



ORDER NUMBER
G-29-22

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 Tilbury Liquefied Natural Gas Storage Expansion Project

BEFORE:

A. K. Fung, QC, Panel Chair
T. A. Loski, Commissioner
R. I. Mason, Commissioner
D. M. Morton, Commissioner

on February 10, 2022

ORDER

WHEREAS:

- A. On December 29, 2020, FortisBC Energy Inc. (FEI) filed an application with the British Columbia Utilities Commission (BCUC) for the approval of a Certificate of Public Convenience and Necessity for the Tilbury Liquefied Natural Gas Storage Expansion Project (Application);
- B. By Order G-185-21 dated June 16, 2021, the BCUC established a regulatory timetable which included a procedural conference;
- C. The procedural conference was held on November 24, 2021, and submissions were made by FEI, B.C. Old Age Pensioners' Organization et al. (BCOAPO), BC Sustainable Energy Association (BCSEA), Citizens for My Sea to Sky Society, Commercial Energy Consumers Association of BC (CEC), Residential Consumer Intervener Association (RCIA), and Tsleil-Waututh Nation (TWN);
- D. By letter dated December 17, 2021, TWN filed a submission responding to matters raised in the procedural conference, which included a request to exclude interveners from hearing its proposed oral evidence;
- E. By Order G-9-22 dated January 13, 2022, the BCUC established a further regulatory timetable, which included the hearing of TWN oral evidence scheduled for April 6, 2022 (Oral Evidence Hearing). The BCUC also sought submissions on TWN's request to exclude interveners from the Oral Evidence Hearing;
- F. By January 21, 2022, BCOAPO, BCSEA, the CEC and RCIA filed submissions regarding TWN's request. On January 28, 2022, TWN filed its reply submission; and
- G. The BCUC has reviewed the submissions and considers the following determinations are warranted.

NOW THEREFORE for the reasons outlined in Appendix B to this order, the BCUC orders as follows:

1. The Oral Evidence Hearing will be held *in camera*, with representatives of TWN, FEI and the BCUC (including their respective legal counsel) in attendance only, along with the BCUC Hearing Officers for transcription purposes.
2. TWN is directed to file with the BCUC for review and approval its proposed redactions to the transcript for the Oral Evidence Hearing no later than one week following TWN's receipt of the transcript.
3. An amended regulatory timetable is established, as set out in Appendix A to this order.

DATED at the City of Vancouver, in the Province of British Columbia, this 10th day of February 2022.

BY ORDER

Original signed by:

A. K. Fung, QC
Commissioner

Attachment

FortisBC Energy Inc.
Application for a Certificate of Public Convenience and Necessity for the Tilbury Liquefied Natural Gas Storage
Expansion Project

REGULATORY TIMETABLE

Action	Date (2022)
FEI Response to Panel Information Request (IR) No. 1	Tuesday, March 1
Intervener Written Evidence	Tuesday, March 15
TWN Oral Evidence on TWN Knowledge	Wednesday, April 6
BCUC, FEI and Intervener IRs on Intervener Written Evidence	Wednesday, April 13
BCUC, FEI and Intervener IRs on TWN Oral Evidence	Monday, April 25
Responses to IRs on Intervener Written Evidence and TWN Oral Evidence	Wednesday, May 11
Rebuttal Evidence (if required)	Wednesday, May 25
IRs on Rebuttal Evidence	Wednesday, June 15
Responses to IRs on Rebuttal Evidence	Wednesday, July 6
Procedural Conference	To be determined
Oral Hearing (if required)	To be determined

FortisBC Energy Inc.
Application for a Certificate of Public Convenience and Necessity for
the Tilbury Liquefied Natural Gas Storage Expansion Project

REASONS FOR DECISION

1.0 Introduction

On December 29, 2020, FortisBC Energy Inc. (FEI) filed an application with the British Columbia Utilities Commission (BCUC) for the approval of a Certificate of Public Convenience and Necessity for the Tilbury Liquefied Natural Gas Storage Expansion (TLSE) Project (Application).

By Order G-185-21 dated June 16, 2021, the BCUC established a regulatory timetable which included a procedural conference. The BCUC conducted the procedural conference on November 24, 2021, and received submissions from FEI, B.C. Old Age Pensioners' Organization et al. (BCOAPO), BC Sustainable Energy Association (BCSEA), Citizens for My Sea to Sky Society, Commercial Energy Consumers Association of BC (the CEC), Residential Consumer Intervener Association (RCIA), and Tsleil-Waututh Nation (TWN).

