



LETTER NO. L-8-05

SIXTH FLOOR, 900 HOWE STREET, BOX 250
VANCOUVER, B.C. CANADA V6Z 2N3
TELEPHONE: (604) 660-4700
BC TOLL FREE: 1-800-663-1385
FACSIMILE: (604) 660-1102

ROBERT J. PELLATT
COMMISSION SECRETARY
Commission.Secretary@bcuc.com
web site: <http://www.bcuc.com>

VIA E-MAIL

wjandrews@shaw.ca

January 27, 2005

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

Exhibit No. A-45

Mr. William J. Andrews
Barrister & Solicitor
1958 Parkside Lane
North Vancouver, BC V7G 1X5

Dear Mr. Andrews:

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

Please find attached the Commission Panel's determination on the January 14, 2005 request by the GSX Concerned Citizens Coalition, B.C. Sustainable Energy Association and Society Promoting Environmental Conservation (collectively "GSXCCC") requesting a reconsideration of certain decisions made by the Commission Panel regarding the conduct of the proceeding.

Yours truly,

Original signed by:

Robert J. Pellatt

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Enclosure

cc: Mr. Richard Stout, Chief Regulatory Officer
British Columbia Hydro and Power Authority
Registered Intervenors

British Columbia Hydro and Power Authority
Call for Tenders for Capacity on Vancouver Island
A Review of Electricity Purchase Agreement
Request for Reconsideration of Commission Decisions

REASONS FOR DECISION

By letter dated January 14, 2005, GSX Concerned Citizens Coalition, B.C. Sustainable Energy Association and Society Promoting Environmental Conservation (collectively "GSXCCC") requested a reconsideration of certain decisions made by the Commission Panel regarding the conduct of the proceedings.

The letter of January 14, 2005 from GSXCCC (Exhibit No. C20-29) states the request for reconsideration of the following decisions by the Commission Panel:

1. That the Panel must make a final decision without reasons by February 17, 2005;
2. That the Panel's final decision will be issued without reasons, i.e., with reasons to follow within an unspecified period of time;
3. That the time available for cross-examination of the witnesses of, *inter alia*, BC Hydro and Duke Point Power Limited, is arbitrarily limited to the times allotted in the Hearing Schedule adopted by the Panel (Exhibit A-38); and
4. That "the full panoply of rights that may be afforded to the parties and a full-blown oral hearing process" do not apply in this section 71 hearing (Exhibit A-36, Reasons for Decision, JIESC Reconsideration Application, p.3).

Pursuant to section 99 of the *Utilities Commission Act* ("UCA") and A Participant's Guide to the British Columbia Utilities Commission ("Commission's Guide"), an applicant for reconsideration must establish a prima facie case sufficient to warrant full consideration by the Commission. The relevant factors and criteria upon which the Commission exercises its jurisdiction regarding reconsiderations has already been set forth in previous reconsideration decisions in this proceeding and will not be repeated here.

In its application for reconsideration, GSXCCC states that the Commission Panel's determination to render a decision without reasons by February 17, 2005 (Decision 1) is an error of law and jurisdiction because it is a substantive decision made on the basis of the submissions of counsel and not on the basis of evidence which was subject to cross-examination.

Next, GSXCCC submits that the Commission Panel's determination to make a final decision to be followed later by written reasons (Decision 2) is an error of law and jurisdiction because issuing a final decision without reasons has the effect of imposing practical limitations on the statutory right of the intervenors to apply for leave to appeal to the British Columbia Court of Appeal under section 101 of the *UCA*. GSXCCC further submits that a delay in the issuance of reasons will have prejudicial effect on the ability of an intervenor to seek a stay order from the Court of Appeal.

