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**BRITISH COLUMBIA  
UTILITIES COMMISSION**

**ORDER  
NUMBER G-11-12**

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

**and**

**2012 Negotiated Settlement Process  
Policy, Procedures and Guidelines**

**BEFORE:** L.F. Kelsey, Commissioner February 2, 2012

**O R D E R**

**WHEREAS:**

- A. On January 20, 2011, the British Columbia Utilities Commission (the Commission) held a stakeholders meeting to review the January 2001 Negotiated Settlement Process (NSP) Guidelines;
- B. On January 25, 2011, the Commission issued draft minutes/notes of the meeting and requested comments by February 1, 2011 and submissions by February 8, 2011. Comments were received by February 24, 2011;
- C. On August 12, 2011, the Commission issued the Revised August 2011 draft NSP Guidelines and requested comments from the stakeholders by August 26, 2011. The deadline for comments was subsequently extended to September 9, 2011;
- D. On November 18, 2011, the Commission issued the Revised November 2011 draft NSP Guidelines and requested stakeholder comment by December 2, 2011;
- E. The Commission has reviewed the comments and considers that the issuance of the February 2012 NSP Guidelines is warranted.

**NOW THEREFORE** the Commission orders as follows:

- 1. The January 2001 NSP Guidelines are rescinded.
- 2. The February 2012 NSP Guidelines attached as Appendix A to this Order are approved.

**DATED** at the City of Vancouver, in the Province of British Columbia, this *Second* day of February 2012.

BY ORDER

*Original signed by:*

L.F. Kelsey  
Commissioner

Attachment

Orders/G-11-12\_BCUC 2012 NSP Guidelines



# **Negotiated Settlement Process**

## **Policy, Procedures and Guidelines**

**February 2012**

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## REVISED NEGOTIATED SETTLEMENT PROCESS

### POLICY, PROCEDURES AND GUIDELINES

#### I POLICY STATEMENT

The policy of the British Columbia Utilities Commission (Commission) is to use the Negotiated Settlement Process judiciously to save time and reduce the cost of utility regulation while achieving sound regulatory decisions. The Commission is committed to public participation in its processes and to transparency in its decision making. It is in the spirit of these values that this policy has been implemented.

This document replaces the Commission's January 2001 Negotiated Settlement Process, Policy, Procedures and Guidelines document.

#### II BACKGROUND

Negotiated settlements can offer significant benefits to the regulatory process; however, realizing those benefits, while maintaining fundamental principles of natural justice and fairness, requires that certain principles and process attributes be present, including the appropriate participation of Commission staff. If participants are not satisfied with a Negotiated Settlement Process they are free, at any time, to choose not to participate and to use the traditional hearing process to resolve their concerns. The flexible nature of the Negotiated Settlement Process allows it to adapt to problems as they arise.

A Negotiated Settlement Process may not always be appropriate or successful. The first question to be considered by potential participants is whether any of the issues are amenable to the Negotiated Settlement Process. Considerations to be taken into account are listed in Part III.

The Commission has statutory obligations under the *Utilities Commission Act* and other provincial legislation and cannot delegate decision-making power to others; however, the Negotiated Settlement Process is a tool that provides considerable flexibility to the Commission and to parties appearing before it.

#### III WHEN IS A NEGOTIATED SETTLEMENT PROCESS APPROPRIATE?

To assist the Commission in determining when to use the Negotiated Settlement Process, all or portions of an application should be evaluated in light of the following considerations:

- (i) Will customer classes or other groups that are likely to be affected by the agreement be participants in the negotiating sessions? It may be necessary to exercise judgement as to the significance of any settlement agreement for parties that will not be active participants. Will the interests of the non-represented groups be adequately addressed by other interveners and/or the active participation of Commission staff?
- (ii) Will the application pose policy issues about which there is no established Commission precedent? If so, all or portions of the application may not be suitably addressed by negotiation.

- (iii) Has the set of issues posed by the application been subject to a public hearing within a reasonable interval? This consideration derives from the need to maintain an adequate public record and to avoid systematic lack of representation by any affected customer class or group.
- (iv) The Commission Panel may request confirmation from the parties who intend to participate in the settlement discussions. It may also be the case that, in some circumstances, too large a number of Participants could preclude an effective settlement process. When this occurs, the Commission Panel may:
  - divide the application into sub-issues to reduce the number of Participants at any one negotiation session;
  - encourage Participants representing similar issues to work together; or
  - decide that a Negotiated Settlement Process is not workable.

