

# File 6408224 –Application by Cybernet Communications Ltd. for a Communications Site Licence of Occupation

## Decision Rationale

This document provides an accounting of the factors I have considered and the rationale I have employed as delegated statutory decision maker in making my decision, under the *Land Act*, on the application by Cybernet Communications Ltd. for a communications tower. These factors have all been considered, as described in this document, prior to my decision of December 10, 2010.

### **Background**

Cybernet Communications Ltd. (Cybernet) submitted an application for wireless internet communication towers to the FrontCounter BC (FCBC) office in Smithers in June 2006. The four separate tower locations applied for were Blue Pearl Mine (Site 1), Kitsegukla (Site 2), Chicken Mountain (Site 3), and Ski Hill (Site 4). The Ski Hill tower was proposed to provide wireless internet service to the ski hill cabin colony and to Hudson Bay Mountain Resort (HBMR) for on-hill operations. A tenure offer was made in October 20, 2008 under lands file 6408121. The offer was subject to certain conditions being met. Prior to meeting those requirements Cybernet constructed the Ski Hill tower, thereby placing the tower in trespass. In addition, several trees were topped without appropriate authorization. The timber trespass was referred to the Ministry of Forests and Range compliance and enforcement staff for investigation.

Subsequent to the tower construction an objection under Section 63 of the Land Act was submitted regarding the approval of the Ski Hill tower. As well a petition from adjacent cabin owners opposing the tower was submitted. The objection was based on five grounds, one of which being that Ski Hill tower as built differed in design and location from the tower as shown in the referral and consultation package. The Minister denied the request for a hearing on the decision, however, directed that a new public consultation process, and therefore a new application, should be undertaken to adequately solicit public comment on the actual tower location.

A temporary licence (File 6408224) was issued to allow the tower to exist while a new consultation process occurred and to provide service to Hudson Bay Mountain Resort for their operating season. Sites 1, 2 and 3 remained on File 6408121. Cybernet was fined for the trespass on the Ski Hill Tower and required to remove a wind turbine which had not been identified in the original management plan. The removal of this wind turbine resulted in the tower not becoming operational during the ski season. As a result HBMR installed alternate equipment at the base lodge to access Cybernet's services. The temporary licence expired May 16, 2010.

## **Decision:**

In making my decision, I have weighed the complexity of the social, environmental and economic factors associated with the application. In doing so, I have considered the file history, relevant land use planning direction including objectives set by Government resulting from the Bulkley LRMP, any information or comment provided by referral agencies, the public and First Nations, and the needs of the applicant.

### **Factors Relevant to Decision**

#### a) Prior Approvals

The tower on HBM, as currently located, has received two prior approvals under the *Land Act*. The first approval resulted from the original application for the four tower locations. This application approved subsequent to a review process which included public and First Nations consultation and referrals to government agencies, local government and the Bulkley Valley Community Resources Board. However, in the application Cybernet had used an incorrect latitude & longitude format and as a result the location as plotted was not the intended tower location. The location was however still within the developed area of the ski hill, with the base lodge and some cabins in close proximity.

Responses to the original application for the four tower locations focused on the Blue Pearl site and no comment was made on the ski hill location. Due to the lumping of unique sites into one application and multiple issues with the other three sites, the ski hill site was not identified as a significant issue when the mapping error was noticed. As the advertised ski hill location generated no public comment prior to the offer stage, despite being visible from ski cabins and the main ski lodge, it was decided to proceed to offer with no further consultation.

The second approval was the temporary licence issued to allow for a new consultation process. Concern has been raised over the influence past decisions have on this decision. My role as an independent decision maker is not to validate or repeal previous decisions. Past decisions and the information gathered during the application processes certainly informed my review which is founded on the legal and policy framework and state of the landbase at the time of decision.