GSXCCC also submits that the time available for cross-examination of the witnesses of BC Hydro and Duke Point Power Limited has been arbitrarily limited to the times allotted in the Hearing Schedule (Decision 3). Therefore, GSXCCC submits that the Commission has made an error of law and jurisdiction because it violates

the intervenors' right to cross-examine witnesses and it unlawfully fetters the Commission's discretion to allow or to limit cross-examination in accordance with section 38 of the *Administrative Tribunals Act*.

Finally, GSXCCC submits that the Commission Panel's determination that the full panoply of rights that may be afforded to the parties and full-blown oral hearing process do not apply in this section 71 hearing (Decision 4) is an error of law and jurisdiction because it is contrary to the principles of natural justice and the requirements of the *Administrative Tribunals Act*. GSXCCC acknowledges that the content of the procedural and substantive rights afforded to parties will vary with the nature of the particular hearing, but submits that the Commission does not have jurisdiction to arbitrarily deny rights to parties on a generalized, unspecified basis. GSXCCC submits there is no basis in law for a party's rights to be curtailed because of an asserted distinction between this public hearing under section 71 and "a full-blown oral hearing process".

GSXCCC is supported in its request for reconsideration by Shady Brook Farm (Exhibit No. C-33-9) and Ms. McLellan (Exhibit No. C-36-13).

The Joint Industry Electricity Steering Committee ("JIESC") and NorskeCanada in their respective letters of January 19, 2005 (Exhibit No. C19-22) and January 20, 2005 (Exhibit No. C2-12) express concern over certain procedural aspects related to this hearing but restricted their support for GSXCCC's application for reconsideration with respect to Decision 4.

The Commercial Energy Consumers ("CEC") by letter dated January 19, 2005 (Exhibit No. C32-7) supported a request for reconsideration regarding Decision 3.

The application for reconsideration is opposed by BC Hydro and Duke Point Power Limited ("DPP").

In its letter dated January 19, 2005 (Exhibit No. B-66), BC Hydro references provisions of the *UCA* and the *Administrative Tribunals Act* which allow the Commission to control its own process and make rules respecting its practice and procedure to facilitate the just and timely resolution of the matters before it. BC Hydro also submits that the scope of a hearing and applicable procedures are dictated by the mandate of the tribunal. BC Hydro submits that the Commission has appropriately limited the scope and applicable procedures of a section 71 hearing to the relevant issues.

With regard to the specific decisions for which reconsideration is sought, BC Hydro made further submissions.

Regarding Decision 1, BC Hydro submits that the Commission's determination is procedural rather than substantive. Procedural decisions such as the structure and timing of decisions should not be subject to reconsideration because they do not fulfill any of the criteria in the Commission's guidelines that state the test for reconsideration. BC Hydro also takes issue with GSXCCC's submission that the February 17, 2005 deadline was determined on the basis of counsel's submissions and not on the basis of evidence. BC Hydro refers to the VIGP decision, the Commission's January 23, 2004 letter establishing the period during which it would conduct a review, the terms of the EPA and CFT report filed in this proceeding.

Regarding Decision 2, BC Hydro submits that there is no prejudice to an intervenor in seeking leave to appeal to the Court of Appeal as a result of the delivery of written reasons after a final decision. It submits that if the appeal period runs from the date of the decision, then a party is able to preserve its appeal period and obtain leave to delay the filing of further materials until reasons have been issued. Further, the issuance of a decision without reasons to follow is a procedural determination that does not meet the criteria for reconsideration set out in the Commission's guidelines.

Regarding Decision 3, BC Hydro submits that no arbitrary time limit has been placed on any party. Rather, a limit was placed on the total time for the evidentiary portion of the hearing. BC Hydro submits that pursuant to section 38 of the *Administrative Tribunals Act*, there is no requirement that cross-examination must be permitted before any limits or constraints on cross-examination are imposed. BC Hydro also submits that the nature of a section 71 hearing is not an application. Rather, the Commission has identified public interest issues in which it is interested and has determined the extent of cross-examination that is needed in total in order to reasonably inform itself with respect to those issues. BC Hydro states that even where natural justice requires cross-examination, the Commission nevertheless retains the jurisdiction to control its process so long as overall, all parties have an adequate opportunity to present their case.

