



**LETTER NO. L-3-05**

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**VIA E-MAIL**

January 13, 2005

British Columbia Hydro and Power Authority  
Call for Tenders for Capacity on Vancouver Island  
Review of Electricity Purchase Agreement

**Exhibit No. A-36**

Mr. Richard Stout  
Chief Regulatory Officer  
British Columbia Hydro and Power Authority  
17<sup>th</sup> Floor, 333 Dunsmuir Street  
Vancouver, B.C. V6B 5R3

Dear Mr. Stout:

Re: British Columbia Hydro and Power Authority  
Call for Tenders for Capacity on Vancouver Island  
A Review of Electricity Purchase Agreement

Please find attached as Appendix A to this Letter, the Panel's Reasons for Decision in the December 16, 2004 request by the Joint Industry Electricity Steering Committee that it reconsider the scope and evidence allowed in the Public Hearing and review of the above-noted proceeding.

Yours truly,

*Original signed by:*

Robert J. Pellatt

RJP/yl  
Enclosure  
cc: Mr. Brian Wallace, JIESC  
Registered Intervenors

**REASONS FOR DECISION**  
**JIESC Reconsideration Application**

On December 16, 2004, the Joint Industry Electricity Steering Committee ("JIESC") requested, *inter alia*, that the Commission "reconsider the limited scope it has set for this hearing and broaden it to allow consideration of all evidence necessary to determine if the CFT is in fact the most cost-effective solution to the potential capacity shortfall on Vancouver Island" (JIESC reconsideration application, Exhibit C19-5). At the Pre-hearing Conference held on December 22, 2004, the JIESC reiterated its request and the Chair indicated that a written procedure would be established to deal with the application to reconsider the scope of the CFT proceeding (T4: 689). By Order No. G-119-04 dated December 24, 2004 (Exhibit A-16), the Commission set dates for a written Phase 1 reconsideration process to consider whether the JIESC has established a *prima facie* case sufficient to warrant full consideration of its application.

The Commission has considered the submissions filed by parties, including BC Hydro (B-22) and Duke Point Power Limited Partnership (C17-3) who opposed the application and NorskeCanada (C2-4), Green Island Energy Ltd. ("Green Island") (C9-9), GSXCCC and BCSEA (C20-16), Commercial Energy Consumers (C32-2), Mr. Bob McKechnie (C22-5), Sea Breeze Pacific Regional Transmission System, Inc.(C23-5), Gabriola Island Ratepayers and Residents Association (C30-5), Mr. John Hill (C13-4) and Mairi McLennan (C36-7) who supported the application.

In its January 5, 2004 reply submission, the JIESC confirmed its allegation that the Commission has made errors in fact and in law by limiting the scope of the CFT review to such an extent that the Commission cannot carry out its statutory duty.

The Commission's "A Participant's Guide to the British Columbia Utilities Commission" ("Guide") describes a two phase process for reconsideration applications before the Commission (pp.34-35). As noted in the Guide, where an error is alleged, an applicant must meet the following criteria:

- the claim of error is substantiated on a *prima facie* basis; and
- the error has significant material implications.

At issue is the Commission Panel's 'scope ruling' rendered on November 30, 2004 at pages 307-315 of transcript volume 2. The 'scope ruling' was made following submissions by parties as requested in the Commission's letter dated November 24, 2004 (Exhibit A-2).

Specifically, parties in favour of the JIESC application take issue with the Commission Panel's characterization of the principal issue for the Electricity Purchase Agreement ("EPA") review: "Is Tier 2, Tier 1, or the No Award option the most cost-effective option to meet the capacity deficiency on Vancouver Island commencing in the winter of 2007/08?" (T2: 313-314). In this regard, the Commission Panel accepted that for the purpose of the EPA review, no other resource options need be considered. The Panel, however, noted the concerns raised by intervenors "regarding the potential for

resource option bias in the QEM” and concluded that, “as relevant to the principal issue, such design bias is an issue for the proceeding” (T2: 314).

As parties are aware, this EPA review has its genesis in, and is related to, the Vancouver Island Generation Project ("VIGP") proceeding which resulted in the decision of the Commission dated September 8, 2003 ("VIGP Decision"). The VIGP Decision, which followed an oral public hearing process, denied a certificate of public convenience and necessity ("CPCN") application by Vancouver Island Energy Corporation for the VIGP. In that decision, the Commission encouraged BC Hydro to proceed with a call for tenders ("CFT") and indicated that based on the results of the CFT, the Commission was prepared to consider any future application for CPCN approval or electricity purchase agreements on an expedited basis (VIGP Decision, p. 77). The Commission reiterated this intention in its letter to BC Hydro dated January 23, 2004 (Exhibit B-1, Appendix F).

In the November 30 'scope ruling', the Chair referred to the determinations from the VIGP Decision that are relevant to the determination of scope for the EPA review including: that there is a capacity shortfall on Vancouver Island, commencing in the winter of 2007/08 (VIGP Decision, p. 27); and, that the evidence from that hearing suggests that the appropriate next resource addition should be on-Island generation, provided the cost of the proponents' projects can be confirmed near their expected value (VIGP Decision, p. 78).

