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

LETTER NO. L-81-05

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

Log No. 10556, 10941

VIA E-MAIL
regulatory.affairs@terasengas.com

September 29, 2005

TGI-TGVI_ROE 2005 Exhibit A-12

Mr. Scott Thomson
Vice President, Finance and Regulatory Affairs
Terasen Gas Inc.
16705 Fraser Highway
Surrey, B.C. V3S 2X7

Dear Mr. Thomson:

Re: Terasen Gas Inc. ("Terasen Gas")
Terasen Gas (Vancouver Island) Inc.
Application to Determine the Appropriate Return on Equity ("ROE") and Capital Structure and to Review and Revise the Automatic Adjustment Mechanism

Please find attached Reasons for denying a request by the Joint Industry Electricity Steering Committee ("JIESC") that the Commission Chair should decide to not sit on this matter.

Yours truly,

Original signed by:

Robert J. Pellatt

RG/rt
cc: Registered Intervenors
Interested Parties

Terasen Gas Inc.
Terasen Gas (Vancouver Island) Inc.
Application to Determine the Appropriate Return on Equity ("ROE") and Capital Structure and to Review and Revise the Automatic Adjustment Mechanism

REASONS

Introduction

These are my reasons for denying a request by the Joint Industry Electricity Steering Committee ("JIESC") that I should decide to not sit on this matter. I will first identify the regulatory record. I will then comment on the facts raised by parties in their submissions and on other facts that I can recall. I will then state my conclusions regarding whether in law those facts support the allegation of a reasonable apprehension of bias.

The Regulatory Record

During the Procedural Conference, held on August 3, 2005, the JIESC first raised concerns regarding my sitting on the review of the Application and asked for certain information regarding my previous employment with West Kootenay Power Ltd. ("WKP") and an affiliate company (Transcript 1, pp. 3-19). By letter dated August 5, 2005 (Exhibit C2-2), the Commission provided further information. By letter dated August 25, 2005 (Exhibit C2-3), the JIESC filed their concerns that I should not sit on this proceeding because it will compromise the unbiased appearance of this proceeding. By letter dated August 8, 2005 (Exhibit A-7), the Commission requested comments from parties on the JIESC request, with the JIESC given a right of reply to any comments.

Comments were received from Commission Counsel (Exhibit A2-1), B.C. Old Age Pensioners' Organization et al. ("BCOAPO") (Exhibit C3-2), Heating, Ventilating & Cooling Industry Association of BC ("HVCI") (Exhibit C17-3), Vancouver Island Gas Joint Venture ("VIGJV") (Exhibit C20-2), BC Hydro (Exhibit C15-2), and Terasen Gas (Exhibit B-4). The JIESC's reply was filed as Exhibit C2-4 ("Reply Submission").

The Factual Background

The facts that were raised in support of the JIESC request are confined to events that occurred between 1989 and December 2001. During that time, I was employed by WKP and an affiliate company ("former employer"), which has since been sold to Fortis Inc. During my employment by my former employer, I was responsible for regulatory affairs. In that capacity I was responsible for, or directly made submissions in, many proceedings before the British Columbia Utilities Commission ("BCUC") and the Alberta Energy and Utilities Board ("AEUB").

At page 2 of Exhibit C2-3, the JIESC identifies the facts they believe to be relevant. The JIESC also says that my involvement with ROE matters was not peripheral or secondary. On behalf of my former employer, I was responsible for all regulatory filings during the period in question. I accept that my involvement was not peripheral or secondary. In its Reply Submission, the JIESC states that the following facts, "viewed cumulatively," would lead "a reasonable and informed person to conclude that I do not have the necessary appearance of objectivity to hear this matter" (Exhibit C2-4, p. 2):

a) a "12-year history of preparing and presenting evidence on matters involving Return on Equity (ROE), ROE adjustment mechanisms, and capital structure on behalf of West Kootenay Power, Utilicorp, Aquila BC and Aquila Alberta";
b) "assisting his employer to obtain the highest ROE possible"
c) "testifying, under oath, on his employers behalf before the Commission"; and
d) "directly instructed Terasen's prime witness, Kathleen McShane, on issues similar to or identical to those arising in this hearing."