Regarding Decision 4, BC Hydro submits that the Commission has great latitude to shape the procedures it feels are necessary to carry out its statutory mandate. Normally, hearings are not required with respect to section 71 proceedings. Having made the decision to conduct an oral hearing, the Commission is not obligated to establish procedural rules that are the same as those employed in any of its other proceedings.

DPP submits that GSXCCC has mischaracterized the Commission Panel's determination that it must make a decision by February 17, 2005. DPP submits that the Commission has indicated it intends to render a decision by that date, not that it must. Further, the decision is procedural in nature and within the discretion of the Commission.

By letter dated January 21, 2005 (Exhibit No. C20-34) GSXCCC replied to the submissions from BC Hydro and DPP opposing the application for reconsideration. GSXCCC submits that although Decision 1 may be a procedural decision, the Commission's guidelines do not impose any exclusion for reconsideration of procedural decisions. Further, GSXCCC submits that although BC Hydro has provided examples of references to the desirability of expediting the EPA review, there is no evidence that February 17, 2005 is necessarily a crucial date beyond which a decision would negate the feasibility of the EPA should it be approved.

In reply to BC Hydro's submissions on Decision 2, GSXCCC asserts that the only practical advantage of the issuance of a decision with reasons to follow would be to allow BC Hydro and DPP to proceed immediately with the DPPP in the event of a decision not to disallow the EPA. GSXCCC also notes that BC Hydro did not reply to GSXCCC's submission that a stay application might be prejudiced as a result of the increased likelihood of BC Hydro and DPP arguing that they had already incurred costs in reliance on the decision.

In reply to BC Hydro's submissions on Decision 3, GSXCCC states that the decision limits not only the total time for the evidentiary portion of the hearing but also allocates specific periods of time for witness panels to be called. GSXCCC notes that the Commission's letter dated January 13, 2005 (Exhibit No. A-38) states that the Commission Panel expects that each witness panel will be concluded within the time frame allotted. Further, in advance of BC Hydro Panel 1 beginning cross-examination, the Commission Panel announced arbitrary time limits on each intervenor's cross-examination and, in the case of GSXCCC then terminated the cross-examination based on the expiration of the time limit and not on any finding that the cross-examination had been sufficient to disclose fully and fairly all matters relevant to the issues in the application.

Further, GSXCCC submits that the prior time limits on cross-examination were not applied in an even-handed manner to intervenors (apart from DPP) on the one hand and to BC Hydro and DPP on the other hand.

GSXCCC also takes issue with BC Hydro's submission that the principles surrounding cross-examination are somehow of less importance or relevance in this proceeding because it is hearing under section 71 of the *UCA* which involves a "filing" rather than an "application". While acknowledging the statutory basis of the hearing

(section 71 of the *UCA*) as the primary determinant of the matters relevant to the issues, nothing in that section dilutes the principles of cross-examination set out in section 38 of the *Administrative Tribunals Act*.

Finally, GSXCCC submits that although there may be instances where no breach of natural justice will occur by a curtailment of cross-examination, the statutory mandate and considerations applicable in those instances are not before the Commission Panel.

In response to BC Hydro's submissions on Decision 4 to the effect that the Commission Panel does not have an obligation to establish procedural rules that are the same as those employed in any of its other proceedings, GSXCCC submits that the issue is not whether the procedures for an oral hearing under section 71 must be the same as in proceedings under different sections of the Act. GSXCCC acknowledges that they do not. However, GSXCCC submits that the issue is whether an oral hearing pursuant to section 71 must be conducted in accordance with the principles of natural justice and the requirements of the *Administrative Tribunals Act*.

