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BRITISH COLUMBIA UTILITIES COMMISSION

ORDER NUMBER G-125-06

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IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

An Application by Ms. Pam Sutherland, Dr. Kyong Nam, and Mr. Mark Warwarick
for a Reconsideration of the July 7, 2006 Commission Decision and Order No. C-4-06
relating to the British Columbia Transmission Corporation
Application for a Certificate of Public Convenience and Necessity
for the Vancouver Island Transmission Reinforcement Project

BEFORE: R.H. Hobbs, Chair
N.F. Nicholls, Commissioner
L.A. O'Hara, Commissioner

October 6, 2006

O R D E R

WHEREAS:

A. By application dated July 7, 2005, the British Columbia Transmission Corporation ("BCTC") requested that the British Columbia Utilities Commission (the "Commission") grant a Certificate of Public Convenience and Necessity ("CPCN") pursuant to Sections 45 and 46 of the Utilities Commission Act (the "Act"), for the Vancouver Island Transmission Reinforcement Project (the "VITR") to reinforce the electricity transmission system serving Vancouver Island and the Southern Gulf Islands (the "VITR Application"); and

B. The Public Hearing commenced on February 6, 2006 in Vancouver and the evidentiary phase of the proceeding closed on March 23, 2006. The Written Argument phase of the proceeding was completed when BCTC filed its Reply Submission on May 16, 2006, and the Oral Phase of Argument, including submissions regarding motions by a number of parties, was heard on May 30 and 31, 2006; and

C. On July 7, 2006 the Commission issued its Decision ("VITR Decision") pursuant to Sections 45 and 46 of the Act granting a CPCN to BCTC for the VITR Project; and

D. By letter dated August 7, 2006 ("Reconsideration Application"), Ms. Pam Sutherland, Dr. Kyong Nam, and Mr. Mark Warwarick ("Sutherland et al.") requested a reconsideration of the VITR Decision; and

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E. By letter dated August 11, 2006, the Commission established a first phase process for the Reconsideration Application. The first phase process provided an opportunity for written comments from BCTC, Intervenors and Interested Parties on September 8, 2006 with written reply by Sutherland et al. by September 29, 2006; and

F. The Commission has reviewed the submissions and has prepared its Reasons for Decision.

NOW THEREFORE the Commission denies the Reconsideration Application and issues its Reasons for Decision attached as Appendix A to this Order.

DATED at the City of Vancouver, in the Province of British Columbia, this 6th day of October 2006.

BY ORDER

Original signed by:

Robert H. Hobbs
Chair

Attachment

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for a Reconsideration of the July 7, 2006 Commission Decision and Order No. C-4-06
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Application for a Certificate of Public Convenience and Necessity
for the Vancouver Island Transmission Reinforcement Project

REASONS FOR DECISION

By letter dated August 7, 2006 ("Reconsideration Application"), Ms. Pam Sutherland, Dr. Kyong Nam, and Mr. Mark Warwarick ("Sutherland et al.") requested a reconsideration of the VITR Decision dated July 7, 2006 ("VITR Decision"). By letter dated August 11, 2006, the Commission established a first phase process for the Reconsideration Application. The first phase process provided an opportunity for written comments from BCTC, Intervenors and Interested Parties on September 8, 2006 with written reply by Sutherland et al. by September 29, 2006. The Commission has reviewed the submissions, and provides the following reasons for denying the Reconsideration Application.

The Reconsideration Application alleges that the Commission has made errors both in fact and in law and that the errors have significant material implications to the Tsawwassen homeowners. The grounds that are relied on relate to the Tsawwassen First Nation Right of Way Agreement (the "TFN ROW Agreement"), the extent of BCTC's discussions with the TFN, and the existing ROW Agreements in Tsawwassen (the "TSW ROW Agreements"). The Commission concludes that the Applicants do not rely on a fundamental change in circumstances or facts since the Decision, that a basic principle had not been raised in the original proceedings, nor that a new principle has arisen as a result of the Decision, which are the other criteria that the Commission applies to determine whether or not a reasonable basis exists for allowing reconsideration.

