Treaty 8 Tribal Association

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Re: BCUC Independent Review – Treaty 8 Tribal Association Round #2 Submission

Dear Messrs. Costello, Ostergaard and Wallace,

Treaty 8 Tribal Association (T8TA) is providing this written submission to the Task Force as part of the second round of comments for the Independent Review of the British Columbia Utilities Commission (BCUC), including its processes, structure, resource needs and performance.

We appreciate the additional time provided by the Task Force for written submissions, particularly as the T8TA was unable to prepare and submit substantive comments earlier in this Independent Review.

INTRODUCTION

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 hydroelectric generation projects; and
- Review and commentary on submissions by other participants.

Following our review of the Round #1 submissions, we elected to combine the above focus areas under the headings of the Terms of Reference to assist the Task Force in reviewing the materials, and for the reasons outlined directly below. We have also provided some comments on the Terms of Reference, as we noted that the Interim Task Force Consultation Summary did not include any First Nation perspectives, as to date no other First Nations or related organizations have participated in this Review.

In our letter, we requested that the Task Force and participants provide any further direction on the scope of our written submission by no later than Friday, June 20. We received direction from the Task Force on June 18 indicating your interest in hearing from the T8TA on the proposed interventions and offering us flexibility to comment within the confines of the Terms of Reference.

On July 4, we also received a copy of a letter from BC Hydro to the Task Force raising concerns about the case study, and objecting to our summary of the recently completed MPUB Needs for and Alternatives To (NFAT) review process for two large-scale hydroelectric projects proposed by Manitoba Hydro. The following addresses the relevant aspects of BC Hydro's letter.

First, our proposal clearly states (as restated above) that the interventions will be "in the context of the focus areas identified in the terms of reference."

Secondly, with respect to the first item dealing with the WMFNs experience in the DCAT process, we note that BC Hydro did not object to the scope of our proposal. With respect to the potential item of concern, our intention was to review the *First Nations Information Filing Guidelines for Crown Utilities*, and we have provided comments below. We have spoken to the WMFNs experience under section 2d of the Terms of Reference below.

Regarding the second bullet point, our intent was to compare procedural and not evaluative aspects of the CPCN and NFAT processes in the context of the terms of reference for the work of the Task Force. There was no mention of capital planning aspects in our submission outline, nor are these matters considered in the Terms of Reference for this Independent Review. We also noted that the focus of our review would be on procedural matters and all of the aspects mentioned in the outline are procedural in nature.

As the Task Force is aware, the Commission has not undertaken a review (a CPCN, section 5 review or otherwise) of a large-scale greenfield hydroelectric facility in decades, as both Ruskin and John Hart were brownfield projects, which present a greatly simplified set of issues, impacts, opportunities and concerns. In our view, the matter of how to develop an appropriate approach to potential Commission evaluation of a large-scale green field hydroelectric facility, likely through a review under section 5 of the *UCA*, is an important one given the considerable changes since the last review of such a facility by the Commission.

We also believe that the current Independent Review process does provide an opportunity (under part 2d.ii of the Terms of Reference) for discussion of procedural matters related to the "alternative review process" under section 5 of the *UCA*. We concur with Hydro's suggestion that it would be "instructive to review the instances in which the section 5 *UCA* referral power has been used" in developing future similar review processes, whether in relation to Site C or otherwise. We have echoed this suggestion in our comments below.

However, we are also cognizant of the breadth of the Task Force's mandate and the limitations on this Independent Review in terms of time and available resources, particularly for non-utility participants, including the T8TA. As such, we have not undertaken a comparison between a CPCN and an NFAT process but have provided relevant aspects from a variety of utility board processes that we trust are of potential use to the Task Force.

COMMENTS

1. A review of comparable utility regulators and models in other jurisdictions, along with key benchmarks.

T8TA understands that consultants to the Task Force are undertaking this review, and we will comment on the materials, as appropriate, if and when they are made available.

2. BCUC processes:

b. Timeliness, effectiveness, efficiency and cost of reviews;

The most timely and affordable reviews are those that never take place. An effective planning process that determines the most appropriate and defensible means of conserving and developing the available energy resources in the Province will by its nature avoid unnecessary reviews.