While the Commission strongly supports the development of the Negotiated Settlement Process, it has a statutory duty to regulate in the public interest. Therefore, the Commission will not accept a proposed settlement agreement unless it is persuaded that the agreement is in the public interest and consistent with the requirements of the *Utilities Commission Act*.

#### **IV PROCEDURES FOR THE NEGOTIATED SETTLEMENT PROCESS**

##### **1. Role of the Commission or Commission Panel Prior to Commencing a Negotiated Settlement Process**

###### **(i) Initiation of the Process**

The decision to initiate the Negotiated Settlement Process will be made by the Commission or a division of the Commission (Commission Panel) and confirmed by order, after consideration of the application, the preference of the Applicant, the likely interests of affected parties and any other matter it considers relevant. The Negotiated Settlement Process timetable, and opportunities for information requests and responses from the utility, will be specified by the Commission Panel.

Participation in negotiations is voluntary. While unanimous support from the Applicant and the Registered Interveners is preferred before attempting a settlement process, there may be situations where general agreement is sufficient.

Before settlement discussions begin, the Commission Panel may establish various pre-settlement processes, including workshops and issues meetings. The purpose of workshops is to assist all parties to understand specific aspects, policies or concepts in an application through informal presentations and discussions.

**(ii) Establishing the Participants**

The Commission recognizes the right of Registered Interveners, Commission staff and the Applicant (Participants) to participate in settlements. The Commission does not exclude or prohibit participation unless the party in question has no reasonable interest in the subject matter or pursues issues that are out of scope of the settlement discussions. Any challenges to a party's participation should be made in writing to the Commission Panel prior to the start of negotiations. The Commission Panel will then decide whether to hold an oral hearing to resolve the matter or address it through written submissions.

Parties cannot be forced to participate in a settlement process. A decision not to participate will not limit the right of the party to comment, for the Commission Panel's consideration, on a proposed settlement agreement.

Proper notice is important to ensuring that all registered parties have the opportunity to participate in settlement discussions. The Commission order that initiates the Negotiated Settlement Process will be sent to all registered parties to provide proper notice.

Sufficient information will be available to the Participants so that issues can be assessed and the Negotiated Settlement Process can begin. In most cases this will include, at a minimum, the application and responses to information requests.

Negotiated Settlement Processes are considered "proceedings" for the purpose of cost awards under section 118 of the *Utilities Commission Act*. All parties requesting a participant assistant/cost award must sign the attendance form each day of the negotiations. Awards may be granted even if a settlement cannot be reached, but will be granted according to the same conditions, where appropriate, as for costs awarded in the case of a full public hearing. Parties being asked to pay will have the opportunity to comment on the award request and the comments may address Section 1, Participant Eligibility of the Participant Assistance/Cost Award Guidelines.

**(iii) Appointing the Facilitator**

The Commission will normally provide a Facilitator. The appointment of the Facilitator will be made by the Commission Chair, pursuant to section 28(1) of the *Administrative Tribunals Act*. The appointee will normally be a person knowledgeable in matters involving public utilities. In making the appointment, the Commission Chair may consider the names of Facilitators recommended by the Commission Panel assigned to the application. Prior to making the recommendation, the Commission Panel may canvas the Applicant, Registered Interveners or Commission staff for names of potential Facilitators. A Participant proposing a Facilitator must provide the Facilitator's name and credentials.

If any Participant in a Negotiated Settlement Process requests someone other than Commission staff or a consultant to facilitate or chair the negotiating sessions, that request, with supporting reasons, should be submitted in writing to the Commission Panel. The other Participants in the Negotiated Settlement Process will be given an opportunity to comment on the request.

The Commission Chair will either approve the recommendation or advise the Participants why the proposed Facilitator is unacceptable.



**(iv) Establishing the Role of Commission Staff in the Negotiations**

Commission staff participation in settlement discussions, and alternative dispute resolution generally, is important to the effectiveness of the process. Commission staff provide certain skills, knowledge and experience that may otherwise not be available to all participants. Normally the role of Commission staff is separate from the role of the Facilitator and staff have the responsibilities listed below. The Commission Panel may modify the responsibilities of Commission staff and may require that the role of Facilitator and Commission staff be fulfilled by the same person.