In the VIGP Decision, the Commission stated that it was BC Hydro's choice whether to proceed with the CFT, recognizing that BC Hydro must develop sufficient information to identify the most cost effective resource addition for Vancouver Island and that the results of the CFT should provide valuable information for BC Hydro to discharge that responsibility (VIGP Decision, p. 79). The Commission Panel does not consider that it is necessary or appropriate in the circumstances of the present proceeding under section 71 of the Utilities Commission Act ("Act") to embark upon a detailed examination of other resource options that may be available to BC Hydro. Since the VIGP Decision stated that a CFT process would be appropriate, it is not now the intent, and nor should it be, that this EPA review should be enlarged to conduct an extensive comparative analysis of all other potential projects.

While the Commission Panel has identified the principal issue there remains considerable latitude for parties to pursue issues related to the CFT criteria and resource options. In its scope ruling, the Commission Panel indicated that issues regarding the implications of the CFT criteria for certain resources including co-generation may be pursued during this proceeding and the Panel cautioned that evidence from developers might be helpful in its determination of whether the DPP is the most cost-effective resource for Vancouver Island at this time (T2: 312). As suggested by Green Island, the Commission may during the course of this proceeding “hear evidence that inherent bias against ‘non-gas’ projects or unduly stringent criteria in the CFT disadvantaged or excluded certain projects”.

In the Commission Panel's view, the identified scope of the proceeding will be more than adequate to satisfy the public interest test and to assist the Panel to fulfill its statutory obligations with respect to energy supply contracts filed under section 71 of the Act. Norske, Green Island and GSXCCC-BCSEA suggest that the framework for the public interest test to be applied is found in subsection 71(2) of the Act. That subsection provides:

71(2) The commission may make an order under subsection (3) if the commission, after a hearing, finds that a contract to which subsection (1) applies

is not in the public interest by reason of:

- (a) the quantity of the energy to be supplied under the contract;
- (b) the availability of supplies of the energy referred to in paragraph (a);
- (c) the price and availability of any other form of energy, including but not limited to petroleum products, coal or biomass, that could be used instead of the energy referred to in paragraph (a)';
- (d) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph a); or
- (e) *any other factor that the Commission considers relevant to the public interest.* (emphasis added)

The Commission Panel considers that it has a broad discretion to determine the 'public interest' within the context of section 71 and notes that the matters identified in paragraphs (a) to (e) of subsection 71(2) are not conjunctive and may not all be mandatory in the circumstances of each filing. That being said, the Commission Panel believes that the evidentiary record adduced on the basis identified in the 'scope ruling' will allow a decision to be made consistent with the Commission's statutory authority, including paragraphs (c) to (e).

The Commission Panel, therefore, does not consider that a *prima facie* case has been established that an error in law or fact has been made in the determination of the scope for this proceeding.

It is important to recognize that as a result of this EPA review, the Commission will not be making, nor will it be in a position to make determinations or grant approvals for energy supply contracts in relation to other potential projects. The matter before the Commission is the EPA related to the Duke Point Power Project. In this EPA review, the Commission, in accordance with its authority under subsection 71(3) of the Act, may:

- (a) by order, declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or
- (b) make any other order it considers advisable in the circumstances.

As noted in the Commission's 'confidentiality' decision dated January 6 (Exhibit A-19), public processes have not been frequently or typically invoked to consider section 71 filings. In these circumstances, however, it was anticipated that a public process would be utilized. As noted above, an expedited process was also contemplated and it could or should have been reasonably assumed that the nature and extent of such a process would be determined by the Commission in its discretion. The Commission has endeavoured to afford parties and the public an opportunity to meaningfully participate in this EPA review. The Commission Panel, however, does not consider that there was or should have been, in the circumstances of the review, an expectation that the full panoply of rights that may be afforded to parties in a full-blown oral hearing process would be assumed to apply to this section 71 proceeding. Given the public interest considerations and commitments made by the Commission and understood by parties, some restrictions may be imposed, as the Commission considers necessary and appropriate, including the nature and extent of the scope of the proceeding.

On another related matter, in its submission dated January 4, 2005 BC Hydro identified a change in circumstances that may warrant a reconsideration of the 'scope ruling', i.e. Commissioner Birch having recused himself from the panel on December 22, 2004, following submissions on the GSXCCC-BCSEA motion concerning a reasonable apprehension of bias. BC Hydro suggests "that it would be desirable for the present Commissioners to review and reconsider the submissions made by the parties on November 29, 2004 with respect to scope to determine whether the current panel would have reached the same decision as was reached by the three-member panel that included Commissioner Birch". The JIESC agrees that a new process is not required prior to such a review though it suggests that an opportunity for parties to comment on the issue may be appropriate. Norske submits that the Commission must first seek further comments from Intervenors before proceeding in a manner suggested by BC Hydro and, in any event, submits that BC Hydro's request should be denied.

The Commission Panel denies BC Hydro's request. The Panel does not consider it appropriate or necessary in the circumstances to reconsider and remake decisions taken to date related to the CFT review, nor has any other party, including GSXCCC-BCSEA and parties who supported the motion on its merits, made such a request which, in the panel's view, should have been more timely made during, or within a reasonable timeframe following, the submissions on the motion. The Panel also notes that Commissioner Birch recused himself from the Panel prior to its consideration of parties' submissions on the GSXCCC-BCSEA motion. There was, therefore, no consideration of the merits of, or specific findings made by the Panel in relation to, GSXCCC-BCSEA motion.