#### b) First Nations Consultation

The tower is within the consultative area of the Office of the Wet'suwet'en (OW). Both the initial incorrect location and the existing location were referred to them. No information was received from the OW to indicate an infringement of aboriginal rights and/or title. Given the size of this application within the context of the existing level of development in the vicinity I am satisfied that the Province's duty to consult has been completed and First Nations interests have been addressed.

c) Public consultation

Public advertising of Land Act applications is at the discretion of the Province. The application was advertised in the Interior News on February 3<sup>rd</sup> and 10<sup>th</sup>, 2010. Due to the removal of the wind turbine, the tower height was reduced to less than the threshold to trigger Industry Canada's adjacent owner notification requirements.

In addition, prior to the end of the public comment period, and at the request of a representative of the Cabin Owners Association, a representative of the Province attended a meeting to answer questions regarding the application and provide information on the public consultation process. The meeting was informal in nature and it was made clear to representatives of the association that it was not intended to be a public hearing on the part of government. A significant amount of written comment was received and has been considered in my decision. I therefore am satisfied that the public consultation process was adequate to identify the range of concerns with the application.

d) Validity of the application

Cybernet applied for the tower to provide wireless internet service to Hudson Bay Mountain Resort on-hill operations and to the Prairie t-bar cabin colony. Numerous comments received stated that the tower was not necessary due to the availability of other internet service providers on the mountain. The fact that there is existing service is not disputed. The tower will however provide service to those residents of the cabin colony who currently are clients of Cybernet without them needing to change service. Hudson Bay Mountain Resort has also stated that while it currently has a means to access Cybernet's services it wishes to have a backup system in place to ensure continued on-hill business operations. The existence of alternate service providers, in the context of the overall assessment of impacts, is not sufficient reason to prevent opportunities for service providers. I have therefore determined that the application is valid.

e) Land Use Planning Direction:

Approved Land Use Plans inform decision makers on the social, environmental and economic balance of values within plan areas. The tower is within both a retention visual quality polygon and the Ski Smithers Special Management Zone 2 (SM2) of the Bulkley Land and Resource Management Plan (BLRMP). The tower is also within the plan area of the Telkwa Landscape Unit Plan (LUP) however it contains no specific direction for the Ski Smithers SM2. Specific Land Use Objectives arising from the plans were established under the *Land Act* in 2000 and 2006.

The legal objective for the Ski Smithers SMZ is to *maintain visual quality within view of major river and highway corridors and recreation focus points, and recreational opportunities and access by not constructing roads onto the grassy tundra, and developing timber in a manner which minimizes the effects on these values.* The BLRMP objective for the Ski Smithers SM2 is to *encourage commercial and public recreation in this area subject to visual quality constraints.* The Telkwa LUP objective for retention visual quality is that *forest management*

*activities in retention areas as identified on Map 4 may be discernible but not clearly visible to the average viewer. Disturbances should appear to be from natural causes.*

While established under the *Land Act*, the Land Use Objectives do not have a direct legal application to *Land Act* decisions. In addition, the direction and strategies for both the Ski Smithers SM2 and retention visual polygon focus mainly on forest management and timber extraction. Land use planning direction for resource management zones often places restrictions only on certain types of activities. It is therefore not appropriate for me to draw a direct link from one activity to all activities. The direction does, however, identify priority values which should be considered during other activities.

I am satisfied that the tower is consistent with the policy direction contained within the Bulkley LRMP and Telkwa LUP. In making my decision I have considered the values of the retention visual quality polygon and the Ski Smithers SM2 and how the tower would impact those values. Those values and my considerations relevant to them are further described in the sections below.

#### f) Visual Quality

The tower is located within the Ski Smithers viewscape. The majority of public opposition was due to the visual impact of the tower on the recreational values of the ski hill and general vicinity of the cabin colony. On its own, if this were a pristine mountain environment, this would certainly be the case. However, the presence of the ski hill has resulted in extensive development, including the cabin colony, ski lifts and a power line. The impact of the tower must be considered within the context of the existing visual landscape.