Both the JIESC and VIGJV say that I testified in ROE and capital structure proceedings. The VIGJV states:

> The Chair has given evidence in return on equity proceedings. To the extent that such evidence dealt with policy considerations or was supportive of principles advocated by rate of return expert witnesses, perhaps even Ms. McShane, the Chair has adopted positions, under oath, that may be seen as compromising his objectivity in relation to the Application. We see this as materially different from merely having been a participant in other regulatory hearings or even having acted previously as an advocate of a particular position. We understand that it might be desirable for Commissioners to be knowledgeable and to have experience in utility regulation and that it is not reasonable to expect that Commissioners will be completely unencumbered by a regulatory history. However, when their background involves having given sworn testimony on matters that may be at issue in a particular proceeding, we submit that there is an important substantive distinction. In that circumstance, how can participants be confident of an objective decision fairly based on the record of the proceeding? (Exhibit C20-2, p. 2)

The above passage is quoted in its entirety in the JIESC's Reply Submission (Exhibit C2-4, p. 3). The JIESC in its Reply Submission states:

> This case involves a highly unique situation on issues where the Chair was previously intimately involved in directing his employer utility's case on the same or virtually identical issues to the point that he took the stand to articulate those positions and he instructed the lead witness for the Applicant, on identical or very similar issues, over an extended period of time (Exhibit C2-4, p. 2).

Given this emphasis on testimony I gave regarding ROE and capital structure, I believe I should address this concern. The JIESC and VIGJV have not provided references for their comments regarding testimony. In reviewing the public record I cannot find any occasion when I testified on ROE and capital structure issues. On my review of the record the only proceeding that may be of concern to the JIESC and VIGJV was the proceeding for approval of rates effective January 1, 1996 for WKP. That proceeding was a review of a Settlement Agreement in which Ms. McShane filed evidence but did not testify. The Vice President Finance testified to ROE and capital structure issues, and my testimony was limited to issues related to incentive mechanisms (Transcript dated June 27, 1995, pp 40- 110). Not to suggest that my involvement in ROE and capital structure issues was peripheral or secondary, but testifying to ROE and capital structure issues was not my responsibility, and I believe I have never testified to ROE and capital structure issues.

The JIESC, VIGJV, BCOAPO, and HVCI comment on my former professional relationship with Ms. McShane. I can offer only the following comments in response. I have vague recollections of discussions with Ms. McShane, and I cannot recall any specific instructions to Ms. McShane. My only recollection of any substantive issue discussion is limited to an explanation of differences in taxation between the U.S. and Canada. Yet, even with respect to that explanation, I cannot recall the proceeding that we were discussing.

I do not recall the last time I had a discussion with Ms. McShane, although the record suggests that it was in 1999. I can confirm that I have had no discussions with Ms. McShane since December 2001 other than those that are a matter of public record when Ms. McShane gave testimony on matters in a recent proceeding (PNG Income Trust) over which I was presiding. I believe that the public record is the best source for an examination of the instructions that I gave Ms. McShane.

The JIESC states that members of the AEUB do not hear matters with respect to utilities with which they have been previously associated. The AEUB issued its Generic Cost of Capital Decision 2004-052 on July 2, 2004. One of the presiding AEUB Panel Members was RG. Lock, formerly employed by ATCO Gas.

The Law and Reasonable Apprehension of Bias

The JIESC submits that the facts establish a reasonable apprehension of bias. No party has raised actual bias concerns.

The following three cases have been referred to me by counsel: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623; Committee for Justice and Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369;* and *Wewaykum Indian Band v. Canada, [2003] 2 S.C.R. 259.*

Commission Counsel provides the test as follows:

> The test to be applied in determining whether the Chair should not hear this proceeding is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude. Would the person think that [it] is more likely than not that the Chair, whether consciously or unconsciously, would not decide fairly? (*Wewaykum Indian Band v. Canada, [2003] 2 S.C.R. 259) (Exhibit A2-1, pp. 1, 2*)

The JIESC states:

> Moreover, the Chair directly instructed Terasen's prime witness, Kathleen McShane, on issues similar or identical to those arising in this hearing. This work experience in particular could affect his assessment of her credibility in a way that is not transparent to others involved in the hearing. These circumstances, viewed cumulatively, would certainly lead a reasonable and informed person to conclude that the Chair, intentionally or unintentionally, consciously or unconsciously, does not have the necessary appearance of objectivity to hear this matter (Exhibit C2-4, p. 2).

