Treaty 8 Tribal Association

10233 – 100th Avenue, Fort St. John, BC, V1J 1Y8

Phone: (250) 785-0612 Fax: (250) 785-9800 or 785-2021

Website: www.treaty8.bc.ca

August 11, 2014

c/o Heather Johnstone, M.A.Sc., P.Eng.
Policy Advisor, Generation and Regulatory Branch
Electricity and Alternative Energy Division
Ministry of Energy and Mines
bcucreview@gov.bc.ca

Re: BCUC Independent Review – T8TA Round #3 Submission

Dear Messrs. Costello, Ostergaard and Wallace,

Treaty 8 Tribal Association (T8TA) is pleased to make this written submission to the Task Force as part of the third round of comments for the Independent Review of the British Columbia Utilities Commission (BCUC).

INTRODUCTION

Since our prior submission of July 14, the T8TA had the opportunity to meet with the Task Force to discuss our respective needs, concerns and interests, as well as to review the direction given to the Task Force in the Minister's letter of July 15.

Further to our meeting, we are writing to address matters raised by the submissions of other participants as well as to speak to the following four items raised by Minister Bennett:

- Mechanisms for government to provide clear and timely policy direction;
- The appropriate application of the energy objectives of the *Clean Energy Act*;
- Options for clarifying the roles and mandate of the Province and the BCUC with respect to utility regulation; and
- Whether a different regulatory model for Crown corporations should apply as compared to investor-owned utilities.

In our letter of June 13, the T8TA proposed three topics of intervention in this proceeding in the context of the focus areas identified in the terms of reference:

- A case study of the recent experience of the West Moberly First Nations (WMFNs) in the BCUC review and decision in relation to the Dawson Creek/Chetwynd Area Transmission Project (DCAT);
- A summary review of the Manitoba Public Utilities Board (MPUB), a comparable utility board to the BCUC, specifically in relation to alternative regulatory processes for reviewing hydroelectric generation projects; and
- Review and commentary on submissions by other participants.

Our submission of July 14 addressed the first and third items above. Following our discussion with the Task Force, we understand that you remain interested in our views concerning different regulatory models for Crown corporations, including the approaches of the MPUB, in terms of the focus areas identified in the terms of reference. We address these approaches below in the context of different regulatory models for Crown corporations.

COMMENTS

1. Matters raised in Round 2 submissions

Merging of BCUC and Environmental Assessment Reviews respecting Energy Projects

In our earlier submission, we suggested that the Task Force should approach the notion of coordinated regulatory processes with considerable caution. While the T8TA would welcome improvements to the Province's environmental assessment process, we concur with BC Hydro's comments in its Round 2 submission that if the Province thinks this idea has merit that the more appropriate approach is to address this matter in a separate review and consultation process.

2. Mechanisms to provide clear and timely policy direction

The T8TA supports the need for clear and timely policy direction. We also believe that policy design benefits from thorough consideration prior to implementation. There is merit in reviewing and consulting on policy with potentially affected participants in the energy industry, including First Nations. While we recognize the need for policy to continually evolve, many of the energy policies articulated by government over the past several years have not stood the test of time as a result of initial misconceptions, as opposed to evolving circumstances. This has resulted in continual readjustments through Ministerial directives.

The IEPR Task Force noted the following in its final report:

> *In British Columbia, the Government has the ability to displace BC Hydro's and the Commission's discretion on matters through directives, directions, exemptions, and regulations under several sections of at least four Acts. Government's use of its regulatory powers has increased over time. There have been 87 BC Hydro-related regulatory directives since 1980. Almost one third of them were issued since 2010, as the Clean Energy Act created a number of enabling powers that were exercised by regulation. Many have had the effect of imposing costs onto BC Hydro ratepayers. (p.15)*

In general, the T8TA supports a return to government establishing policy pursuant to appropriate public, Aboriginal and legislative review and consultation, with a greater role for the Commission in interpreting and implementing policy without continual government micromanagement. The use of Ministerial directives should be reserved for extenuating circumstances.

3. Appropriate application of the energy objectives in the *Clean Energy Act*

The provincial energy objectives are detailed in section 2 of the *Clean Energy Act* (the *Act*) and are addressed below.