No longer requiring the integrated resource plan (IRP) to be the subject of independent regulatory oversight by the Commission compromises the potential for an effective planning process. The failure to put in place a process that thoroughly tests refutable evidence before the Commission undermines efficiencies more than any other factor. The decision not to submit the IRP to review and examination by the Commission results in missed opportunities, projects proceeding through the regulatory process unnecessarily, and ultimately sub-optimal choices. Notwithstanding the considerable efforts of BC Hydro in preparing its most recent IRP, the review process conducted prior to IRP approval was not comparable to a process of rigorous examination designed to test its assumptions, methods and findings in order to arrive at defensible conclusions.

As First Nations whose territory forms the primary landscape for electricity and natural gas development in the Province, the Treaty 8 First Nations (T8FNs) must also cope with the social and governance costs associated with continual interventions in regulatory proceedings. Though many of these proceedings are essential and meaningful, some are unnecessary or insufficiently considered prior to initiation as a result of the politicized approach to energy planning in the Province.

Yet, the need for independent review and regulation of system planning in the Province has only increased as a result of several recent and evolving circumstances, including the following:

- **Low domestic load growth**. Historically, electricity planning focused on determining *what* supply-side resources were preferred, as opposed to *whether* any were even required; always in the comfort that load growth would shortly cover up any misguided choices. This luxury is no longer available as the rate of load growth in the Province has

declined every decade since the 1960s,[1] and load has remained flat to negative for the past decade.[2]

- **Low export prices**. The advantage of export prices that are higher than domestic rates was extolled by BC Hydro in its 2001 Annual Report: "BC Hydro's low tariff rates, compared to market prices for energy, made it more economic for our domestic wholesale customers to purchase energy from BC Hydro instead of purchasing it in the open market."[3] This is no longer the case (though we note that recent Annual Reports have not extolled the virtues of wholesale customers purchasing their electricity on the open market instead of from BC Hydro) and the loss of a higher priced export market removes another redundancy to surpluses of expensive electricity resulting from inadequate scrutiny of planning and development choices.
- **Increasing domestic prices**. In the government's 10-year plan, rates increase 28% over the next five years, with rate increases set by the Commission thereafter.[4] Ratepayer tolerance for continual rate increases above inflation is not endless. Eventually, consumers reduce demand, load shift, self-generate or leave the Province, all of which have the tendency to drive up rates for those remaining and those who have fewer choices.
- **Technological changes**. Both demand-side and supply-side technologies are changing the choices available to consumers, making it easier and more affordable to lower demand and increasingly possible for consumers to consider self-generating some or all of their electricity, but also making it more difficult to forecast loads.
- **First Nation consultation and accommodation**. Several court decisions, including *Haida* and the recent *Tsilhqot'in* decision, have heightened the importance of early consultation with First Nations who have the potential to be affected by planning choices, heightening the need for early and adequate consultation.

A properly structured integrated resource planning process before the Commission provides an ideal opportunity for:

- ensuring meaningful and early consultation;
- involving First Nations in the provision and testing of evidence;
- putting in motion opportunities that are likely to be embraced by affected First Nations;
- avoiding consideration of planning options that are likely to be opposed;
- increasing First Nation appreciation of the challenges and opportunities facing utility planners;

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[1] Statistics Canada. Table127-0001 – Electric power statistics, monthly (megawatt hour), CANSIM (database).

[2] Statistics Canada. Table127-0003 – Electric power generation, receipts, deliveries and availability of electricity, monthly (megawatt hour), CANSIM (database).

[3] BC Hydro. 2002. The Power of Sustainability: Annual Report 2001.

[4] http://www.newsroom.gov.bc.ca/2013/11/10-year-plan-means-predictable-rates-as-bc-hydro-invests-in-system.html

- educating utilities and the Commission about First Nation values and priorities; and
- building better relationships.