Further, the JIESC states:

> In our submission a reasonable person could not realistically view anyone this closely tied historically to one perspective – the utility perspective – on the issues in this case as impartial. Rather we submit that a reasonable person would be concerned that the Chair's presence on the hearing panel would severely compromise its impartiality and the "unbiased appearance" found by the Supreme Court of Canada to be an essential part of procedural fairness" (Exhibit C2-3, p. 3).

I find that the factual background does not support any other allegations that might lead me to conclude that I should recuse myself for a reasonable apprehension of bias. The JIESC request, therefore, fails or succeeds on whether or not concerns regarding "anyone this closely tied historically to one perspective – the utility perspective" and instructions to "Terasen's prime witness, Kathleen McShane, on issues similar or identical to those arising in this hearing" raise a reasonable apprehension of bias.

I agree with the following submission of Terasen Gas:

> The essence of the August 25 letter of Mr. Wallace is that Mr. Hobbs has worked for a public utility regulated by the Commission (which may be affected by the decision on the application of TGI and TGVI) and has worked with a witness being called by TGI and TGVI, and therefore should disqualify himself (Exhibit B-4, p. 2).

It can be fairly said, as was said by the JIESC, that while acting on behalf of my former employer I had one perspective – the utility perspective. The first question that I must answer is whether or not such a perspective

held over many years raises a reasonable apprehension of bias. On my reading of the case law, I conclude it does not. As was said by Laskin C.J. in *Committee for Justice and Liberty* at paragraph 46*:*

> Members of administrative boards acquire their expertise by virtue of previous exposure to the industry which they are appointed to regulate. The system would not work if it were not premised on the assertion of faith in those appointed to adjudicate:
>
> > It is to be assumed that a body of men entrusted by the Legislature with large powers affecting the rights of others will act with good faith.
> >
> > Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.
> >
> > Unitied States v. Morgan (1940), 313 U.S. 409 at page 421, per Mr. Justice Frankfurter

Prior employment, in this case by a utility, does not in and of itself raise a reasonable apprehension of bias. In this regard, I refer to the excerpt from *Newfoundland Telephone Co.* quoted by Commission Counsel (Exhibit A2-1, p. 3). I also conclude that the submissions of the JIESC regarding the "one perspective – the utility perspective" does not raise a reasonable apprehension of bias. As was said by Hyde J. of the Quebec Court of Appeal in R. v. Picard et al. and quoted by Laskin C.J. in *Committee for Justice and Liberty* at paragraph 45:

> Professional persons are called upon to serve in judicial, quasi-judicial and administrative posts in many fields and if Government were to exclude candidates on such ground, they would find themselves deprived of the services of most professionals with any experience in the matters in respect of which their services are sought. Accordingly, I agree with the Court below that this ground was properly rejected.

If my employment by a utility does not in and of itself raise a reasonable apprehension of bias, then my performance of those duties from the perspective of my former employer cannot result in a reasonable apprehension of bias. A reasonable person would assume that I fulfilled my employment responsibilities from the perspective of my former employer. Therefore, I conclude that the only issue for consideration is whether or not instructions to "Terasen's prime witness, Kathleen McShane, on issues similar or identical to those arising in this hearing" raise a reasonable apprehension of bias. As I have stated earlier, I have no recollection of the instructions that I gave to Ms. McShane.

It is instructive that in *Newfoundland Telephone Co.* the comments by the Commissioner made prior to the filing of the application were found not to support a finding of an apprehension of bias. And yet those comments spoke directly to expenses that were to be considered by the Commission in that proceeding.

Cory J. said at paragraph 36: "Once the matter reaches the hearing stage a greater degree of discretion is required of a member." And at paragraph 34 he said "As long as those statements (pre-application statements) do not indicate a mind so closed that any submissions would be futile, they should not be subject to attack on the basis of bias." If the statements made by the Commissioner in the Newfoundland case, prior to the filing of the application, were not considered to raise a reasonable apprehension of bias, then I believe it follows that instructions to a witness made on behalf of an employer more than six years ago about a different proceeding cannot seriously be considered as support for a reasonable apprehension of bias request in this proceeding.

The Application is filed pursuant to Sections 59 and 60 of the Utilities Commission Act; the ratemaking sections of the Utilities Commission Act. As was said by Cory J. in *Newfoundland Telephone Co.* at paragraph 32:

> When determining whether any rate or charge is "unreasonable" or "unjustly discriminatory" the board will assess the charges and rates in economic terms. In those circumstances the board will not be dealing with legal questions but rather policy issues. The decision-making process of this board will come closer to the legislative end of the spectrum of administrative boards than to the adjudicative end.