(a) to achieve electricity self-sufficiency;

The final report of the IEPR Task Force notes the following with respect to the self-sufficiency requirement:

> *Government's policy statement related to self sufficiency is clear in both the Energy Plan and CEA. However, policy implementation has changed with the revised definition of self sufficiency and the removal of the requirement for BC Hydro to acquire insurance power (low market prices and limited premiums for clean and renewable generation have limited the value of surplus power and the likely cost of an electricity deficit in low-water years).*
>
> *Self sufficiency policy and legislation applies to BC Hydro and not to other utilities. It is unclear whether there is an appropriate allocation of risk between the shareholder and ratepayers because the policy does not appear settled. It is also likely that the policy will have the effect of increasing costs to ratepayers by acquiring power that may be sold in the export market at a loss in high water years.*
>
> ***Recommendation:** As BC Hydro's surplus diminishes, Government should consider whether a requirement for self-sufficiency is consistent with a long-run approach to least cost electricity prices. (p.18)*

We concur with the clarity of the self-sufficiency policy and the unsettled nature of its implementation. The issue going forward then is not one of appropriate policy application but whether the policy should continue at all. Once load growth soaks up the surplus, it is quite plausible that BC Hydro will continue to be faced with a choice between market purchases on the order of $40/MWh, developing Site C at $100/MWh and creating a large multi-year surplus, or signing new IPP contracts at $125/MWh to meet load incrementally. It is far from obvious which of these options the government of the day will choose.

The T8TA supports the policy implementation changes to date respecting the use of average water years and the removal of the 3,000 GWh/year of insurance. However, there appears to be little economic merit in maintaining this policy given the extremely low market prices. The question becomes whether the premium paid by BC ratepayers for additional, higher-cost electrical energy to satisfy this policy is the most effective allocation of limited ratepayer resources to achieve the environmental benefits that may result. What are the net

environmental benefits, and what are they costing ratepayers? We have not seen any analysis to date of this trade-off and this policy merits further investigation to determine its value to date and going forward.

> (b) to take demand-side measures and to conserve energy, including the objective of the authority reducing its expected increase in demand for electricity by the year 2020 by at least 66%;

This objective appears to imply that demand-side management (DSM) is possible or desirable only in the context of increasing electricity demand. Many DSM measures are not contingent on load growth, and it appears that sustainable annual reductions in demand on the order of 1-2% are plausible in British Columbia based upon the experience in other jurisdictions.[1] Additional DSM in the context of very low, flat, or declining load growth remains preferable to the renewal of power purchase agreements where the cost of DSM is lower than the cost of renewing these agreements, or where decommissioning existing generation facilities achieves substantial environmental or social benefits.

One of the recommendations of the IEPR Task Force was as follows:

> *Acquire all possible conservation up to the cost of new supply. There is no need for the BC Hydro-specific 66 per cent conservation objective in the Clean Energy Act.*

We support this recommendation. In removing this objective from the *Act*, the Province may wish to provide additional policy direction as to how the "cost of new supply" is to be determined. While the quantification of GHG emissions can be integrated into the cost of new electricity supply through the carbon tax, it is less clear how non-GHG environmental effects are to be considered in comparing various demand-side and supply-side alternatives. For the Treaty 8 First Nations, and we suspect for other First Nations, the sole emphasis on GHG emission reductions is not appropriate. We noted the following in our submission to the IEPR Task Force:

> *Though the cost of carbon has been internalized, the cost of other environmental impacts, including to fish, wildlife, land use, species at risk, heritage resources and many other values have been eliminated from the decision-making process. That the lowering of greenhouse gas emissions has become synonymous with environmental policy in British Columbia is evident in the definition of "clean energy" in the* Clean Energy Act*, …*
>
> *But sustainability is about more than greenhouse gas emissions. At the most fundamental level, sustainability is based on the principle of fairness, and no geographical region and —* a fortiori*, no First Nation — "should bear an*

[1] BC Hydro. 2013. Integrated Resource Plan, Appendix 4D DSM Jurisdiction Review Comparison of DSM Achievements, at page 6 of 13.

unreasonable share of the adverse effects, risks or costs, or be denied a reasonable share of the benefits" of a project.[2]

If the Task Force is to make recommendations that touch on environmental and aboriginal policy, the T8FNs urge it to recommend that the government adopt a broad enough view of sustainability to encompass ecosystem and aboriginal impacts as well as greenhouse gas emissions.

This suggestion to the IEPR Task Force applies equally to the Task Force for the current Independent Review of the BCUC.