TFN ROW Agreement

The submissions of the Corporation of Delta regarding the TFN ROW Agreement are the most helpful in framing the issues arising from the TFN ROW Agreement:

> "…, with respect to the first criteria, Delta is respectfully of the view that the Commission erred in both fact and law in concluding that a new agreement would be required for Option 4 over lands in the Tsawwassen First Nation ("TFN"). This is based largely on the Commission's treatment of the evidence upon which the Commission reached its decision. Further, Delta submits that it was prejudiced by a clear breach in the rules of procedural fairness in the process and not *given an appropriate opportunity to pursue the matter at issue during the hearing*, which amounts to a further error of law" (italics added to original) (Delta Submission, p. 2).

The Commission concluded at pages 28-29 of the VITR Decision that Delta was "given an appropriate opportunity to pursue the matter at issue during the hearing". As stated in the VITR Decision, counsel for Delta did not pursue this opportunity during the hearing for reasons that were not clear until the Oral Phase of Argument. Regarding the Commission treatment of the evidence upon which the Commission reached its decision, the Commission notes the comments made in the VITR Decision at page 29 and quoted by BCTC in their submission at page 3:

> "The Commission Panel concludes that Delta could have pursued the matter with the Commission Panel earlier, following the filing of B1-134, as contemplated by the Chair. **Moreover, the Commission Panel finds that there is little probative value in the documents requested because the record concerning the requirement for an additional ROW through TFN lands is adequate. The motion is dismissed"** (bold in original).

The Commission further concluded at page 101 of the VITR Decision:

> "The Commission Panel concludes that a new agreement with TFN would be required for Option 4 based on the evidence in this proceeding taken in the context of comments from counsel for Delta. In this regard the Commission prefers the evidence of the witnesses for BCTC (T17:3016) to the evidence of the witness for Delta" (T22:4172).

The Applicants now state at page 2 of the Reconsideration Application that the "ROW Agreements already in place give BC Hydro, and by definition BCTC, the right to do anything that they darn well please". This is effectively the same submission that was made during the proceeding, and was rejected by the Commission.

The Commission finds no error was made when the Commission concluded that the record concerning the requirement for an additional ROW through TFN lands was adequate and based on that evidence concluded that a new agreement would be required for Option 4. With respect to the second criterion regarding material implications of the error, the Corporation of Delta submits at page 2:

> "that the issues related to access over TFN lands played a significant part in the Commission's preference for the Option 1 route over the Option 4 route. This includes the Commission's findings on the existence and nature of impacts of Option 4 on the TFN, and ultimately leads to the Commission's findings on the incremental costs of Options 1 and 4".

The Commission accepted that the "existence and nature of impacts of Option 4 on the TFN" were significant and as stated at page 101 of the VITR Decision:

> "… the incremental costs and First Nations impacts are of considerable concern to the Commission Panel and are determinative of the preference for Option 1 over Option 4".

However, the Commission does not accept the view that the issues related to the TFN Agreement affect "the existence and nature of impacts of Option 4 on the TFN" as claimed by Delta. Whether or not BCTC has the right to the use of the land along Highway 17 does not change the impacts of Option 4 on the TFN. Therefore, even if an error was made when the Commission decided that a new agreement with TFN for Option 4 would be required, it does not necessarily follow that the error would be material to the Decision.

Extent of BCTC's Discussions with TFN

The second ground in the Reconsideration Application appears to be centered on the Applicants' comments that "it behooves [sic] BC Hydro/BCTC to pursue more meaningful dialogue in order to reach an equitable agreement with First Nations before indulging in discriminatory practices against their neighbours in the Town of Tsawwassen". These comments appear to be in support of an argument that, regardless of what the existing TFN Agreement allows, BCTC or BC Hydro should have taken further steps to negotiate an agreement with the TFN to allow Option 4 to be built.