ROE and capital structure is an element of every decision setting rates, although due to the ROE adjustment mechanism and the less frequent reviews of capital structures, previous Commission decisions are usually relied on to determine this element of rates. As I have said, I believe the JIESC request turns on the significance of instructions that I gave to Ms. McShane regarding issues that the JIESC submits are similar to or identical to those that I will adjudicate in this proceeding. However, as was said by Cory J. in *Newfoundland Telephone Co.* at paragraph *29:*

> In the end, however, commissioners must base their decision on the evidence which is before them. Although they may draw upon their relevant expertise and their background of knowledge and understanding, this must be applied to the evidence which has been adduced before the board.

The Commission Panel must base its decision on the evidence that has been filed in this proceeding. In that regard, it is not significant that more than six years ago I gave instructions to Ms. McShane in prior proceedings that addressed issues that are similar to the subject matter of this proceeding. I had no involvement in the development of the evidence in this proceeding. As BC Hydro submits:

> Mr. Wallace's suggestion is akin to suggesting that judges who, while in practice, typically acted for insurers are unable to adjudicate plaintiffs' claims that could result in an insurance settlement. Or, to take another example, should former prosecutors be disqualified from hearing criminal matters on the basis that, during their professional careers, they routinely sought convictions? (Exhibit C15-2, p. 1)

On this issue, I also agree with the following Terasen Gas submission:

> The natural extension of the submissions of JIESC and others supporting its position is that Commissioners such as Mr. Hobbs should disqualify themselves if a party to a proceeding raises a concern regarding reasonable apprehension of bias on the basis that the Commissioner has had involvement in the past with an issue similar to the issue before the Commission. As noted in the quotation above, to avoid such potential disqualifications would lead to the appointment of persons who have never been involved in the regulation of public utilities. Such a result would not be desirable (Exhibit B-4, p. 2).

The BCUC benefits from the participation of many witnesses and counsel that have been involved in our proceedings in one capacity or another over many years. Counsel for Terasen is correct when he states that the JIESC has called an expert witness, on their own behalf, that I have given instructions to over many years. Moreover, at least two counsel that regularly appear before me have also been retained by me during my prior employment. On this issue, I find the comments of Terasen helpful. If I accept the submissions of the JIESC, then I would need to establish a "different bias standard" for Ms. McShane in this proceeding than other witnesses that I have worked with in the past, and I might add a "different bias standard" for Ms. McShane in different proceedings. I will not explore that possibility because I believe it would become completely unworkable, and I believe there is no foundation for such a standard or approach in law.

I also conclude that our system would not work if it were not premised on the assertion of faith in those appointed to adjudicate. Although judges may often recuse themselves where it is not legally necessary, I agree with the BC Hydro submission:

> It is anxious, however, that in determining whether to continue hearing this particular application, the Chair not accept the far too broad submissions made by the JIESC as the basis for standing down. The Chair should only stand down if he concludes that based on his specific involvement with West Kootenay Power and its affiliated companies and the nature of West Kootenay's interest in this proceed, a reasonable person would consider him unable to render an unbiased decision (Exhibit C15-2).

As I wrote in a letter dated July 13, 2005 regarding the selection and appointment of Panel members:

> The Utilities Commission Act gives authority to the Commission Chair to appoint Commissioners to Panels and to designate a Commissioner as the Panel Chair. There are no stated practices or guidelines regarding appointments. Once appointed, the public may make an application for a Commissioner to be recused on grounds that are a matter of law. However, the appointment of Panel members is within the sole discretion of the Commission Chair. The Commission Chair does not discuss appointments with the public, and does not have an obligation to provide reasons for such appointments.

The JIESC states: "The cumulative concerns that the JIESC, the BCOAPO, the HVCI, and the VIGJV have are serious enough to warrant this recusal." (Exhibit C2-4, p. 4) The issues raised by BCOAPO, HVCI, and VIGJV have all been addressed in my conclusions regarding the submissions of the JIESC, and I give no weight to the fact that those issues are raised by several participants in this process.

I find that a reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, would conclude that I will decide fairly.

In concluding my reasons, I refer to the following quote from the *Wewaykum Indian Band* decision provided by Commission Counsel:

> First, it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. (Exhibit A2-1, p. 2)

DATED at the City of Vancouver, in the Province of British Columbia, this 29th day of September 2005.

Original signed by:

Robert H. Hobbs
Chair