With respect to matters of efficiency, the T8TA is of the view that efficient review processes will follow only from an effective planning process. Considering the amount of development already occurring in the Treaty 8 territory and the number of regulatory proceedings currently underway, there is no interest among the First Nations in extending proceedings any longer than is necessary to achieve acceptable outcomes. What is of interest to Treaty 8, and we expect many other Aboriginal communities as well, is avoiding unnecessary or premature proceedings. This means that more emphasis needs to be placed on system planning, and initiating meaningful consultation early in the process. The Commission provides the appropriate venue for these activities to take place.

With respect to the affordability of reviews, the issue of excessive costs incurred by BC Hydro (and potentially also other utilities) in its participation in regulatory proceedings requires greater attention. We note the following, as raised by the BCPIAC in their Round #1 submission:

> *It appears to us that the utilities have an unlimited ability to spend money on regulatory processes – expenditures which are ultimately at the ratepayers' expense. By contrast, the funding available to intervener groups is severely restricted, not guaranteed and often delayed until long after the process is complete. This creates an enormous imbalance of resources between the utilities and the interveners who represent what are often opposing interests.*
>
> *Although we do not know how many utility employees are spending how much time working on any particular application behind the scenes, at in-person proceedings (including simplified proceedings such as Streamlined Review Processes and informal pre-application workshops), there are often a large number of utility staff members present, many of whom do not appear to have an active role in the proceeding. It may be appropriate to restrict (other than through revenue requirement applications) the amount of money utilities are able to spend on regulatory proceedings both in order to avoid waste of ratepayer money and to help even the playing field between utilities and the interveners.*

The recent experience of the T8TA at the environmental assessment hearings for the proposed Site C Project, where costs are deferred by BC Hydro ultimately to be passed on to ratepayers, concurs with these observations of the BCPIAC. While not a BCUC process, the assessment hearings stand as an example of utility largess. Typically, BC Hydro had about 20 personnel in the hearings each day, including staff, consultants and legal counsel. This compares to a similar environmental assessment process for the Lower Churchill Project in Labrador, where the Crown proponent Nalcor Energy typically had between 5 and 10 personnel in the hearings. On one day of the hearings, more than 40 staff, lawyers and expert consultants attended the hearings on behalf of BC Hydro. During that session, there were more than 20 presentations. BC Hydro personnel asked not a single question the entire day, though the process provided them ample opportunity to do so. The cost for BC Hydro's participation that day, including salaries,

fees, expenses and travel would have exceeded $100,000 and possibly exceeded the funding of $140,000 available to non-Aboriginal interveners for the entire multi-year assessment process.

We are not aware of all of the specific measures currently at the disposal of the Commission to address utility costs during proceedings, but it does appear that more needs to be done. The question of whether these expenditures are reasonable and prudent must be asked and answered.

We understand that the 2011 BC Hydro core review did consider both external oversight (i.e. BCUC) and internal processes to control costs, at least in general terms.[5] Several of the core review recommendations appear to be relevant to the question of the Crown Corporation's operating costs, some of which would include participation in Commission proceedings:

> *Accelerate the pace and magnitude of change to develop an organizational structure that reflects the reasonable level of internal and external staffing that reduces costs passed on to ratepayers.*[6]
>
> *Executive management team and the Board of Directors establish stronger targets and controls on all spending of a discretionary nature (e.g. business expenses, travel and contracting for professional services).*
>
> *Strengthen its controls over travel planning and align its travel policies and allowable business expenses with provincial government's Core Policy.*
>
> *Implement stronger policy to ensure appropriate use of contract services.*[7]

We are unsure of the latitude of the Task Force to probe into the costs incurred by BC Hydro, but it may be worthwhile for the Task Force to investigate what progress, if any, has been made on the above recommendations as these relate to BC Hydro participation in Commission activities. Any specific measures taken by BC Hydro to reduce costs in relation to participation in Commission activities may also be relevant to this Independent Review.

