



SIXTH FLOOR, 900 HOWE STREET, BOX 250
VANCOUVER, BC V6Z 2N3 CANADA
web site: <http://www.bcuc.com>

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER E-13-12**

TELEPHONE: (604) 660-4700
BC TOLL FREE: 1-800-663-1385
FACSIMILE: (604) 660-1102

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

and

**An Application by the Industrial Customers Group
for Reconsideration of Order E-29-10 regarding a Capacity Purchase Agreement
between FortisBC Inc. and Waneta Expansion Power Corporation**

BEFORE: L.F. Kelsey, Commissioner
L.A. O'Hara, Commissioner April 13, 2012
D.A. Cote, Commissioner

ORDER

WHEREAS:

- A. By Order E-1-12 dated January 23, 2012 the British Columbia Utilities Commission (Commission) determined that a process should be initiated to determine whether the Executed Capacity Purchase Agreement (WAX CAPA), between FortisBC and Waneta Expansion Power Corporation and a Justification Report in relation to the Waneta Expansion Power Project (the Filing) should continue to be held confidential by the Commission;
- B. The Commission has yet to decide whether a hearing pursuant to section 71 of the *Utilities Commission Act* (Act) should be held to determine whether the Executed WAX CAPA is in the public interest;
- C. The Commission received submissions from FortisBC, the Industrial Customers Group, and Alan Wait on the need to maintain confidentiality of the WAX CAPA and the Justification Report; and
- D. The Commission has considered the submissions of the parties.

NOW THEREFORE pursuant to section 71 of the Act and for the reasons expressed in the Reasons for Decision, attached as Appendix A to this Order, the Commission determines as follows:

- 1. The Executed WAX CAPA and Justification Report will continue to be held confidential by the Commission pending the Commission's decision as to whether a hearing is necessary to determine whether the Executed WAX CAPA should be accepted as being in the public interest.

DATED at the City of Vancouver, in the Province of British Columbia, this 16th day of April 2012.

BY ORDER

Original signed by:

L.F. Kelsey
Commissioner

Attachment

An Application by the Industrial Customers Group
for Reconsideration of Order E-29-10 of a Capacity Purchase Agreement
between FortisBC Inc. and Waneta Expansion Power Corporation

REASONS FOR DECISION

By Order E-29-10 dated September 23, 2010, the British Columbia Utilities Commission (Commission) accepted a filing by FortisBC Inc. (FortisBC) pursuant to section 71 of the *Utilities Commission Act* (Act) of a Capacity Purchase Agreement (WAX CAPA) between FortisBC and Waneta Expansion Power Corporation (WEPC) and a Justification Report in relation to the Waneta Expansion Power Project (the Filing) and agreed to hold confidential both documents;

On November 18, 2011, FortisBC filed the Executed version of the WAX CAPA. The Executed WAX CAPA appeared to contain some substantive differences from the agreement accepted for filing by Order E-29-10. FortisBC requested that the Commission continue to maintain confidentiality over the Executed WAX CAPA and the Justification Report.

By Order E-1-12, the Commission requested that FortisBC provide its submissions related to the need to maintain confidentiality to the Commission and provided an opportunity for those parties wishing to participate in the review of FortisBC's request for confidentiality to provide their submissions. FortisBC was also provided the opportunity to submit reply submissions. All parties were asked to address the provisions of the Commission's Confidential Filing Practice Directive in their submissions. FortisBC, the Industrial Customers Group (ICG) and Alan Wait provided submissions on the request for confidentiality.

Pursuant to Order E-1-12, FortisBC filed its submission by letter dated February 6, 2012. FortisBC submits that the commercially sensitive nature of the WAX CAPA and the Justification Report has already been determined by the Commission when Order E-29-10 was issued. Even though the Executed WAX CAPA may contain certain substantive changes from the earlier version, the commercially sensitive nature of its contents has not changed and neither has the justification for the WAX CAPA as set out in the Justification Report.

FortisBC submits that the Commission's Confidential Filing Practice Directive has no application in the present circumstances because the directive, by its own words, only applies to public hearings and no public hearing has been ordered to be held to review the WAX CAPA.