(c) to generate at least 93% of the electricity in British Columbia from clean or renewable resources and to build the infrastructure necessary to transmit that electricity;

The T8TA believes this objective is poorly conceived. We fail to see how prescribing the percentage of renewable energy can lead to a more efficient allocation of financial and energy resources to reduce carbon emissions than the appropriate application of the carbon tax across the economy. Our views support those of the IEPR Task Force in its final report:

A long-term carbon price should be used in evaluating all electricity supply proposals and the price should be determined by Government after a public process. This would eliminate the need for the objective to generate at least 93 per cent of the electricity in British Columbia from clean or renewable resources. (p.6)

(d) to use and foster the development in British Columbia of innovative technologies that support energy conservation and efficiency and the use of clean or renewable resources;

Table 1-1 of BC Hydro's IRP indicates how the Crown utility is interpreting and responding to this objective:

Concerning 2(d), BC Hydro's DSM program component contains a Technology Innovation component within its supporting initiatives. The SOP rules are set so that "completed prototype generation technologies" as well as "commercial operation generation technologies" are now eligible. In addition, the BCUC approved a proposal for BC Hydro's Net Metering tariff, which permits projects up to 100 kW. Previously projects were limited to 50 kW in size.

The above measures relate primarily to "fostering" rather than "using" innovative technologies. How is BC Hydro using innovative technologies within its operations? What is the total financial commitment to this objective and how has this commitment evolved over time? What has been the result of fostering the innovative technologies in terms of quantifiable outcomes, such as GWh or MW conserved, or supplied by renewables? How have the costs of the fostered

[2] Sustainable criteria adopted by the Joint Review Panel for the Lower Churchill Generation Project. JRP Report, p. 355.

innovative technologies evolved over time? What innovative technologies have been adopted as a result of utility investment? How is progress towards this objective being measured?

It may be the case that some of these questions are addressed in BC Hydro filings with the Commission, but we are not aware of these. Appropriate application of this objective may benefit from a requirement for the regulated utilities (i.e. BC Hydro, Fortis BC, etc.) to file with the Commission research and innovation plans demonstrating continual improvement over time in terms of energy, capacity, financial and other relevant indicators related to this objective.

(e) to ensure the authority's ratepayers receive the benefits of the heritage assets and to ensure the benefits of the heritage contract under the *BC Hydro Public Power Legacy and Heritage Contract Act* continue to accrue to the authority's ratepayers;

No comments.

(f) to ensure the authority's rates remain among the most competitive of rates charged by public utilities in North America;

T8TA views this objective as a means of promoting new and continuing investment in the Province. However, we are somewhat concerned that it is at odds with many other objectives in the *Act*, including energy conservation and environmental protection objectives.

The fact that BC Hydro's rates are as low as they are is in part the result of historical and ongoing choices not to immediately or adequately compensate affected First Nations for the adverse and ongoing impacts of Hydro's heritage assets, including the WAC Bennett and Peace Canyon Dams. Ensuring that Hydro's rates remain low should not be at the expense of environmental protection, socio-economic wellbeing or unjustified infringement of the Aboriginal and Treaty rights of affected First Nations.

An additional factor relevant to the issue of competitive rates is the dividend currently taken from BC Hydro by the Provincial government shareholder. While some other electricity Crown Corporations regularly pay dividends to their Provincial shareholders (e.g. Hydro Québec), others pay only occasional dividends (e.g. Saskpower), others forego dividends during periods of high capital expenditure (e.g. Ontario Power Generation), while others pay no dividends (e.g. Manitoba Hydro). As rates continue to rise in British Columbia, it may be time to reconsider the dividend paid to the Province as a means of keeping rates competitive and affordable. The Province already receives water rentals and taxes from BC Hydro. The discontinuation of the dividend may also make the government more (and appear more) impartial in setting policy, as well as remove what appears to be a direct conflict between the shareholder and ratepayers.

(g) to reduce BC greenhouse gas emissions

T8TA notes that there is not a companion objective to reduce the other adverse effects of energy development in the Province. If the process of reducing greenhouse gas emissions involves significant adverse environmental effects and impacts on First Nation Aboriginal and Treaty rights as a result of the development of low-emission resources, this would appear to undermine the environmental protection benefits of reducing greenhouse gas emissions. As

indicated above in relation to objective 2b), the approach to sustainability needs to be broad enough to encompass ecosystem and aboriginal impacts as well as greenhouse gas emissions.

(h) to encourage the switching from one kind of energy source or use to another that decreases greenhouse gas emissions in British Columbia;

This objective should not be interpreted to include only electrification, as conversions from higher emission to lower emission sources are also relevant. In addition, there may be instances where switching to fossil fuels from electricity is appropriate, such as where fossil fuel technologies are substantially more energy efficient and cost-effective than electricity technologies, allowing the conserved electricity to be used to offset other more intensive fossil fuel emissions.