At the procedural conference, TWN stated it intends to provide written and oral evidence (Oral Evidence). With respect to the Oral Evidence, TWN submits this is directed at the impacts of the TLSE Project on TWN Rights, Title and interests, as well as rights pursuant to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). TWN requests the Oral Evidence be held confidential by the BCUC, as TWN intends to provide culturally sensitive information, the publication of which could significantly harm cultural and spiritual sites of TWN and also TWN's ability to practice its rights. However, TWN is amenable to FEI being present to hear the Oral Evidence.¹

By letter dated December 17, 2021, TWN filed a submission responding to matters raised in the procedural conference, which included a request to exclude interveners from hearing its proposed Oral Evidence. TWN proposes that TWN review and redact culturally sensitive information from the transcript of the hearing for its Oral Evidence which would be made available to interveners upon request.²

By Order G-9-22 dated January 13, 2022, the BCUC established a further regulatory timetable, which included the hearing of TWN Oral Evidence scheduled for April 6, 2022 (Oral Evidence Hearing). In the reasons for decision attached to that order, the Panel accepted TWN's request to present its written and Oral Evidence, and determined that the Oral Evidence Hearing would be held *in camera*. The BCUC also sought submissions on TWN's request to exclude interveners from the Oral Evidence Hearing.

By January 21, 2022, four interveners (BCOAPO, BCSEA, the CEC and RCIA) filed submissions regarding TWN's request. On January 28, 2022, TWN filed its reply submission.

In these reasons for decision, the Panel summarizes parties' submissions on TWN's request, and outlines its determinations.

¹ Transcript Volume 3.

² Exhibit C7-6, p. 1.

2.0 Parties' Submissions

2.1 TWN

TWN submits it is appropriate to exclude interveners from the Oral Evidence Hearing. TWN is alive to the importance of an open and transparent hearing process, but submits in this case, the public interest in disclosing TWN's culturally sensitive evidence is outweighed by the irreparable harm that would result to TWN's Indigenous Rights, Title, and interests. To strike a balance with the interests of interveners, TWN proposes that TWN review and redact culturally sensitive information from the transcript of the Oral Evidence Hearing which would be made available to interveners upon request. TWN submits its proposal to exclude interveners from the Oral Evidence Hearing is based on the following reasons:

- Disclosing culturally sensitive information to Interveners would infringe TWN's constitutionally protected Aboriginal Rights by putting cultural and spiritual sites at physical risk and eroding the sanctity of its sacred sites and sacred knowledge.
- Disclosing culturally sensitive information to Interveners would be inconsistent with TWN's cultural protocols and infringe TWN's right to protect traditional knowledge pursuant to the UNDRIP.
- Excluding interveners from the Oral Evidence Hearing is consistent with the UNDRIP and the constitutional imperative of reconciliation, both of which the BCUC is obligated to implement in its processes.
- The Crown's duty to consult requires that the BCUC take appropriate measures to protect TWN's culturally sensitive information.
- There are precedents from other tribunals for granting a confidential Oral Evidence Hearing.
- BCUC has the power to exclude Interveners from the Oral Evidence Hearing, and to do so would be in the public interest.³

In particular with respect to preserving the sanctity of the TWN's sacred sites and sacred knowledge which TWN proposes to discuss at the Oral Evidence Hearing, TWN notes the importance of ensuring that as few people know about these sites and practices as possible. TWN states:⁴

This sacred knowledge is traditionally only held by a few Tsleil-Waututh individuals. Nevertheless, the reality of the colonial, Canadian legal system necessitates that TWN sometimes disclose this information to the Crown to protect these sacred sites and practices. TWN intends to disclose this evidence regarding this sacred knowledge to FEI and to the BCUC to ensure these parties appropriately consider the impacts of the Project on TWN's constitutionally protected Aboriginal Rights and Title and Indigenous rights pursuant to UNDRIP.

In short, but for the need to ensure that both the applicant (FEI) and the decision maker (the BCUC) properly consider the impacts of the Projects on its Indigenous Rights, Title and interests in a manner consistent with the requirements of the Canadian legal system, TWN submits it would not otherwise reveal these sacred sites and practices to other than a select group of TWN individuals.⁵

³ Exhibit C7-6, pp. 1-2.