In terms of specific measures that the Commission could take, the following are proposed for consideration to verify that participation by BC Hydro (and potentially other utility applicants) is reasonable and prudent, assuming they are not already being implemented:

- **Detailed attendance**. Keep accurate records of attendance by the various parties to Commission proceedings;
- **Billing rates and expenses**. Require daily and hourly billing rate and expense information for BC Hydro representatives participating in Commission proceedings to determine the reasonableness of these rates and expenses and to use this information as a proxy for determining suitable rates for intervener legal counsel and consultants in an updated version of the Participant Assistance / Cost Award (PACA) Guidelines;

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[5] Government of British Columbia. June 2011. Review of BC Hydro, at p.37.

[6] *Ibid*., at p. 120.

[7] *Ibid*., at p.121.

- **Costs by proceeding**. Require Hydro to report costs on a proceeding by proceeding basis, with sufficient detail for the Commission to determine and identify opportunities for cost savings as well as to determine the percentage of total review costs that are the result of utility costs, Commission costs, intervener costs, etc. in order to create comparable metrics (i.e. ratios between cost categories for specific proceedings, between proceeding types, between utilities in similar proceedings, etc.);
- **Performance measures**. Develop cost performance measures for utility participation in regularly occurring Commission proceedings (e.g. number of preparation days per hearing day), and use this information to determine suitable similar performance measures for interveners, as appropriate.

c. Standing/funding for interveners;

Eligibility for funding

Section 1 of the Commission's PACA Guidelines deals with eligibility, noting the substantial interest criterion and the potential for those other than ratepayer groups (e.g. First Nations) to be eligible for funding in energy supply contract, rate design, resource plan, and CPCN proceedings. The approach is generally workable for First Nations, except eligibility for funding is not finally determined until the end of the proceeding. Eligibility needs to be determined as early as possible in the process and not left to the very end, which has the effect of discouraging participation of otherwise eligible First Nations.

The need for early funding decisions may mean allocating more time during the initial phase of a proceeding for First Nations to determine their respective interests and to retain expertise. Most First Nations do not have capacity within their organizations to monitor the ongoing proceedings of the Commission or to prepare filings, and may not be entirely aware of the matters in an application depending on the actions taken by the applicant to notify and consult with the First Nation prior to filing.

The MPUB encourages collaboration very early in the process between potential interveners with similar interests, including First Nation and Métis interveners, in order to avoid duplication, reduce costs and focus the interventions. In cases where there are terms of reference, the scope of each of the interventions before the Commission could be defined by reference to the key topics contained in the terms of reference. Where there are no specific terms of reference, it would be beneficial to scope the key issues or tasks of the proceeding early in the process (see 2d below), in order to focus the interventions and avoid unnecessary duplication.

Nonetheless, circumstances can and do change during a proceeding. Upon application to the Commission and with opportunity for comment by other participants, there should be flexibility to broaden or narrow the scope of an intervention (and related funding) where it can be demonstrated that the proposed changes would add value to the process. We understand this is usual procedure for the Commission.

Funding

First Nations generally do not have the ongoing financial or organizational capacity to participate in the proceedings of the Commission, and intervener funding is therefore essential to that participation. Without funding, First Nation interventions would be unlikely to occur or necessarily cursory. The result could be unresolved issues, misunderstandings and conflicts, which could undermine or later nullify decisions made or actions taken by the Commission.

The approach to cost awards in section 2 of the PACA is generally unworkable for First Nations. The advice letters provided by Commission staff concerning the potential for interventions to receive a cost award are helpful in appropriately shaping the interventions, but provide no certainty of a cost award in whole or in part. While some technicians working for First Nations may elect to proceed without payment certainty where they have an established relationship with a First Nation, others may not. The ability to attract new additional expertise is compromised by this payment uncertainty.