In reply to DPP's submissions against reconsideration, GSXCCC submits that there is no general rule that if a decision is procedural, it need not be supported by evidence. In particular, GSXCCC submits that the February 17, 2005 deadline for a final decision without reasons was presumably based on a finding that there would be some real-world adverse consequences to a decision being made later. That finding is necessarily a fact based conclusion which requires supporting evidence.

ANALYSIS

As stated above, an applicant for reconsideration must establish a *prima facie* case sufficient to warrant full consideration by the Commission. One of the factors considered by the Commission in making that determination is whether or not the Commission has made an error in fact or law. Most, but not all, of the submissions in support of reconsideration relied upon errors of law and jurisdiction by the Commission Panel.

The Commission Panel considers that it has a wide latitude to institute procedures to control its own processes as a result of the provisions of the *UCA* and the *Administrative Tribunals Act*. The Commission Panel also agrees with the submissions of BC Hydro and the reply submissions of GSXCCC to the effect that the Commission does not have an obligation to establish procedural rules that are the same as those employed in any of its other proceedings.

The Commission Panel rejects the submission of GSXCCC that there was an insufficient evidentiary basis to make the decision to render a final decision without reasons by February 17, 2005. In almost all applications or filings made with the Commission which lead to a hearing, whether written or oral, there are competing interests at stake with regard to timing of various steps in a proceeding. It is the Commission Panel's task in meeting its public interest mandate to balance the competing interests between the parties.

In coming to its determination that February 17, 2005 was to be the date for delivery of the Commission Panel's decision, the Commission Panel considered Exhibit B-2 which confirmed BC Hydro's response to the key milestone dates for the proposed Duke Point Project and in particular the anticipated COD date and the commitments made in its January 23, 2004 letter to complete the proceedings within ninety days. The Commission Panel also considered the background of the filing including the VIGP decision and the commitments made therein, the desirability of an earlier rather than later date, the terms of the EPA and the CFT report filed in this proceeding. After considering these factors, the Commission Panel determined that the public interest would be served by having a decision date of February 17, 2005. Therefore, the Commission Panel denies GSXCCC's request for a reconsideration of Decision 1.

The Commission Panel also rejects GSXCCC's request for a reconsideration of Decision 2 that the panel's final decision will be issued with reasons to follow at a later date. The Commission Panel considers that its jurisdiction affords it a discretion to either issue a decision with written reasons or issue a decision to be followed by written reasons. Once again, the Commission Panel considers that it must exercise its discretion in the public interest. Absent improper considerations, the Commission Panel is of the view that it controls its own procedure within the confines of the statutory constraints applicable to it. In this instance, the Commission Panel considered the desirability of issuing a decision with written reasons to follow against delivering the decision with written reasons.

If the Commission were to delay the issuance of its decision until written reasons were prepared to be released, it was probable that given the resources of the Commission and commitments of panel members and Commission staff to other duties that there may have been unnecessary delay after the conclusion of the evidentiary portion of the hearing to deliver its decision. The Commission concluded that it was in the public interest to issue an early decision instead of delaying the delivery of the decision.

The Commission Panel specifically rejects the submissions of GSXCCC that it considered in any way the possible tactical advantages to BC Hydro and DPP as outlined in its submissions in support of reconsideration. The Commission Panel also notes that it is not unusual for a justice of our superior courts to advise the parties of the determination of an issue with reasons to follow at a later date.

In addressing the request for reconsideration of Decision 3, the Commission Panel wishes to clarify certain matters. In Exhibit No. A-38, the Commission Panel stated that it expected the evidentiary portion of the hearing to conclude by no later than January 28, 2005. A schedule proposing a time line for each of the witness panels expected to be testifying at the hearing was attached to the letter and the parties were advised that each witness panel should be concluded within the time frame allotted. The letter also noted that if it was determined during the course of the hearing that additional time other than that allotted in the schedule was required, the Commission Panel would sit longer hours as necessary to preserve the schedule.