The interactions between fuel switching, GHG emissions, electricity prices, electricity demand, carbon prices and fossil fuel prices are complex. Nonetheless, as with some other objectives in the *Act*, it is not clear how the Commission should evaluate progress towards this objective. The *Act* (in s.3(1)(b)) does require BC Hydro to indicate its plans for achieving the Provincial energy objectives, but this particular objective is not targeted for reporting. To better operationalize this objective, it may be appropriate to require the utilities to report specifically on progress to date, including measurable indicators.

(i) to encourage communities to reduce greenhouse gas emissions and use energy efficiently;

The term "communities" is not defined in the *Act*, and is presumed to mean municipalities and First Nations. As with some other objectives in the *Act*, it is not clear how the Commission should evaluate progress towards this objective. The *Act* (in s.3(1)(b)) does require BC Hydro to indicate its plans for achieving the Provincial energy objectives, including the implementation of demand-side measures. However, these requirements do not extend to reporting on a community-level, meaning that it is not possible to assess progress towards this objective. Where the utilities, the Province, or communities gather information on a community-level basis and can report that information publicly, it would be instructive to see whether certain communities have been more successful at reducing GHG emissions or using energy efficiently. With respect to matters for which the utilities have responsibility, it may be appropriate to require them to report specifically on progress to date, including in relation to measurable indicators.

(j) to reduce waste by encouraging the use of waste heat, biogas and biomass;

Similar to other objectives, progress towards the achievement of this objective is difficult to assess. It may be appropriate to require the utilities to report specifically on progress to date, including in relation to measurable indicators.

(k) to encourage economic development and the creation and retention of jobs;

The T8TA also considers it relevant to consider whether or not the economic benefits occur within or outside of the Province. When considering economic development within the Province, this objective is best interpreted in terms of net economic benefits rather than simply economic impacts.

The market valuation of expenditures indicates the amount that people and businesses are paid for the goods and services they provide. The economic activity account indicates the net benefit (producer surplus or economic rent) that people and businesses realize when what they are paid exceeds their opportunity or incremental costs (the minimum amount they require to willing supply the goods and services). It also indicates the net cost when what suppliers are paid is less than their opportunity or incremental costs, where they incur a net loss.

The net economic benefits measured under this account are not the same as the ***economic impacts*** *that are generated. Economic impacts indicate the direct, indirect, and induced demand for labour and goods and services generated by the project.*[3]

For example, an investment made in a region of high unemployment or low business activity will have greater net benefits than an equivalent investment in a region of low unemployment or high business activity.

(l) to foster the development of first nation and rural communities through the use and development of clean or renewable resources;

As we learned from BC Hydro's recent IRP, achievement of this objective is not so straightforward in the context of low load growth. The selection of one portfolio of demand-side and supply-side resources necessarily defers to the end of the planning period (or longer) the selection of a different portfolio. All portfolios to some degree or another will foster the development of First Nation and rural communities, so the issue is one of greater net benefits. Where First Nations or rural communities have low unemployment and high levels of economic opportunity, fostering the development of First Nation and rural communities is better to occur elsewhere where the employment and economic investment will have greater net benefits.

(m) to maximize the value, including the incremental value of the resources being clean or renewable resources, of British Columbia's generation and transmission assets for the benefit of British Columbia;

Maximizing the value of the generation and transmission assets appears to imply concepts such as longevity (e.g. refurbishment as opposed to replacement) and efficiency (e.g. BC Hydro's Resource Smart program). Maximizing the value of the clean and renewable resources is less clear. What is meant by resource "value"? Does it mean economic value or does it also include other values? What happens if in maximizing the economic value, other values are compromised? The T8TA suggests changing this objective to delete the phrase "including the incremental value of the resources being clean or renewable resources".