The Commission Panel will establish the role of Commission staff prior to the commencement of negotiations and will request submissions from the Applicant and the Registered Interveners. Commission staff's role may be as an Active Participant, an Advisor, an Observer or a Facilitator as described below:

a) Commission Staff's role as an Active Participant may include:

- actively participating in negotiations;
- taking a position on issues; and
- providing a letter of support or comment on any proposed settlement agreement.

Where a Commission staff member participates as an Active Participant, the Commission staff member will not:

- discuss any matters relating to the application or the negotiations with Commission staff that are performing an Advisory role during the negotiation sessions; and
- discuss any matters relating to the application or the negotiations with the Commission Panel from the start of the Negotiated Settlement Process until the Commission Panel either approves any proposed settlement or issues its decision following any oral or written public hearing that takes place on the application.

b) Commission Staff's role as an Advisor may include:

- supplying factual information that may otherwise not have been brought to the attention of the Participants;
- describing possible implications of settlement proposals for unrepresented parties;
- advising the Participants of any relevant decisions and precedents recognized by the Commission
- ensuring that the Participants are aware of matters the Commission Panel has identified for consideration; and
- preparing an Issues Summary which contains a list of issues to be addressed in the negotiations, a summary of each issue and any concerns relating to each issue.

Where a Commission staff member participates as an Advisor, the Commission staff member will not:

- take a position on issues;
- prepare a Strawman which contains the Issues Summary along with a proposed resolution of each issue and a rationale of the proposed resolution of each issue;
- actively participate in the Negotiated Settlement Process other than in an Advisory role;
- discuss any matters relating to the application or the negotiations with Commission staff that are participating in an Active Participant role during the negotiation sessions;
- discuss any matters relating to the negotiations with the Commission Panel; or
- provide a letter of support or comment on any proposed settlement agreement.

c) Commission Staff's role as an Observer may include:

- monitoring the Negotiated Settlement Process to ensure that it is fair and open to all parties;
- reporting back to the Commission Panel on the fairness of the process; and
- providing the Commission Panel with technical assistance in its review of any proposed settlement agreement or in a hearing if the Negotiated Settlement Process has not resolved all issues.

d) Commission Staff's role as a Facilitator, in addition to those matters identified in Part IV.2 may include:

- preparing an Issues Summary for the purposes of issues negotiation; and
- preparing a separate Strawman proposal for the purposes of issues negotiation.

In summary, the responsibility of Commission staff is to ensure that the interests of all affected parties are taken into account. Commission staff who attend settlement discussions will not disclose to the Commission Panel any positions or offers presented during the negotiation sessions without the consent of all Participants.

#### **(v) Identifying Matters for Consideration**

The Commission Panel will determine the appropriateness of referring all, or portions of, an application to a Negotiated Settlement Process, making reference to the criteria listed in Part III. The Commission Panel will also identify any of the matters it wishes the Participants to consider, and this information will be provided to the Participants in written form.

## **2. Role of the Facilitator During the Negotiated Settlement Process**

In conducting the settlement process the Facilitator will:

- help to foster an environment of cooperation and trust among Participants;
- ensure that all Participants have an opportunity to express their views on each issue;

- facilitate the preparation of a proposed settlement agreement which contains all the required components; and
- guide the preparation of a list of outstanding issues, if any.

The Facilitator in the Negotiated Settlement Process has authority to bring about a resolution of issues by any reasonable means, and in particular by:

- clarifying and summarizing a Participant's position;
- making explicit any differences in the positions taken by Participants;
- recognizing the possible concerns of unrepresented parties;
- encouraging a Participant to evaluate its own position in relation to that of other Participants by introducing objective standards; and
- identifying settlement options or approaches that have not yet been considered.

In summary, the role of the Facilitator is twofold: a) to oversee the manner in which the settlement process is carried out; and b) to ensure that the full range of issues is effectively addressed. Participants to the negotiation are responsible, however, for the substance of the proposed settlement and the supporting rationales.