In an effort to seek solutions to reducing the impact to adjacent cabin owners the Province contracted a local communications company to determine if there was an alternate tower location that could provide service to the ski hill base lodge and to the Prairie cabin colony. A location was found near tower 7 of the Panorama t-bar, completely within the ski area and well away from the cabin colony. However, the proximity to ski runs presented a safety liability that Hudson Bay Mountain Resort was not willing to allow within their operating area and as a result this alternate location has been determined to be unacceptable.

I am satisfied that the tower is not contrary to the overall intent of land use planning direction for visual quality.

#### g) Recreational Values:

The Ski Smithers SM2 is highly valuable for both commercial and public recreation. During the winter Hudson Bay Mountain Resort (HBMR) operates an alpine ski facility within the Hudson Bay Mountain (Ski Smithers) Controlled Recreation Area (CRA). At the time of application the CRA was under the jurisdiction of the Ministry of Tourism Culture and the Arts (MTCA). The tower footprint is partially within the CRA. MTCA advised that they deferred to HBMR for comment on the tower. HBMR has stated that they require the service however they neither support nor oppose the current tower location.

The resort also provides the general public with recreational access to the surrounding area for nordic and backcountry skiing, snowshoeing, hiking and mountain biking. Land use planning direction for the Ski Smithers SM2 focuses on managing access and visual impacts. Visual impacts are discussed in the previous section and there are no impacts to access associated with the tower location.

The tower is located across the access road from the base of the Prairie T-bar, at the top of a knoll. The slope from the knoll to the t-bar is used frequently by the adjacent cabin owners and other visitors to the area as it is a short gentle slope for tobogganing. The tower is located a sufficient distance from the slope break to not interfere with the use for tobogganing.

The top of the knoll is also the trailhead for "Piper Down", a mountain bike trail established in 2010 as a Recreation Site under the *Forest and Range Practices Act*. The tower is located directly adjacent to the recreation site boundary. At the time of the application the existing tower location had been approved and therefore was a prior existing right. The tower does not impact the accessibility or safety of the recreation site however the District Recreation Officer (RO) has identified that the tower reduces the aesthetic quality of the trailhead area, similar to the concerns raised by adjacent cabin owners. It should also, however, be noted that numerous recreation trails in the region are adjacent to communications facilities. The RO requested that Cybernet provide visual screening of the tower. Consideration was given as to whether Cybernet could be asked to provide picnic tables however as mentioned above, the tower has prior rights over the recreation site and therefore there exists no legal authority to require Cybernet to mitigate any impacts. However, in making my decision I have required Cybernet to raise the solar panels off the ground such that no further tree removal or topping is required.

I am satisfied that the tower does not unacceptably impact the overall recreational value of the Ski Smithers SM2.

h) Impacts to directly adjacent cabin owners:

Five cabins are located within 20 metres of the tower. For those owners the primary concern raised has been the impact the tower has on their views from the cabins themselves and associated property values. The Smithers-Telkwa Rural Official Community Plan does not contain specific restrictions or direction on communications towers and similar infrastructure as they relate to the Prairie Cabin Colony. Impacts to property values are not within the mandate of the Province in the review of decisions.

Concerns were raised regarding health impacts of the tower. Industry Canada has confirmed that the equipment used on the tower is in compliance with Health Canada requirements for radio communications and therefore causes no health impact. The wind turbine had been causing noise which would impact adjacent residents and therefore the Province required the turbine to be removed. Removal of the turbine has however resulted in an increased footprint due to the need for additional solar panels to power the tower.

I am satisfied that the concerns of adjacent cabin owners have been considered to the extent possible within my mandate as a decision maker.

## **Summary:**

After weighing and assessing all of the public and agency referral comments as well as potential impacts to First Nations Interests, I am satisfied that my determination to grant the *Land Act* tenure for a communication site represents an appropriate balance of the social, environmental and economic concerns expressed. I am also satisfied that my determination takes into account and considers the balance of public values as expressed through the Bulkley LRMP and subsequent associated legal and policy documents. I therefore grant approval of Cybernet's application for a communications tower in its current location on Hudson Bay Mountain.