(n) to be a net exporter of electricity from clean or renewable resources with the intention of benefiting all British Columbians and reducing greenhouse gas emissions

[3] Shaffer, M. 2010. Multiple Account Benefit-Cost Analysis: A Practical Guide for the Systematic Evaluation of Project and Policy Alternatives, at p.74.

in regions in which British Columbia trades electricity while protecting the interests of persons who receive or may receive service in British Columbia;

The T8TA questions the merit of this objective given current export market prices, the availability of competing renewables in neighbouring jurisdictions (e.g. wind, but increasingly solar and other renewables), and the additional adverse environmental effects associated with developing clean or renewable resources in the Province. Is it the responsibility of British Columbia to reduce the greenhouse gas emissions of neighbouring jurisdictions? Is it appropriate to impose additional adverse effects on British Columbia fish and wildlife to provide electricity to jurisdictions that may not have effective electricity conservation measures in place or have not enacted basic measures (e.g. carbon taxes) regarded as effective at reducing carbon emissions? The T8TA also has some concerns about what appears to be a lack of protection from risk for taxpayers, since ratepayers (i.e. "persons who receive or may receive service") are protected.

While we acknowledge that BC Hydro is not currently pursuing generation or transmission developments for export due to lack of economic market opportunities, we remain concerned that the consequences of this objective have not been adequately considered.

The T8TA recommends that this objective be removed entirely from the *Act*.

(o) to achieve British Columbia's energy objectives without the use of nuclear power;

No comments.

(p) to ensure the commission, under the *Utilities Commission Act*, continues to regulate the authority with respect to domestic rates but not with respect to expenditures for export, except as provided by this Act.

We note the definition of "expenditures for export" in the *Act*, and that section 4(5) of the *Act* does not allow BC Hydro to recover expenditures for export in domestic rates. In the event that objective 2(n) is removed from the Act, this objective will need to be modified to remove the latter half dealing with expenditures for export since there would not be any.

4. Options for clarifying the roles and mandate of the Province and the BCUC with respect to utility regulation

The role and mandate of the BCUC is specified in the *Utilities Commission Act*, *Administrative Tribunals Act* and other legislation. These "options" for clarifying roles and mandate with respect to utility regulation would appear to overlap with or be similar to the "mechanisms" for providing policy direction discussed above. These mechanisms include directives, exemptions and regulations, as well as the current Independent Review. As indicated above, the T8TA supports a return to government establishing policy, including the role and mandate of the Commission, pursuant to appropriate public, Aboriginal and legislative review and consultation. The use of Ministerial directives for clarifying the role and mandate of the Commission should be reserved for extenuating circumstances.

5. Whether a different regulatory model for Crown corporations should apply as compared to investor-owned utilities

In general, the T8TA is of the view that the circumstances in which a different regulatory model could apply to Crown corporations are specific, and limited to development of major projects or implementation of important policy. In other respects, Crown corporations can be regulated similar to investor-owned utilities.

In reviewing the prior submissions by participants, we noted the following comment from the Association of Major Power Consumers in its Round 1 submission:

> *If the government shareholder is unconvinced that independent regulation can best support public policy, a transitional hybrid is possible. Government direction that might previously have been made with little consultation could be subject to public review before implementation. In this way the cost of planning decisions and potential alternatives could be better understood and supported.* (p.2) (underlining added)

The T8TA concurs with the notion of a "hybrid" approach to regulating Crown corporations that differs from that of investor-owned utilities but that is not equivalent to an exemption from any scrutiny or contribution by the Commission. In general terms, it is a model that: provides meaningful opportunities for public participation and Aboriginal consultation; makes greater use of independent expertise; avails of the experience and informed scrutiny of the Commission; and provides the Minister with discretion to accept, modify or reject the conclusions and recommendations of the Commission. We expect that the consultant conducting the review of comparable utility regulators and models in other jurisdictions pursuant to section 1 of the Task Force Terms of Reference will investigate potential approaches in those jurisdictions that may be relevant to the consideration of different regulatory models for Crown corporations.

For our part, the T8TA investigated the process used in Manitoba for the review of the need and alternatives to large-scale electricity generation and transmission developments. Commonly referred to as a Needs for and Alternatives To (NFAT) Review, this process was applied in 2004 to the Wuskwatim Project, a 200 MW hydroelectric generating facility with associated 230 kV transmission facilities ("Wuskwatim NFAT"), and this past year to the Keeyask (695 MW) and Conawapa (1485 MW) generating facilities and associated domestic and export transmission facilities ("Keeyask NFAT"). These reviews were conducted under section 107 of the *Manitoba Public Utilities Board Act* pursuant to an Order in Council.

The focus of our review concerned the procedural aspects of the NFAT process, as opposed to the evaluative aspects. Of course, the two are inter-related, and we have referred to certain evaluative aspects of the process in order to demonstrate the benefits or shortcomings of procedural approaches.