### **3. Activities in the Negotiated Settlement Discussions**

The Negotiated Settlement Process may include technical workshops and pre-hearing conferences but will usually include the following stages:

- i) At the outset of the Negotiated Settlement Process, the Facilitator will invite the Registered Interveners, the Applicant and Commission staff to identify issues arising from the application to be addressed through negotiation.
- ii) Parties who intend to participate in the negotiations will be required to confirm that they will adhere to the terms and conditions of the process, as set out in Part V, as a precondition of their participation.
- iii) During the negotiations, Participants will present their positions on each issue. All negotiations are on a without prejudice basis for each issue until that issue has been signed off.
- iv) Participants will seek a consensus resolution of each issue. Once an issue has been signed off, the Participants signing off agree not to dispute that issue at a settlement hearing on the proposed settlement agreement unless new material information becomes available that was not reasonably available at the time of the negotiations.
- v) It is the responsibility of Participants to ensure that the proposed settlement agreement contains sufficient evidence to support the proposal. The proposed settlement agreement must address each of the requests made by the application, describe the issue and the relevant information responses, and provide the resolution to each issue. In particular, provisions of the proposed settlement agreement that relate to matters of concern identified by the Commission Panel, or any

other matters that may affect the public or non-participant parties, must be supported by explicit rationales.

- vi) Any proposed settlement agreement will allow dissenting Participants to pursue their position directly with the Commission Panel as set out in paragraph 6 below.
- vii) Participants agree that they will not raise any position taken by other Participants during the negotiations at a settlement hearing.
- viii) Participants are free to communicate their own position with respect to any issue but agree that they will not communicate the positions of any other Participants taken at the negotiations to third parties unless all the Participants to the negotiations agree.
- ix) Once the negotiations are completed, and all issues are signed off, the proposed settlement agreement will be circulated to all other Registered Interveners whether or not they were present at the negotiations in order to advise them of the negotiations and to obtain the positions of those not present. When Participants sign off on a proposed settlement agreement they agree to provide their support to the agreement and to waive their right to present evidence and cross-examine on matters dealt with by the agreement.
- x) A Participant who intends to dissent from a Negotiated Settlement Agreement may remain in the Negotiated Settlement Process throughout its duration. A dissenting Participant should, where possible, state their dissent during the Negotiated Settlement Process so that the opportunity for other Participants to take them into account in arriving at a settlement agreement is not lost. However a dissenting Participant is not required to provide reasons for their dissent and may simply choose to provide them to the Commission Panel with their Letter of Comments.

#### **4. Discussions Without Prejudice and Confidential**

To foster open, frank, and innovative settlement discussions, positions presented during the settlement discussions will be without prejudice and confidential. The without prejudice and confidential nature of the discussions requires each Participant to disclose whether they are participating in their own right or on behalf of their group or client(s). This disclosure will ordinarily appear in the Notice of Intervention, but if it does not, the Participant must disclose the identity of the party for whom the Participant is acting.

Information that would have become available independently of the Negotiated Settlement Process remains public information. Parties must agree to the confidentiality agreement set out in Part V below, or they will not be permitted to participate in the Negotiated Settlement Process. The confidentiality agreement must be signed either before the commencement of the first issues meeting or, in any event, before the commencement of negotiations.

#### **5. Authority to Act**

The Commission Panel will require representatives to be able to speak to the concerns of their group or client(s) during negotiations. Further, the Commission Panel will require that representatives who sign a proposed settlement agreement have been given the authority by their group or client(s) to do so.

## **6. The Right to Dissent**

The Commission explicitly recognizes the right of Participants to dissent from a proposed settlement agreement. If a Participant dissents, it can submit a written argument to the Commission Panel. If the Commission Panel is of the view that the dissent is reasonable and material, it may request written rebuttal argument or, where the settlement review process is to occur at an oral hearing, request argument at the oral hearing. If the dissent is determined to be reasonable and material, the dissenting Participant retains the right to cross-examine, call evidence, and make final argument on the issue at a settlement hearing without prejudice to any positions that they may or may not have taken during the negotiations. In such an instance, no reference will be made to any positions taken by any other Participant during the negotiations. In like manner Participants that do sign off, preserve the right to cross-examine, call evidence, and make final argument on the issue raised by dissenting Participants.