⁴ Ibid., p. 2

⁵ Ibid.

2.2 Other Interveners

The four interveners that provided written submissions on the issue of their proposed exclusion from the Oral Evidence Hearing were evenly split on this issue. Two interveners (BCOAPO and the CEC) opposed the proposal in whole or in part and the remaining two (BCSEA and RCIA) generally supported TWN's position. We summarize their respective submissions along with any reply submissions from TWN below.

BCOAPO

BCOAPO's preference would be to attend the Oral Evidence Hearing as an observer only. Given the sanctity of TWN's oral knowledge, BCOAPO submits that should the BCUC find it appropriate for interveners to attend the Oral Evidence Hearing, interveners should nonetheless be excluded from the aspects of the Oral Evidence Hearing where particular culturally sensitive details are to be presented. BCOAPO notes the BCUC took a similar approach in the Parkland Corporation Request for Advance Ruling on Confidentiality for Fuel Price Transparency Act Reporting Submissions proceeding. If the BCUC does not permit interveners to attend aspects of the Oral Evidence Hearing, BCOAPO supports TWN's suggestion that interveners be provided with a redacted version of the transcript, if requested. However, BCOAPO submits that alongside the transcript, it would be helpful if TWN provided a high-level summary of the redacted evidence to ensure that the transcript is a useful tool for interveners.⁶

In reply to BCOAPO, TWN submits that while it appreciates BCOAPO's position, it is practically difficult for TWN Knowledge keepers to silo the culturally sensitive information when providing Oral Evidence. However, TWN is amenable to the BCOAPO's suggestion that TWN provide a high-level summary of the redacted evidence and to answer questions arising therefrom.⁷

BCSEA

BCSEA considers that culturally sensitive information to be provided by TWN warrants a confidentiality direction by the Panel under Rule 19.01 of the BCUC Rules of Practice and Procedure (Rules). BCSEA has chosen not to request access to TWN's culturally sensitive information, and does not need to know the content of TWN's culturally sensitive information in order to participate fully in the current proceeding. BCSEA requests that the BCUC make a redacted version of the transcript available on the public record of the proceeding to mitigate the loss of transparency associated with the confidentiality direction, while protecting the confidentiality of TWN's culturally sensitive information.⁸

The CEC

The CEC highlights that the BCUC has longstanding effective statutory tools at its disposal to protect confidential information under Part IV of the Rules, the standard form of confidential undertaking and Part 8 of the *Utilities Commission Act*. CEC submits participants in this proceeding, as well as the BCUC, are challenged in responding to the TWN assertions in Exhibit C7-6 without knowledge of the potential contents, scope, or impact of the TWN evidence.⁹

⁶ Exhibit C4-8, p. 1-2.

⁷ Exhibit C7-7, p. 2.

⁸ Exhibit C2-7, p. 1.

⁹ Exhibit C5-16, pp. 1-2.

The CEC submits the Supreme Court of Canada found in *Ktunaxa Nation v. British Columbia (Ktunaxa Nation)*¹⁰ that evidence of culturally significant matters is best subjected to testing in order to ensure the proper recognition is granted. The CEC submits that the presentation and accepting of evidence without fulsome ratepayer representation in the presentation and testing of that evidence is not only contrary to the public interest but will impact on the credibility of the decision making of the BCUC.¹¹

The CEC submits that the confidentiality provisions and use of non-disclosure agreements are “effective measures to recognize and protect the exercise” of Indigenous rights as is specifically called for by UNDRIP. The CEC adds it is a principle of natural justice and a procedural right for parties with interests in this regulatory proceeding to know the case being made and to respond to it. The CEC submits it is not consistent with the Rules, or the “public” utility commission context, to exclude ratepayer representatives from assessing and, if appropriate, challenging and cross-examining evidence.¹²

Should the BCUC not grant access to the Oral Evidence Hearing, the CEC submits that any redactions from the transcript would be undertaken by the Panel in consult with TWN. In the event the BCUC, having heard the TWN Oral Evidence, determines it is appropriate for the evidence to be heard by interveners, such an order should be granted subject to TWN having a right to withdraw the evidence in which case it would be given no weight in the proceeding.¹³