Considering the limited time and resources available to conduct this review, we focused our efforts on obtaining and understanding the views and experiences of several participants to these NFAT processes. With more time and resources, additional interviews would likely yield

more insights into the process and to the potential application of its various features in the BC context. Nonetheless, we make the following observations.

Terms of Reference

Section 5(2) of the *UCA* indicates that: "the Lieutenant Governor in Council may specify terms of reference requiring and empowering the commission to inquire into the matter."

Where the Commission is reviewing the proposed actions of a Crown corporation, it is important that the process be (and be seen to be) independent. Ideally, the terms of reference should be finalized by the Commission and not by the Provincial shareholder. This could be achieved by having the Minister of Energy prepare a draft of the terms of reference for finalization by the Commission through a consultative process with review participants. Alternatively, the responsibility for preparing terms of reference could be left solely with the Commission, while providing the Crown Corporation the opportunity to comment on a draft of the Terms of the Reference along with other participants.

In the case of the recent Keeyask NFAT, the terms of reference were delivered by the Manitoba Government in their final form with the role of the MPUB limited to clarification of a couple of definitions. This proved to be problematic in several ways.

First, it became apparent very early in the process that the lack of a requirement for an integrated resource planning process was a serious shortcoming in the terms of reference. The MPUB noted the following in its final report:

> *By failing to offer an analysis of conservation measures as a stand-alone energy resource competitive with other generation resources, Manitoba Hydro presented an analysis of conservation measures that was neither complete, accurate, thorough, reasonable nor sound.*
>
> *Integrated resource planning is a regular practice in many jurisdictions. An integrated resource plan determines what supply side and demand side resource mix is in the best interest of electricity customers. The Panel heard evidence that the best practices for integrated resource planning involve placing every resource option on an equal footing and a public consultative planning process.*[4]

While BC Hydro does make use of an integrated resource planning process, the important observation here is that by finalizing the terms of reference, the Manitoba Government prevented the MPUB from avoiding what in colloquial terms would be referred to as a "fatal flaw". Two of the final five key recommendations of the MPUB sought to address this *post festum*, but that was too late for the NFAT review.

Second, one of the key terms used in the terms of reference, "macroenvironmental impact", had no common usage or meaning in the fields of environmental assessment or comparative analysis. As a result, the MPUB sought input into the meaning of this term, lacking the ability to change the terms of reference. The more preferable approach would have been to permit the

[4] Manitoba Public Utilities Board. June 2014. Needs For And Alternatives To (NFAT) Review of Manitoba Hydro's Preferred Development Plan – Final Report, at p.33-34.

Board to consult on and finalize the terms of reference in order to meet its requirements in terms of comparative analysis respecting environmental aspects of the alternatives, and to avoid the use of unfamiliar terminology.

Third, the information request process is an important aspect of a regulatory model for Crown corporations, as it is for investor-owned utilities. Many information requests can be avoided by using the consultation process on the terms of reference to address preliminary questions and observations of participants. The NFAT process in Manitoba could have focused the review process from the outset and avoided many information requests by taking this important step.

In addition, the Terms of Reference for the recent NFAT also imposed a process for the handling of potentially commercially sensitive information (CSI) that was unworkable. Specifically, access was provided to legal counsel of interveners but not to the interveners or to other experts retained by interveners. This raised ethical considerations respecting the relationship between solicitors (who would have access to the information) and their clients (who would not), as well as practical considerations as these solicitors could not consult their respective client's experts. As a result, no interveners sought access to any commercially sensitive information during the process.

In general, a regulatory model for Crown corporations must be designed in a manner that allows as much access as possible to CSI considering the added importance of transparency in the review of Crown proposals. We note the following text in the Practice Directive of the British Columbia Utilities Commission "Confidential Filings":

> *9. If the Commission grants a request for confidentiality, the Commission may, upon request, consider whether access to the confidential information should be provided to all other parties to the proceeding, or only to their counsel or consultants and experts. If the Commission grants such request, each party or individual eligible to receive a copy of the confidential information shall first sign and file a declaration or undertaking, in a form consistent with Attachment A, in respect of the use of the confidential information and stating that the party or individual will hold the document in confidence and use it only for the purpose of the public hearing, as the Commission considers appropriate.*

We recommend that the Task Force give careful consideration to whether there actually exist any circumstances in which confidential information would need to be shared only with a party's counsel or experts but not with the party itself. We are not aware of any such circumstance, considering that both the party, its counsel and consultants would be required to sign and file the declaration as required by the Commission Directive.