## **7. Steps Following the Conclusion of Settlement Discussions**

Following the conclusion of settlement discussions:

- i) The proposed settlement agreement will be circulated amongst the Participants and the Facilitator will request a letter of support or letter of comment regarding the proposed settlement agreement from the Participants. The Facilitator will then distribute the proposed settlement agreement and letters of support or comment to the non-participating Registered Interveners and to the Commission Panel. Normally the Commission Panel will give the non-participating Registered Interveners one week to provide comments to the Commission Panel on the proposed settlement agreement prior to the Commission Panel commencing its evaluation of the proposed settlement agreement.
- ii) Any party who does not agree with the settlement will be expected to provide written reasons to the Commission Panel. All responses will be transmitted to the Commission Panel for its consideration.
- iii) The Commission Panel will not be provided with any information about the negotiations unless the Participants to the negotiations agree.

## **8. Commission Panel's Evaluation of Settlements**

The Commission Panel may approve proposed agreements as “packages” rather than line-by-line. At the same time, the Commission Panel will not accept individual terms that, in its judgement, contravene the Commission's statutory obligations. Settlement agreements need to be supported by a significant and substantial consensus group of the Participants.

If the Commission Panel wishes to amend a portion of a settlement and that amendment would have a material effect on one or more interests, the Commission Panel will provide the necessary time for staff to contact all the signatories to the settlement to determine if they will agree to the changes. A final meeting of the Participants to the Negotiated Settlement Process to address the changes may be scheduled.

If the Commission Panel rejects the proposed settlement agreement, then the Commission Panel will establish a process for the review of the application.

It is important that the Commission Panel have sufficient information on the public record to evaluate a proposed settlement agreement. This information includes any requirement stated in Part IV.3(v) “Activities in the Negotiated Settlement Discussions”. In most cases, the following information will be required at a minimum: the terms of the agreement, the application and information responses, and a list of the Participants who agree to the terms of the settlement. The Commission Panel may require Participants to submit additional information, either orally or in writing. The onus of ensuring that sufficient information is on the record always rests with the proponents of the agreement.

The Commission Panel may evaluate proposed settlements through either an oral or a written public hearing. The responses of Participants will be distributed to all Registered Interveners before a settlement hearing begins. The Commission Panel may approve the proposed settlement agreement provided the Commission Panel believes the settlement satisfies the public interest and the Commission Panel’s statutory obligations.

## **9. The Effect of a Settlement Agreement**

The benefits of the Negotiated Settlement Process will only be realized if Participants are bound to the terms of the agreement. There are, however, circumstances where the proposed settlement agreement may require amendment. Those circumstances include where:

- i) one or more Participants becomes aware of important new information that was not reasonably available to the Participant(s) at the time of the settlement discussions and which has a significant bearing on the assumptions upon which the proposed settlement agreement was reached; or
- ii) all Participants decide to opt out of the proposed settlement agreement pending an acceptable amendment.

Amendments will not be made once the Commission Panel has reviewed and accepted the terms of a proposed settlement agreement.

If a proposed settlement agreement is approved by the Commission Panel then any disputes regarding matters contained in the settlement agreement that are referred to the Commission for determination shall be examined based on the wording in the settlement agreement approved by the Commission. If the Commission determines that there is uncertainty in the wording of the approved settlement agreement then the Commission may look to the evidentiary record to assist in resolving the ambiguity.

**V CONFIDENTIALITY AGREEMENT OF PARTICIPANTS TO THE NEGOTIATED SETTLEMENT PROCESS**

As discussed in Part IV.4 above, “Discussions Without Prejudice and Confidential”, bargaining positions presented during the settlement discussions will be without prejudice and confidential. All Participants in settlement negotiations must agree to the confidentiality agreement set out below and comply with the confidentiality agreement, or they will not be permitted to attend the negotiated settlement process.

We, on behalf of ourselves, and/or on behalf of our clients, as the case may be, will not disclose any positions taken either orally or in writing during the course of the Negotiated Settlement Process to any parties not subject to this confidentiality agreement without the consent of all Participants to the negotiations. If we or our clients need to discuss with or seek information from other people within our organization or external advisors those parties will also be bound by this confidentiality agreement.

Without restricting the generality of the foregoing, we acknowledge that this confidentiality agreement will prevent us, or our clients, from cross-examination on those positions at any public hearing held in this matter and further prevent us from making use of those positions against the proponent of the positions in any argument at such hearing. Similarly, we undertake not to cross-examine witnesses about any positions taken in the Negotiated Settlement Process.

We further acknowledge that we have fully read and now agree to conduct our attendance and negotiations according to the Negotiated Settlement Process - Policy, Procedures and Guidelines as set out by the Commission.