FortisBC submits even if the directive applies, however, the order for confidentiality should be maintained. Specifically, FortisBC submits that the WAX CAPA and Justification Report contain sensitive information not in the public domain regarding the terms and conditions on which FortisBC will purchase capacity from the Waneta Expansion Limited Partnership (WELP). The sensitive information includes:

- a. the price of capacity to be purchased;
- b. the existence of FortisBC's option to extend the term of the WAX CAPA and the mechanism to establish the price of capacity during the extended term;
- c. the allocation of risk between WELP and FortisBC regarding timing of commencement of operation of the Waneta Expansion Project;
- d. the mechanism for adjusting the price of capacity in the event of a shortfall in agreed-upon capacity deliveries;

- e. the allocation as between WELP and FortisBC of risk regarding curtailment of energy and capacity deliveries in the event of forced outages;
- f. the allocation as between WELP and FortisBC of responsibility for new system constraints imposed either under the Canal Plant Agreement or otherwise;
- g. limitations on the parties' respective liability in the event of breach; and
- h. termination rights.

FortisBC also submits that the WAX CAPA and Justification Report together contain commercially sensitive information about how FortisBC will integrate the WAX CAPA into its overall power supply portfolio, including how FortisBC plans to market, and the value it expects to receive from, surplus capacity.

FortisBC submits that it has consistently treated the WAX CAPA and Justification Report as confidential. It has not publicly released or agreed to the public release of any confidential information in either document.

FortisBC submits that disclosure of the commercially sensitive information could reasonably be expected to result in undue material financial loss to FortisBC or significant harm or prejudice to FortisBC's competitive or negotiating position, and, therefore, also to the interests of its ratepayers. FortisBC plans to use the capacity provided by the WAX CAPA to engage in certain market activities including the sale of surplus capacity to third parties. FortisBC submits that forecast rate impacts associated with WAX CAPA reflect certain assumptions about revenue it expects to realize from the market activities. If the terms and conditions on which FortisBC acquires capacity are known to the market, then FortisBC will be prejudiced in its ability to negotiate advantageous terms thereby negatively affecting ratepayers.

FortisBC also submits that there is no competing public interest to be served by the disclosure of the WAX CAPA. Further process on the WAX CAPA will deprive the parties of the certainty provided by Order E-29-10 and could create a cascade of deleterious effects in the Province.

Finally, FortisBC submits that it does not believe it is possible to produce a redacted copy of either the WAX CAPA or the Justification Report that is in any way meaningful or useful. Each document is replete with the confidential information such that the vast majority of the provisions of both documents would have to be redacted almost entirely.

The ICG submits in its letter dated February 17, 2012, that Order E-1-12 established the first step in the process for review of the Executed WAX CAPA pursuant to section 71 of the Act. Therefore, the ICG submits that FortisBC's reference to the need for confidentiality being previously determined by Order E-29-10 is outside the scope of this review. The ICG submits that if the Executed WAX CAPA is not to be reviewed as a new filing under section 71 of the Act, then it is necessary to consider the submissions of the ICG regarding the cancellation of Order E-29-10 or the second phase of the reconsideration of Order E-29-10. In response to the FortisBC submission that the Confidential Filing Practice Directive does not apply, the ICG submits that it has made extensive submissions that ratepayers should have an opportunity to review the agreement in a hearing. If the Commission agrees, then the Practice Directive would apply. Further, even though the Practice Directive may not be binding on the Commission, the executed version of the WAX CAPA and the Justification Report must be

made public unless the Commission decides that it is in the public interest that the documents not be disclosed as per subsections 71(1) and (5) of the Act and section 41 of the *Administrative Tribunals Act*.

The ICG submits that the Commission has the discretion to authorize or order disclosure of commercially sensitive information where it is satisfied that the public interest is better satisfied by an open and fair process. Ratepayers should know all the details of the transaction and any justification provided by FortisBC. The Commission must protect ratepayers from harm that may arise as a result of the self-dealings between a utility and its affiliate. The results of the self-dealings must be reviewed with the full participation of those who will be affected.

The ICG proposes that the Commission should grant access to the confidential information to all parties, including their counsel, consultants and experts, once the necessary confidentiality undertakings have been signed and filed.

Mr. Wait by letter dated February 20, 2012, supports the release of as much of the Executed WAX CAPA as is possible because the Commission is considering the Integrated Systems Plan for FortisBC and the agreement is being presented as the solution for many years to FortisBC's capacity requirements. Mr. Wait submits that while the price is important considering this may not be a completely arm's length transaction, he is prepared to accept receipt of a copy of the agreement with prices redacted.