Utility boards differ in their assessment and determination of potential funding to interveners. The MPUB and the Alberta Utilities Commission (AUC) both make use of an incremental cost award approach. Once an intervener has been determined to be eligible for funding and the scope of their intervention approved, they are certain to receive a cost award for a portion of their costs, typically on the order of 70%. The remainder of the cost award is then determined based on merit considerations. This approach alleviates concerns of interveners respecting uncertainty of payment, while maintaining discretion to address the merit of the intervention. Similar to the current process used by the Commission, these other boards also consider the potential for increases or decreases to cost awards resulting from changes in the length or scope of the proceeding. While section 3 of the PACA Guidelines does provide for interim awards, these are only granted under "exceptional circumstances". During the 2009 Transmission Inquiry, a review initiated under section 5 of the *UCA*, the participating T8FNs applied for and received interim cost awards, as did other interveners.[8] In our view, a more balanced approach is one that involves incremental cost awards and not only under exceptional circumstances.

Adequate funding to interveners must also be considered in the context of alternative review or dispute resolution processes, such as community meetings, technical hearings, or workshops. The recent BC Hydro IRP process offered a maximum of $250 plus eligible travel expenses for participation of First Nation representatives in one of several regional workshops. Considering the time for many First Nations to travel to and from these workshops and the modest funding provided, few First Nations participated.

Eligible Costs and Rates

Eligible costs and rates are detailed in section 4 of the PACA Guidelines. Our comments on these guidelines are as follows:

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[8] http://www.bcuc.com/Documents/Proceedings/2009/DOC_23057_A-28_PACA_Information.pdf

- We are not aware of any expert consultant or lawyer who would testify at a full day of hearings based on only two days of preparation time, and this ratio should be revisited.
- We concur with the observations of others that the rates for legal fees and consultants need to be based on current market rates, and there may be merit in basing these rates on those for similar services provided to the utilities.
- We note that there is no category in the PACA Guidelines for Aboriginal Traditional Knowledge expertise and presume that this is intended to be covered under the "consultant" category.
- The rates for disbursements in Appendix A appear to be out of date.

d. Review processes:

d.i. Conventional oral and written public hearings;

BC Hydro's Application for a Certificate of Public Convenience and Necessity for the Dawson Creek / Chetwynd Area Transmission (DCAT) Project is a recent example of participation by the T8FNs in a proceeding before the Commission. Specifically, WMFNs participated in this hearing as a registered intervener. Observations of the WMFNs participation in this hearing that are of potential relevance to this Independent Review are discussed below.

Filing of First Nation Information

To assist Crown utilities in scoping their consultation activities prior to application, the Commission provides direction in its *2010 First Nation Information Filing Guidelines for Crown Utilities*. The purpose of the Guidelines is to identify the information that must be filed in support of applications. These Guidelines have been useful for the T8FNs in evaluating the consultation processes undertaken to date by BC Hydro.

The Guidelines confirm that the duty to consult First Nations does not rest with the Commission but with the Crown, note that the duty is guided by numerous court decisions, and describe sub-issues used in deciding whether the duty to consult has been fulfilled up to the point of the Commission's decision.

Published in 2010, the Guidelines and Commission practices are updated as the law evolves. Considering the recent *Tsilhqot'in* decision, the Commission should review and update the Guidelines to keep them up-to-date with the current state of the law. In the event that such a review occurs, the active involvement of First Nations should be sought in advance.

Section 3 of the Guidelines requires the utility to provide certain information pertaining to the consultation process, including the following:

- *iv) Identify specific issues or concerns raised by the First Nation, irrespective of whether those issues or concerns are based on the Aboriginal rights in section 35 of the Constitution Act, 1982;*
- *vi) Identify whether other Crown agencies have consulted the First Nation in respect of the application or filing, and if relevant, the issues raised by the First Nation in these consultations and how these issues were addressed;*
- *viii) Describe how the specific issues or concerns raised by the First Nation, as well as any other potential adverse effects on Aboriginal rights or treaty rights, were avoided, mitigated or*

otherwise accommodated. Describe how these actions incorporated feedback from the First Nation. Provide an explanation where no action was taken in response to the First Nation's concern;

- *ix) Provide copies of any documents which confirm that the First Nation is satisfied with the consultation and accommodation to date; and*
- *(x) Provide evidence that the First Nation has been notified of the filing of the application with the Commission and has been informed on how to raise outstanding concerns with the Commission.*

The T8TA generally supports this list of requirements. Our sole suggestion is that Crown utilities be specifically required to report on any outstanding concerns of the First Nations that are known to the utilities at the time of filing.