The issue of whether BCTC or BC Hydro could have gone further in their discussions with the TFN is fully addressed at page 101 of the VITR Decision. The Commission found that while an "exchange" of Pole 1 for the right to construct new facilities was not appropriate from a reliability perspective; BCTC should still have pursued another means of obtaining TFN support and that more information with respect to the views of the TFN regarding compensation may have been helpful. As stated in the VITR Decision, after BCTC made its commitment not to recommend Option 1, it was reasonable to expect that compensation for Option 4 would have been discussed with the TFN. However, as BCTC states, notwithstanding the conclusion regarding compensation discussions, the Commission still came to the conclusion that Option 1 was preferable to Option 4. The Commission concludes that it was not an error to prefer Option 1 over Option 4 when there were no compensation discussions with the TFN, despite a reasonable expectation of such discussions.

Tsawwassen ROW Agreements

The Applicants state at page 2 of the Reconsideration Application:

> "BCTC's plan for the Tsawwassen overhead easement involves a new concept and a brand new application of enormous power capacity and not simply an "upgrade" to an archaic structure about to be decommissioned. They have no legal right …"

In support of this ground, the Applicants make a number of comments including that: "the contents of the prevailing Easement document state clearly the limitations and conditions of use"; the *Hillside Farms* decision is "totally different to the Tsawwassen situation"; "it would have been a terrific idea if the Commissioners had actually availed themselves of the easement documents and read them".

The Commission at page 92 of the Decision states:

> "… regarding the selection of the preferred route through South Delta amongst Options 1, 2 and 3, the Commission Panel concludes that it should give considerable weight to two considerations: 1) the existing ROW, particularly in these circumstances where most residents bought their properties with knowledge of the existing ROW, and 2) the limited incremental impacts associated with the upgrade."

At page 105 of the VITR Decision, (Section 6.5 "ROW Agreements") the Commission states:

> "If the ROW agreements provide BCTC with the right to build Option 1, then Option 1 has advantages over the other options that are relevant to the Commission Panel's selection of the preferred Option."

The Commission then considers the issue of whether or not the ROW Agreements provide BCTC with the right to build Option 1, and concludes that the ROW agreements can reasonably be assumed to provide the right to build Option 1. Similar submissions to those made by Sutherland et al. and others in this reconsideration proceeding have previously been made and considered by the Commission, and do not now provide a prima facie case of error. Therefore, on this ground the reconsideration application is denied. Ultimately, this is a matter for the courts. If the Commission erred in concluding that it could assume the TSW ROW Agreements provide BCTC with the right to build Option 1, then this error would be material to the Decision. At page 6 of its submission BCTC states:

> "The Reconsideration Application asserts that the alleged errors have had significant material implications to the Tsawwassen homeowners affected. However, there is little, if anything, in the Reconsideration Application which addresses this portion of the test for reconsideration. In particular, the Applicants fail to address that the individual grounds on which they apply for reconsideration were only a small fraction of numerous and varied considerations on which the Commission made its Decision, none of the others of which have been challenged by the Applicants; and there is nothing in the Commission's Decision that suggests, even if the Commission's determination on one or more of the grounds alleged had been different, that this would have had a significant material impact on the Decision as a whole."

The Commission generally agrees, and specifically that "individual grounds … were only a small fraction of numerous and varied considerations" relevant to the VITR Decision. However, in the event that the courts conclude that BCTC does not have the right to build Option 1 as is assumed in the VITR Decision, then either BCTC or the Applicants are invited to file an application seeking reconsideration of this Decision.

Chapter 4 of A Participants' Guide to the British Columbia Utilities Commission identifies the criteria that the Commission generally applies to determine whether a reasonable basis exists to allow a reconsideration. An application for reconsideration proceeds in two phases. In the initial screening phase, the applicant must establish a prima facie case sufficient to warrant full consideration by the Commission. For the reasons stated above, the three grounds set forth in the Reconsideration Application do not meet the criteria for a reconsideration application to proceed to the second phase.