On the first day of the evidentiary portion of the hearing, the panel chair inquired of the intervenors as to whether there had been any discussion among them regarding the allocation of time set forth for the cross-examinations of Panels 1 and 3 from BC Hydro. There had been no agreement between the intervenors. Panel 1 was the policy panel for BC Hydro addressing high level policy issues surrounding the filing made pursuant to section 71.

The panel chair indicated that absent agreement among the intervenors, there would be an apportionment of time between the various cross-examiners. The first two intervenors to cross-examine were allotted 20 minutes each and each subsequent intervenor was allotted 15 minutes. Certain of the intervenors quickly came to an agreement that some or all of their allotted time would be given to another intervenor to allow it to conduct more extensive cross-examination. Two intervenors, one of whom included GSXCCC, did not come to an agreement with other intervenors to either increase or decrease their allotted time.

As matters progressed, counsel for GSXCCC was given the opportunity to cross-examine the witness panel. He reiterated his opposition to the time restriction imposed upon his clients for cross-examination. As the time allotted for his clients' cross-examination approached, the panel chair provided counsel for GSXCCC the opportunity to ask two further questions. At the conclusion of those questions, counsel for GSXCCC ceased cross-examining. No application was made to the Commission Panel to extend the time for cross-examination. Further, no submissions or explanations were provided to explain which areas were left unexplored and why they were necessary to disclose fully and fairly all matters relevant to the issues before the Commission Panel. The only other time limit placed upon cross-examination of a witness panel was with regard to BC Hydro's Panel 3.

As matters developed, the allotted time for cross-examination of Panel 3 proved more than adequate for the parties to test that witness panel's evidence by cross-examination.

In reaching the determination to place time limits upon cross-examination of witness panels, the scope of the issues to be determined in this proceeding and the nature of the evidence to be provided by Panels 1 and 3 from BC Hydro were considered. With regard to Panel 3, the time constraints proved to be adequate for the intervenors. With regard to Panel 1, the Panel Chair was of the view that adequate opportunity to cross-examine was provided to GSXCCC. In Exhibit No. A-38, it was contemplated that the Hearing Schedule may need to be extended to accommodate requests for extended cross-examination. If a party felt that it had been prejudiced as a result of the time constraint imposed upon it, it could have requested an extension to the allotment of time with submissions in support of the reasons why further cross-examination was required.

The parties who provided more detailed submissions on the reconsideration of Decision 3 appear to agree that it may be appropriate for limitations on cross-examination to be engaged in certain circumstances.

Given the nature of the filing leading to this section 71 hearing, which has been explained in the JIESC reconsideration decision (Exhibit No. A-36, Appendix A), and the requirements of the UCA and Administrative Tribunals Act, the Commission Panel considers that there is scope to limit cross-examination within the principles of natural justice. In the circumstances, the request for reconsideration of Decision 3 is denied.

The request for reconsideration of Decision 4 is also denied. GSXCCC and BC Hydro appear to agree that procedures for an oral hearing can vary depending upon which provisions of the UCA may be engaged in a filing or an application.

The Commission Panel rejects the submission of GSXCCC that the panel has arbitrarily denied rights to parties on a generalized, unspecified basis. The Commission considers that it has a discretion to determine its procedural rules depending upon which provisions of the UCA are engaged by a filing or application and the nature and scope of the proceeding it considers appropriate to establish to review the filing or application. However, the overriding concern is always that the parties be treated fairly in the context of the process established by the Commission to obtain the information it needs to discharge its public interest obligations. The Commission Panel notes that the Commission and intervenors have filed extensive interrogatories which have been answered to a large extent by BC Hydro and DPP and anticipates that the evidence adduced in this proceeding, including the evidence of intervenors, and the submissions of parties in respect thereto will assist the Commission to make its determination and fulfill its public interest obligations. The Commission Panel considers that in the circumstances of this filing the procedural constraints that have been imposed do not offend the principles of natural justice.

In conclusion, the request for reconsideration of Decisions 1 through 4 inclusive is denied.