In general, we believe that the direction and guidance given to applicants respecting Aboriginal consultation in advance of and in preparation for application to the Commission is necessary and appropriate, as are the procedures for determining and accepting an Application as complete and suitable for review by the Commission.

Written hearing

The WMFNs generally found the information request process for the DCAT hearing to be an effective means of resolving outstanding issues. We found the Commission supportive and genuine in their attempts to understand these issues and to assist the WMFNs and BC Hydro in resolving them. The process also permitted the filing of confidential information requests, which we believe facilitated the work of the Commission since it allowed parties to file information with the Commission that was not released to the public, or that was only released with redactions. This allowed for a negotiation to proceed that was confidential to all but the involved parties and the Commission.

Despite several rounds of information requests, an outstanding issue led the WMFNs to file a motion for a stay of the proceedings so that this issue could be resolved. Prior to the Commission ruling on the motion, BC Hydro requested a suspension of the proceeding in order to respond to a number of policy issues raised in several information requests from the Commission and other interveners. The suspension of proceedings permitted BC Hydro and the WMFNs to resolve this outstanding matter in the manner satisfactory to the WMFNs.

Oral hearing

Following recommencement of the hearing for the DCAT review, the Commission convened a procedural hearing, requesting submissions concerning the need for an oral hearing. WMFNs were the only intervener requesting an oral hearing, BC Hydro was agreeable, the request was granted by the Commission, and a two-day oral hearing was held.

The WMFNs found this procedural hearing to be well-conceived, well-organized and constructive. The decision to limit the scope of the oral hearings to First Nation consultation matters was appropriate as it allowed for an efficient consideration of the issues, avoided the unnecessary participation of parties not directly implicated in the issues, and considered the tight schedule.

Oral hearings are very important for Aboriginal communities, particularly where the knowledge of land users is concerned, or where other "non-technical" persons have knowledge or information that is material to the decisions before the Commission. The hearing format allowed Chief Roland Willson of WMFNs to provide the evidence of the First Nation by making a presentation to the Commission using Google Earth technology.

Site Visit

The Commission also exhibited flexibility in its process during the oral hearing by requesting to fly over of the route of the proposed project by helicopter. Following Chief Willson's evidence, the Commission made a request for submissions concerning the prospect of a site visit by the Commission to examine certain areas to be affected by the proposed Project by helicopter. A fly-over was arranged to take place shortly after the oral hearing and the Commission was accompanied by legal counsel from BC Hydro and WMFNs. WMFNs considered the flexibility demonstrated by the Commission in this circumstance to be extremely valuable to the process.

Following the site visit, the parties filed final written arguments and the Commission issued its Decision. The Commission determined that it would grant a CPCN to BC Hydro for the DCAT Project, subject to further consultation between the WMFNs and BC Hydro, with the expectation that BC Hydro was expected to provide further evidence demonstrating consultation to a medium level on the *Haida* spectrum, and addressing the deficiencies outlined in the Decision. The WMFNs and BC Hydro had six months to undertake the consultation and report back to the Commission. This period allowed the Parties to resolve the outstanding matters and the WMFNs issued a letter supporting the contents of the Compliance Report, allowing the CPCN to be issued.

Other Matters

In addition to the above observations, there were several additional positive aspects to the hearing process that merit mention:

- The process was aimed at facilitating information and perspectives from the parties and the public, including industry participants, First Nations and affected landowners.
- The BCUC staff was helpful, constructive and fair.
- The Commission exhibited flexibility in its approach, making use of a variety of tools and methods at its disposal, including procedural hearings, oral hearings, and a site visit to provide opportunities for the parties to resolve issues and to support meaningful consultation with the WMFNs.
- The Commission showed genuine sensitivity to the realities experienced by our First Nations in relation to the extensive development occurring in the territory.

d.ii. Alternative review processes, including expedited hearing processes and negotiated settlement processes; [and] d.iii. Involvement of the BCUC in alternative regulatory processes;

