through its unceded title lands and culturally significant areas. Evidence about impacts to its rights and title will be set out as well as impacts to the objective of

² Transcript Volume 1, pp. 10–12.

reconciliation and the rights recognized by United Nations Declaration on the Rights of Indigenous Peoples. PIB explains that it is a culture of oral and not written tradition, and oral submissions are more meaningful to the way it conventionally expresses its views, positions and concerns.³

PIB submits it would be more efficient to test the oral evidence at the oral hearing, which PIB proposes should take place on November 23, 2021.⁴ However, PIB would support a written process following the oral hearing, stating that it should not preclude the Panel from asking clarifying questions at the oral hearing.⁵

PIB submits that those interveners that are not adverse in interests are not entitled to ask questions of PIB. PIB adds that much or all of PIB members' evidence must be submitted on a confidential basis.⁶

2.2 FEI

FEI submits that oral evidence from Mr. Hawkes and Dr. Joseph is not needed, as the evidence should be contained in the expert reports and presentation of oral evidence would be duplicative. To the extent that there are any questions, FEI argues they can be addressed in a written IR process.⁷

FEI does not object to PIB's proposed oral evidence provided by its members and submits the proposed dates are acceptable. FEI asks that in advance of the oral presentation of evidence, PIB provide the names of the witnesses and provide an outline of the evidence they intend to present. FEI notes that while it may have clarifying questions after the oral evidence is presented, it would be more appropriate to test the evidence through written IRs.⁸ FEI submits that PIB's proposed date for the oral hearing is acceptable and that any rebuttal evidence should be filed after receipt of IR responses on PIB's oral evidence.⁹

2.3 BCSEA

BCSEA does not object to PIB's request for an oral hearing and takes no position regarding the content.¹⁰ BCSEA would object to being barred from asking IRs on PIB evidence, and that as a matter of procedural fairness, interveners need to be in a position to choose whether to test that evidence. BCSEA adds that it has no objection to the BCUC's usual confidentiality approach, but submits there should be submissions made on confidentiality.¹¹

2.4 BCOAPO

BCOAPO submits PIB's reliance on oral traditions indicates a need to have PIB representatives present their evidence orally. BCOAPO supports FEI's suggestion of PIB providing the names and summary of PIB's expected oral evidence. BCOAPO would not anticipate having discovery questions but this would depend on the nature of the evidence. However, BCOAPO is not clear as to whether there is a need for PIB's experts to attend the oral

³ Transcript Volume 1, p. 10–12.

⁴ Ibid., p. 13.

⁵ Ibid., pp. 34–35.

⁶ Ibid., p. 34.

⁷ Ibid., p. 16.

⁸ Ibid., p. 17.

⁹ Ibid., p. 18.

¹⁰ Ibid., p. 20.

¹¹ Ibid., p. 39.

hearing if their evidence has been subject to IRs.¹² BCOAPO adopts BCSEA's position regarding interveners' ability to ask questions, and confidentiality.¹³

2.5 The CEC

The CEC submits written IRs should be deferred until both the written and oral evidence is on the record, as the oral evidence shouldn't be a chance to reframe the written evidence in response to matters raised in prior IRs. With respect to testing the oral evidence, the parties should be permitted to ask clarifying questions at the oral hearing process, and subsequently via written IRs. The CEC supports FEI's suggestion of PIB providing the names and a summary of PIB's expected oral evidence.¹⁴ The CEC adopts BCSEA's position regarding interveners' ability to ask questions, and confidentiality.¹⁵

2.6 RCIA

RCIA is comfortable with PIB's experts participating in the oral hearing or the alternative of testing their evidence in a written process. RCIA is strongly in support of members and representatives of PIB being given the opportunity to participate in this proceeding in whatever manner is most appropriate and culturally relevant to them. RCIA's view is that it is appropriate for oral evidence to be tested.¹⁶ RCIA adopts BCSEA's position regarding interveners' ability to ask questions, and confidentiality.¹⁷

Panel Determination

For the following reasons, the Panel establishes a new regulatory timetable set out in Appendix A to this order.