Finally, the charge to the MPUB in the terms of reference was too narrow. Essentially, this charge was as follows:

> *1. An assessment as to whether the needs for Hydro's Plan are thoroughly justified, and sound, its timing is warranted, and the factors that Hydro is relying upon to prove its needs are complete, reasonable and accurate.*
>
> *…*

2. An assessment as to whether the Plan is justified as superior to potential alternatives that could fulfill the need.

What was the MPUB to do if it determined that the proposed Plan was not actually justified (which became clear early on that it was not)? By not providing avenues for further recommendations by the MPUB in that eventuality, the terms of reference appeared to favour the shareholders' initial development preference. In designing a different regulatory model for Crown corporations, it is important that the process not preclude from the outset alternative paths that may not be proposed by the Crown corporation.

Alternative Review Processes

The Terms of Reference for this Independent Review include consideration of alternative review processes (section 2.d.ii). We understand this phrase to include expedited hearing processes, and negotiated settlement processes as well as alternative dispute resolution, technical hearings, workshops, community meetings, site visits and related approaches. In designing review processes for a regulatory model for Crown corporations, five principles take on greater importance: collaboration, independence, transparency, public participation and Aboriginal consultation.

Collaboration is more relevant to a regulatory model for Crown corporations since the parties to the proceeding are also very likely to be representing ratepayers or taxpayers, and to be both ratepayers and taxpayers. The implications of the proceeding are more likely to be universally (although not necessarily equally) experienced. Given this reality, the process needs to provide opportunities for the Crown corporation and participants to clarify facts, resolve disputes, and collaborate in identifying and designing the preferred way forward. In this sense, the model is less adversarial than would be the case with a review of an investor-owned utility.

For example, a more collaborative and transparent process would allow for scoping the terms of reference, as indicated above, and would actively solicit and discuss input from the various parties on process design. The objective would be to create and sustain a process that: continually aims to improve the analytical framework; avoids "fatal flaws"; establishes the roles and responsibilities of the Commission and parties to the proceeding; assists the Crown proponent in developing appropriate information; assists the participants in defining appropriate interventions; assists the Commission in carrying out its mandate; provides meaningful and constructive opportunities for public participation and Aboriginal consultation; and provides ongoing opportunities for collaboration between the parties.

Independence and transparency are more important to a regulatory model for Crown corporations as the Crown shareholder is ultimately both the proponent and the regulator. It is essential in this model that the Commission or its independent designate play a leading role in scoping and delivering any alternative review processes. For example, technical conferences can be valuable processes for clarifying factual information, developing analytical approaches, and understanding technical findings. They are more effective and transparent when they are facilitated by the Commission or its independent designate than by a Crown proponent. The experience at the recent NFAT and with the environmental assessment process in British Columbia in general is that technical conferences and workshops lead by a proponent tend to

be more about public relations than about meaningful collaboration, problem-solving or engagement.

The public generally has a greater stake in proceedings concerning Crown corporations, considering that the regulatory outcomes affect us as both ratepayers and taxpayers. For affected landowners and Aboriginal groups as land users and rights holders, there may be additional implications depending on the nature of the matters at issue. For these reasons, a regulatory model for Crown corporations should be particularly preoccupied with public and Aboriginal consultation.

Varied and creative means are often necessary to provide meaningfully opportunities for the Commission to engage with those most affected by the proposal or policy under review, or those most marginalized from the process. We noted in our prior submission, the flexibility shown by the Commission during the oral hearing for the DCAT review in requesting a helicopter flyover of the route proposed for development of the transmission line. At the recent Keeyask NFAT, the MPUB allowed panel presentations under oath by Aboriginal land users affected by the proposal as well as ratepayers most vulnerable to the implications of rate increases. These types of approaches are an important component of a regulatory model for Crown corporations.

Organizational Structure and BCUC Composition

We expect that an alternative regulatory model for Crown corporations would likely only be utilized in specific and complex circumstances. In these cases, the items contemplated in the Terms of Reference related to organizational structure and BCUC composition (section 3.c) are particularly relevant.

The composition of the Commission would be an important consideration for implementing an alternative regulatory model. Given the likely complexity of the review, the Board would need to be able to effectively handle a diversity of issues, potentially including financial, economic, socio-economic, environmental, public interest, Aboriginal, regulatory and policy. The experience with the NFAT reviews in Manitoba has generally been that the financial and economic analysis has been of very high quality but that consideration of socio-economic, environmental and Aboriginal matters has been well below expectations. In particular, the NFAT reviews have struggled without criteria and approaches for weighing competing values (e.g. rates versus biophysical impacts versus socio-economic well-being, etc.).