In its letter of July 4, BC Hydro suggested that it would be "instructive to review the instances in which the section 5 *UCA* referral power has been used". The T8TA concurs with this suggestion,

as the Commission has not initiated such a review in over five (5) years. We also share the Crown utility's concern that the Section 5 Transmission Inquiry undertaken in 2009 could have been improved in several ways. We would be pleased to speak to our experience as a participant in this Inquiry and to provide the Task Force with our insights if that would be of value to the Independent Review.

d.v. Opportunities to make hearing processes more efficient and more focused;

The T8TA concurs with the observations of several other participants that the Commission establish the scope and key issues for a proceeding early in the process. This scoping would provide focus to the proceeding, and a basis for determining the eligibility and scope of participant interventions.

The Commission should continue to make use of conventional information requests, written and oral hearings for obtaining and evaluating information and resolving disputes. However, the T8TA strongly encourages the use of alternative approaches, such as technical hearings, procedural hearings, workshops, community visits and site visits, among others, as these often allow the parties to understand and resolve matters more efficiently and potentially avoid additional written hearings or information requests.

d.vi. The role, effectiveness and use of guidelines and policies;

The T8TA and our member First Nations have found the existing BCUC guidelines for matters such as confidential filings, First Nation information filing and resource planning to be very instructive. We have provided some specific suggestions on guidelines elsewhere in this submission. We recommend that the Commission continue to maintain its guidelines and policies up-to-date. When the Commission is preparing a new set of guidelines or amending existing guidelines, consultation with previous participants in Commission hearings provides a valued opportunity for First Nations to provide input.

d.vii. Application cycle (turnaround) times and establishing timelines for reviews and decisions

Our experience with the recent use of timelines in the federal environmental assessment process under CEAA 2012, suggests that if timelines are to be enacted then capacity will need to be developed within representative First Nation organizations and potentially other interveners as well, and this could take time. If utilized, it might be preferable to initially set longer timelines for proceedings and then examine and consult on ways that these timelines might be shortened for future proceedings recognizing that some reviews are inherently more complex than others.

For First Nations experienced with proceedings before the Commission, the use of timelines could be somewhat less problematic than for those new to Commission processes or less familiar with regulatory processes more generally. To avoid requests for additional time, the Commission may wish to consider earlier notices to potentially affected Aboriginal groups, providing more time upfront for preparation as noted elsewhere in this submission.

In summary, timelines are a plausible long-term objective, but finding where best to improve efficiencies is likely an iterative process.

d.viii. Coordinated regulatory processes.

The T8TA believes that the Task Force should approach the notion of coordinated regulatory processes with considerable caution. Presumably, the most likely processes to be coordinated would be those undertaken by the Commission with those undertaken by environmental assessment agencies.

Historically, environmental assessment in Canada has focused on the determination of the significance of residual adverse environmental effects. While the notion of what is "significant" is often debated and the idea that the environment can be compartmentalized is at odds with many Aboriginal perspectives, the notion of irrevocable serious harm remains very relevant for Aboriginal groups as well as governments. The idea, in essence, is that some values must not be traded off.

On the other hand, utility board comparative analyses of proposed actions (e.g. alternative pipeline routes or electricity generation options) typically utilize some sort of cost-benefit analysis including, more recently, multi-attribute cost benefit analyses designed to incorporate qualitative factors related to environmental and socio-economic effects. The approach leads often to quantifiable trade-offs between alternatives, which are very different from the outcomes of an environmental assessment process.

The CEA Agency comments on this matter in its policy guidance:

> *Cost-benefit analysis cannot be used to determine significance in federal EAs, because it compares the estimated environmental costs and benefits of a project, whereas the Act clearly states that only adverse environmental effects are to be considered in determining significance and likelihood. Although cost-benefit analysis could be used to justify proceeding with a project that is likely to cause significance adverse environmental effects, this justification can take place only after the likelihood of the significant adverse environmental effects has been determined.*[9] (underlining added)

The ever-present danger to coordination is that we move too quickly to the justification decision. In doing so, we fail to "answer the first question first" by sufficiently assessing the potential for irrevocable serious harm to occur as a result of certain development choices. There are very valid historical reasons why the regulatory sequence has evolved in Canada the way that is has, and any decision to overhaul this sequence requires considerable prior reflection, inquiry and consultation.