The Panel agrees that PIB may present oral evidence from its members. We accept the Band's culture of oral tradition and note that none of the parties object to its presentation of oral evidence. The oral evidence shall be presented on November 23, 2021, the date requested by PIB to which no other party objects.

PIB is directed to make a written submission on its oral evidence, listing the names and official Band roles, if any, of the witnesses and providing an outline of the oral evidence by September 27, 2021.

If PIB wishes to request confidential treatment for any of its oral evidence, it may do so by making a submission to the Panel by September 27, 2021. Other parties in the proceeding will be provided an opportunity to respond to any submission from the PIB with respect to confidentiality, and the PIB will have a right of reply. The Panel emphasizes that, in accordance with the BCUC's Rules of Practice and Procedure,¹⁸ reasons must be provided for all requests for confidentiality including the specific harm that could reasonably be expected to result if the information were made publicly available, and PIB bears the onus of responsibility for demonstrating that its evidence should be treated as confidential. PIB should also indicate in its request whether confidential oral information would be shared with other parties in the proceeding on a confidential basis or whether PIB is requesting the information be shared only with the BCUC, and the rationale for such treatment.

¹² Ibid., pp. 22–23.

¹³ Ibid., pp. 39–40.

¹⁴ Ibid., p. 25.

¹⁵ Ibid., p. 42.

¹⁶ Ibid., pp. 28–29.

¹⁷ Ibid., p. 42.

¹⁸ BCUC Rules of Practice and Procedure, Order G-15-19, p. 12.

The oral evidence may be tested by oral questions during the presentation and by written IRs to PIB to follow. All participants in the proceeding may ask questions of PIB's presenters of oral evidence. As the BCUC has a duty to consider the public interest in a CPCN proceeding, interveners play an important part and are admitted as interveners on the basis that they are "directly or sufficiently affected by the BCUC's decision, or that they have experience, information or expertise relevant to a matter before the BCUC that would contribute to the BCUC's decision-making."¹⁹ It would be procedurally unfair to allow PIB to submit evidence that other interveners had no opportunity to test. In the view of the Panel there is no merit to PIB's position that in the case of interveners that are not adverse in interests, they should not be entitled to ask questions of PIB.

The Panel denies the PIB's request to present oral evidence from its experts. In our view there is no compelling reason as it would be duplicative and inefficient; their evidence is to be presented in writing and tested through written IRs. However, PIB should be prepared for its experts to be cross examined orally on November 23, 2021 following their responses to written IRs, if required and time permitting. If such oral cross-examination is not required PIB will be notified on or before November 19, 2021.

We do not agree with the CEC that written IRs should be deferred until both the written and oral evidence is on the record. The Panel considers it more regulatorily efficient to allow parties to test the PIB's written evidence between September 27 and November 23, 2021, and then to have the opportunity for oral cross-examination on November 23, 2021 at the same time as the oral evidence is being presented should there be any outstanding questions.

PIB submits that an oral component to this hearing is necessary to meet the Crown's duty to consult PIB on the OCU Project. While the Panel agrees that an oral component to this proceeding is appropriate, for the reasons stated above, the Panel wishes to clarify that the BCUC does not have a legal duty to consult Indigenous peoples. The BCUC's jurisdiction is limited to the powers conferred upon it by the Legislature. While the UCA confers on the BCUC the power to consider whether adequate consultation has taken place, it does not extend to authorizing the BCUC to consult directly with Indigenous groups to discharge the Crown's duty to consult.²⁰ The role of the BCUC in CPCN proceedings with respect to consultation is to assess the adequacy of consultation to date. Further, the Panel notes in the case of the OCU Project, a CPCN is one of a number of regulatory approvals that FEI will require. For example, FEI will require permits from the BC Oil and Gas Commission, a Crown agency that has been delegated the authority to consult directly with Indigenous peoples.

¹⁹ BCUC Rules of Practice and Procedure, Order G-15-19, p. 5.

²⁰ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at paras. 66 to 74