In composing the membership of the Commission for review of a Crown corporation proposal under an alternative regulatory model, there may be need for a greater diversity of knowledge and experience beyond knowledge of the regulatory process and utility expertise. This suggests the potential need for some Commission members to be selected from the public at large, similar to what is done for environmental assessment review panels. In the case of the Keeyask NFAT, two of the five MPUB members were appointed specifically for the NFAT. If this approach is used, opportunity should also be provided to participants to nominate potential Commission members, something that was not done for the NFAT but is standard for environmental assessment panels.

Independent Experts

It is usual practice for experts to be retained by interveners and utility applicants in a proceeding before a utility board. It is less often that a utility board retains independent experts beyond its staff and consulting expertise. The use of independent experts adds an additional and important layer to the effectiveness and transparency of an alternative regulatory model for review of Crown corporations.

At the recent Keeyask NFAT, the MPUB was permitted to use one or more independent expert consultant(s). In particular, the terms of reference specified that:

- The MPUB shall hire the independent expert consultant(s);
- The independent expert consultant(s) shall provide a report(s) to be filed in evidence on the public record, which shall contain their analysis of the submissions filed by Manitoba Hydro;
- The reports of the independent consultants shall not draw conclusions, which is the role of the Board;
- The independent expert consultant(s) shall be available for cross-examination at the public hearing, and shall be available as a resource to legal counsel for registered interveners; and
- The independent expert consultant(s) may also provide such advice to the Board, and file such report(s) with the Board *in camera*, that contain, reference, or analyse Commercially Sensitive Information in sufficient detail to satisfy the Board.

While the quality of the advice provided by the Independent experts varied somewhat, in total the independent experts were considered by participants to have provided tremendous value. These experts, drawn from across North America, brought knowledge and experience to the process that would have otherwise been unavailable, and provided the Board and the process as a whole with high-quality, independent analysis and advice.

The analysis of the independent experts also provided a knowledge base around which interveners could build additional expert analysis while not duplicating that of the independent experts. The proponent also benefited from the findings of the independent experts and substantially changed its preferred case during the course of the proceeding, acknowledging where the balance of evidence was leading.

The interviewed participants in the NFAT universally considered the independent experts to be essential to the review. Despite this strong endorsement, there were some suggestions as to how to best use these experts in future proceedings. First, the independent experts are there as a resource, and must be used in a way that supports and does not usurp the role of interveners. Using the independent experts to lay a foundation of knowledge around which others could build proved to be appropriate to addressing this concern. Secondly, the independent experts must also be used in a way that does not taint the independence of the Board. Preventing the independent experts from drawing conclusions assisted in this respect. Additionally, concerns were raised about the need to carefully coordinate the independent and intervener experts to avoid overlap while still ensuring that all relevant approaches (in this case, alternatives to the preferred development plan) were adequately investigated.

Timeliness, effectiveness, efficiency and cost of reviews

The Terms of Reference for this Independent Review also consider timeliness, effectiveness, efficiency and cost of reviews (section 2.b.). In designing a different regulatory model for Crown corporations, it is important to appreciate that this model is likely to be utilized in the review of projects or policy that have significant public interest implications. In our view, this tips the balance between effectiveness and efficiency towards the former.

In the recent Keeyask NFAT, a key pre-occupation of interveners was the timeframe for reporting imposed on the MPUB by the terms of reference. The available time and resources did not permit adequate review and cross-examination of filings. Responses to information requests were still being filed during and following the hearings phase, and new materials were often filed after they could be of much use to the receiving party. In this particular instance, the Proponent revised its preferred development plan immediately prior to the hearings. Under usual circumstances, this would have merited a delay to accommodate review of the revisions in preparation for hearings. However, the timeframe for final reporting did not permit a later date for initiating the hearings.

In our view, in designing a regulatory model for Crown corporations, it is important that the process be designed to provide the Commission with the required flexibility to carry out its mandate effectively. This includes the potential to request additional time and resources in response to changing circumstances during a review.

CLOSING

We understand that the next step in the Task Force's review is the release of an updated summary of consultation comments followed by issuing of the interim Task Force report in early October. Should the report of KPMG concerning comparable utility regulators and models in other jurisdictions become available for comment, we would appreciate notification. Should you have any questions regarding this submission, please contact our office.

Sincerely,

Liz Logan
Tribal Chief

cc: Treaty 8 Chiefs
Treaty 8 Directors