In reply to the CEC, TWN states that *Ktunaxa Nation* does not support the CEC’s position that TWN’s Oral Evidence ought to be presented before the CEC and tested by the CEC. TWN notes that this is not a case involving proof of Aboriginal Rights or Title. Instead, TWN is providing Oral Evidence regarding culturally sensitive information to: (a) ensure that the BCUC considers the adverse impacts of the Project on TWN’s Indigenous Rights, Title, and interests in its determination of whether the Project is in the public interest; and (b) to inform the BCUC’s determination on the adequacy of consultation. TWN submits the CEC has failed to articulate what tangible benefit a ratepayer association would gain from hearing TWN’s Oral Evidence regarding culturally sensitive sites and practices despite the significant harms that would result to TWN should it be shared.¹⁴

RCIA

RCIA takes seriously TWN’s wish to keep confidential from interveners the culturally sensitive evidence that it intends to present. RCIA therefore agrees with TWN’s submission that any marginal benefit to RCIA’s own intervention that is accorded by accessing that culturally sensitive information is outweighed by the potential harm to TWN. RCIA supports TWN’s proposal to redact the transcript of the Oral Evidence Hearing.¹⁵

Panel Determination

The Panel determines that the Oral Evidence Hearing will be held *in camera* with representatives of TWN, FEI and the BCUC (including their respective legal counsel) in attendance only, along with the BCUC Hearing Officers for transcription purposes. Further, the Panel directs TWN to file with the BCUC for review and

¹⁰ *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54

¹¹ Exhibit C5-16, pp. 3-4.

¹² Ibid., pp. 4-6.

¹³ Ibid., pp. 6-7.

¹⁴ Exhibit C7-7, pp. 2-3.

¹⁵ Exhibit C1-9, p. 1.

approval its proposed redactions to the transcript of the Oral Evidence Hearing no later than one week following TWN's receipt of the transcript from the BCUC Hearing Officers. Following the receipt of the TWN Oral Evidence at the Oral Evidence Hearing and its review of TWN's proposed redactions to the transcript of the Oral Evidence Hearing, the Panel will make such further orders regarding the confidentiality of that transcript as it considers appropriate, including whether interveners should be granted access to that evidence, whether on a redacted or unredacted basis.

In reviewing requests for confidential treatment of information, the BCUC must balance the potential harm of the disclosure of the information with the public interest in the disclosure of the information or documents in the proceeding. In this case, TWN has relied on unspecified "significant harms" associated with disclosing culturally sensitive information, which the Panel must balance with the public interest of ensuring fairness and transparency in the proceeding, including interveners' ability to review and test a complete evidentiary record.

The Panel acknowledges the comments of the CEC who notes that in the absence of hearing TWN's evidence, parties are not able to comment fairly on the evidence one way or another. In this regard, the Panel is in a similar position. Until we have actually heard the Oral Evidence, we cannot fully assess the degree of potential harm to TWN that could reasonably be expected from further disclosure of the Oral Evidence, or the magnitude or seriousness of that evidence, such as the number and location of sacred sites and nature of its sacred practices, which TWN would prefer not to be disclosed to parties other than BCUC and FEI. Without hearing that Oral Evidence in advance, the Panel is somewhat at a loss as to how to weigh the "significant harms" that TWN asserts would flow from disclosure of its culturally sensitive information against the public interest in ensuring fairness and transparency in the proceeding through full disclosure of all relevant evidence and testing of same by the parties to the proceeding.

The Panel notes that the usual practice before the BCUC with respect to parties' requesting confidential treatment of evidence is to file that evidence with the BCUC on a non-redacted basis for review by the BCUC with an explanation of the grounds upon which confidentiality is sought. In this case, the TWN has not provided the BCUC with the particulars of Oral Evidence such that the Panel is able to assess the strength of its claim for confidentiality or weigh the seriousness of the alleged harm resulting from disclosure of that evidence against the need for fairness and transparency in the conduct of BCUC proceedings. Accordingly, until the Panel has actually heard the TWN's Oral Evidence, it is premature to make any determinations regarding TWN's request for confidential treatment of that evidence, and we decline doing so at this time. That said, like RCIA, the Panel takes seriously and respects the concerns of TWN to keep confidential its culturally sensitive information to the greatest extent possible, including from interveners in this proceeding, so as not to further erode the sacredness of its spiritual sites and practices. Without opining on the merits of the TWN's request for confidentiality, we note that within the context of the BCUC's proceedings, commercially sensitive information, confidential third-party information, personal information and information that might cause harm to the bulk electric system have traditionally been either exempt from public disclosure or subject to limited disclosure upon parties providing signed confidentiality undertakings.