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[9] CEA Agency. 2013. Reference Guide: Determining Whether A Project is Likely to Cause Significant Adverse Environmental Effects. www.ceaa-acee.gc.ca/default.asp?lang=En&n=D213D286-1&offset=&toc=hide

3. Structure, resource needs and performance of the BCUC (including but not limited to):

a. Review the use of stakeholder representation models in other jurisdictions and implications on the role of staff;

We do not support the use of a Consumer Advocate, particularly one that would be funded by government. First Nations would be unlikely to view such a position as "independent" from government, and would prefer to represent their own interests. Considering the limited funds available for intervention, earmarking a considerable portion of those funds to a Consumer Advocate would reduce available funds to other interveners. The current approach, in our view, offers greater flexibility in the allocation of these limited funds. We remain open to models in other jurisdictions that seek to address these issues but are not aware of any.

c. Organizational structure and BCUC composition, including:

c.i. Potential Vice-Chair and Executive Director positions;

The T8TA is unclear as to the benefits of a vice-chair other than as an occasional acting Chairperson. We do support the creation of an Executive Director position but only in relation to administrative and operational functions of the Commission. We are familiar with other departments and agencies where important decisions are been delegated to bureaucrats that really need to remain within the purview of Commissioners or Ministers.

c.ii. Full-time versus part-time Commissioners;

In general, we believe that First Nations would benefit from more full-time as opposed to part-time Commissioners, particularly the T8FNs and others frequently involved in proceedings before the Commission. Continuity avoids the need to continually re-educate Commissioners about issues of importance to the T8FNs.

c.iii. Experience and knowledge;

Some utility boards have at times ensured the board membership includes at least one member having particular expertise in matters important or specific to First Nations. The T8TA is of the view that the Commissioners should reflect the composition of the British Columbia society and that it is the collective knowledge of the Commission that matters more than whether there are "experts" in particular fields. To the extent that Commissioners are "experts", they should have expertise in synthesizing and assessing information from a variety of technical fields and perspectives, with the ability to effectively communicate the findings of their assessments.

c.iv. The need for regulatory process and utility expertise;

Some regulatory process and utility experience is probably necessary if the intention is for Commissioners to participate in hearings immediately upon appointment. However, "expertise" suggests that appointed Commissioners need to have considerable utility experience and the T8TA worries that would preclude many potential Commissioners with expertise that could be

very valuable, offering a different perspective from those normally put forward in Commission proceeding.

4. Other Matters

The T8TA notes the potential LNG economic regulatory role in relation to natural gas pipelines and upstream processing facilities identified in the Interim Task Force Consultation Summary. In particular, we note the following comments from Lawson Lundell in their Round 1 submission:

> *[The BCUC's] role will need to expand to upstream natural gas issues if BC is to successfully develop the LNG opportunity it presently has. The efficient development of gas gathering systems, processing capacity and other midstream assets such as storage will require not just oversight of the facilities by the Oil and Gas Commission but also resolution of economic interests such as third party access, pricing and conditions of service that the BCUC is best placed to provide. The participants in the LNG industry will expect and require an effective regulator that can provide predictable and understandable outcomes if they are to invest the many billions of dollars that the LNG industry is going to require to develop infrastructure.*

The T8TA is generally supportive of a role for the BCUC in regulation of the natural gas industry. The determination of that role should be a topic for discussion and consultation going forward between the Crown, industry, First Nations and other interested parties.

CLOSING

We understand that the next step in the Task Force's review involves meetings with participants in this proceeding. T8TA would like to arrange a meeting with the Task Force in the coming weeks and ask that you or your staff contact our office (250-785-0612) to arrange an appropriate time for this meeting.

Sincerely,

Anna Barley,
Acting Director Administration and Economic Development

cc: Treaty 8 Chiefs
Tribal Chief Logan