By letter dated March 5, 2012, FortisBC responds to the ICG submission regarding the relevance of its submissions by emphasizing that Order E-29-10 remains in place and applies regardless of the changes made to WAX CAPA in its executed form. Order E-1-12 does not establish a fresh review of WAX CAPA and non-application of Order E-29-10. FortisBC also submits that the ICG have mischaracterized the rationale for confidentiality by stating that confidentiality is appropriate only to "protect the interests of a customer from release of customer specific information or to protect the interests of a third party into a competitive bid process." FortisBC submits that confidentiality is determined by a consideration of "undue material financial loss or gain to a person" or whether there will be "significant harm or prejudice to that person's competitive or negotiating position."

FortisBC opposes the release of the WAX CAPA and Justification Report to the ICG, even if they are not made generally available to the public. FortisBC notes that at least one member of the ICG is part of the very marketplace in which FortisBC seeks to preserve its position for the benefit of its ratepayers as a whole.

Finally, FortisBC opposes Mr. Wait's submission that the redacted WAX CAPA be produced so it can be dealt with in the hearing related to the 2012 Integrated System Plan. FortisBC submits that the ISP hearing should not be expanded to include WAX CAPA.

The Commission Panel determines that the Executed WAX CAPA and Justification Report will continue to be held on a confidential basis at this time and will remain confidential until the Commission determines if a hearing pursuant to section 71 of the Act should be held. If the Commission decides to hold a section 71 hearing on the WAX CAPA, the Commission will give consideration to putting in place the necessary and appropriate measures to balance the need for confidentiality against the need for disclosure to facilitate effective participation in a hearing. If the Commission decides that a section 71 hearing is not necessary, then the WAX CAPA and the Justification Report will be held confidential. The Commission Panel has come to this determination for the reasons expressed below.

The Commission accepts as a starting point that utility filings should be made public. However, in certain circumstances, usually as a result of commercial sensitivities, the Commission accepts filings on a confidential basis. The Act specifically contemplates section 71 filings being held by the Commission on a confidential basis. Subsection 71(5) of the Act provides that an energy supply contract or other information filed must be made available to the public unless the Commission considers that disclosure is not in the public interest.

The Commission's Confidential Filing Practice Directive addresses the procedure and considerations the Commission will invoke when receiving requests for confidential filings in public hearings. FortisBC and the ICG made submissions regarding the applicability of the practice directive outside of a public hearing. The Commission Panel is of the view that the principles contained in the Confidential Filing Practice Directive should apply regardless of whether or not a document is filed during the course of a public hearing. Parties who request that the Commission hold a document in confidence are required to explain why the request is being made and the basis for it. If another party wants access to the filing, it can make the request and the Commission will set a process to determine if disclosure in whole or part is warranted and upon what terms or conditions.

In this instance, the Commission Panel is satisfied that the public interest requires the WAX CAPA and Justification Report be kept confidential unless a section 71 hearing is going to be held. The Commission Panel has reviewed the WAX CAPA and Justification Report and is satisfied that for the reasons expressed by FortisBC both documents contain commercially sensitive information which if disclosed could reasonably be expected to harm the competitive negotiating position of FortisBC with regard to the sale of surplus capacity. If the competitive negotiating position of FortisBC is harmed, then it is likely to cause adverse effects for ratepayers. The Commission Panel is convinced that disclosure of the commercially sensitive information is not in the public interest at this time.

Further, the Commission Panel has considered the possibility of ordering the release of a redacted copy of the WAX CAPA and Justification Report. The Commission Panel agrees with the submission of FortisBC that the two documents are so replete with commercially sensitive information that ordering production of a redacted version deleting the commercially sensitive information would be meaningless.

In making this determination, the Commission Panel did not rely on the assertion that at least one member of the ICG is a competitor in the very marketplace in which FortisBC seeks to preserve its position for the benefit of ratepayers. The Commission has made its determination based on the fact that disclosure to the public, including all of the current and future competitors of FortisBC, is not in the public interest because of the potential harm to FortisBC's negotiating position and the deleterious effect that would have upon ratepayers if the commercially sensitive information was released and used to compromise the price paid by a third party for the sale of surplus capacity by FortisBC. The fact that a member of the ICG may be viewed as a competitor to FortisBC, however, is something the Commission will take into consideration in determining what disclosure should be made, how it should be made, and to whom if it decides a section 71 hearing is going to be conducted. Parties to a section 71 hearing will need disclosure of some information if they are to participate effectively.

At this time, the Commission is conducting its usual review process of the Executed Version of the WAX CAPA which contains certain substantive changes from the agreement accepted for filing by Order E-29-10 and the Justification Report to determine whether a hearing is necessary to decide whether the agreement is in the public interest.