In this case, TWN is providing Oral Evidence regarding culturally sensitive information to: (a) ensure that the BCUC considers the adverse impacts of the Project on TWN's Indigenous Rights, Title, and interests in its determination of whether the Project is in the public interest; and (b) to inform the BCUC's determination on the adequacy of consultation. We have previously determined that it is appropriate for TWN to provide such evidence orally in a manner consistent with its own culture, custom and practice and we have scheduled an *in camera* Oral Evidence Hearing for that purpose. The only question left now for us to decide is whether in accordance with TWN's submissions, some or all interveners ought to be excluded from that hearing. In considering this question, the Panel accepts that the public interest in ensuring fairness and transparency in its proceeding generally requires that interveners be afforded the opportunity to review and test the evidence in

the proceeding. However, the right of interveners to review and test evidence on the record is not absolute. As already noted, interveners may be subject to limited or conditional disclosure of redacted confidential information in order to protect the confidentiality of certain types of information.

The Panel is persuaded by TWN's submission regarding the sacredness of its spiritual sites and practices, which means that this knowledge is available only to a few TWN individuals. TWN submits that but for the need to disclose this Oral Evidence to demonstrate the impact of the Project on its Indigenous Rights, Title and interests before an administrative tribunal within the Canadian legal system, it would not normally disclose these sacred sites and practices to non-TWN members. However, TWN submits that in this instance it has no choice but to do so in order to protect its Indigenous Rights, Title and interests.

As an administrative tribunal, the BCUC is master of its own process, which it may adapt as it sees fit. This general discretion is reflected in section 11(1) of the *Administrative Tribunals Act*, which provides in part, "Subject to an enactment applicable to the tribunal, the tribunal has the power to control its own processes." While we generally do not exclude interveners from any part of the public review of proceedings, in the special circumstances of this case we find it appropriate to give weight to TWN's desire to proceed with as limited audience at the Oral Evidence Hearing as possible in order to safeguard TWN's culturally sensitive information. The Panel accepts that to allow interveners to attend the Oral Evidence Hearing may erode the sanctity of TWN's sacred sites and practices. No intervener has challenged TWN's assertions that its spiritual sites and practices are sacred. Furthermore, while not determinative on the issue, at least one intervener, namely, RCIA accepts that any marginal benefit to its own intervention that is accorded by accessing that culturally sensitive information is outweighed by the potential harm to TWN.

As for BCOAPO's suggestion for a compromise solution of permitting interveners to attend the Oral Evidence as observers only in respect of the non-confidential portions of that information, we find that to be an unsatisfactory solution as it does not address TWN's concern with respect to minimizing disclosure of its sacred sites and practices. Once heard, that information cannot be unheard. Furthermore, the Panel agrees with TWN that it is practically difficult for TWN Knowledge keepers to silo the culturally sensitive information when providing their Oral Evidence.

However, although the Panel recognizes the benefit of hearing the TWN Knowledge at the Oral Evidence Hearing in order to better inform any determinations that we must make regarding FEI's Application, we welcome any further clarification that TWN is able to provide at the Oral Evidence Hearing detailing the specific harm that would arise if any of the Oral Evidence or TWN Knowledge were to be disclosed further.

The Panel finds that TWN's proposal to redact culturally sensitive information from the transcript of the Oral Evidence Hearing provides a potential pathway to maintain the fairness and transparency of the regulatory process. The Panel notes that TWN is agreeable to BCOAPO's suggestion to provide a high-level summary of the redactions to interveners. The redacted transcript will provide better context for assessing the confidential nature of TWN's Oral Evidence than is available in the submissions to date, and interveners will have the opportunity to ask information requests related to the un-redacted component of the transcript should they choose to do so. Furthermore, the Panel reserves the right to review the redactions and require TWN to make changes to the redactions, pursuant to Rule 21.02 of the Rules which states:

If the document is accepted as confidential, the BCUC may make the proposed redacted version of the confidential document publicly available, or may adjust or require the filing party to change the redaction in accordance with what it deems necessary for transparency and public interest.

Should this situation arise, pursuant to Rule 22.01 of the Rules, TWN may make submissions about what should be done with the information in question, including withdrawing the entirety of the Oral Evidence from the evidentiary record, in which case that information will be given no weight by the Panel notwithstanding the Oral Evidence Hearing.