



ORDER NUMBER
G-315-22

IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

Capital Power Corporation
Request for Reconsideration of BCUC Order G-280-22 in the matter of
the British Columbia Hydro and Power Authority 2021 Integrated Resource Plan

BEFORE:

A. K. Fung KC, Panel Chair
E. B. Lockhart, Commissioner

on November 3, 2022

ORDER

WHEREAS:

- A. On December 21, 2021, British Columbia Hydro and Power Authority (BC Hydro) filed its 2021 Integrated Resource Plan (IRP) Application with the British Columbia Utilities Commission (BCUC), pursuant to section 44.1 of the *Utilities Commission Act* (UCA) and in accordance with Order G-28-21 dated January 27, 2021;
- B. By Order G-280-22 dated October 7, 2022, the BCUC made certain determinations with respect to confidentiality of BC Hydro responses to certain Information Requests (IRs) in the 2021 IRP proceeding. Specifically, the BCUC ordered, in part, as follows:
 1. BC Hydro's responses to Capital Power Corporation (Capital Power) IRs 1.2.1.1, 1.2.1.2, 1.2.1.3, and 1.2.2.1, and Commercial Energy Consumers of BC (the CEC) IR 1.90.1 be held as confidential.
 2. Under the terms outlined further in the reasons set out in Appendix A of Order G-280-22, by no later than October 13, 2022, BC Hydro must provide the responses to those interveners who:
 - a. Request access to the confidential Capital Power IR responses and/or the CEC IR 1.90.1;
 - b. Have executed the appropriate BCUC confidentiality declaration and undertakings; and
 - c. Do not have current or potential commercial interests which may conflict with BC Hydro;
- C. By letter dated October 12, 2022, Capital Power filed a request for a Reconsideration of BCUC Order G-280-22 on procedural fairness grounds (Reconsideration Application). Specifically, Capital Power requests:
 1. That the BCUC grant Capital Power's request for reconsideration of Order G-280-22 and suspend the application of directive 2 of said Order to Capital Power in the manner contemplated by the reasons attached to said Order pending an opportunity for Capital Power to reply to BC Hydro's access request objection of October 6, 2022 prior to the BCUC's redetermination of Capital Power's access request of October 3, 2022;

2. That the BCUC postpone the second round IR filing deadline of October 20, 2022 for any potential Capital Power IRs pertaining to the Capital Power IR responses pending a redetermination of Capital Power's access request; and,
 3. That the BCUC exercise its discretion under sections 4.02 and 4.03 of the Rules to decide this matter without the reconsideration hearing procedure contemplated by section 30 of the Rules, or that any such hearing be conducted in writing on an expedited basis in the interests of an efficient IR process; and
- D. By Order G-291-22 dated October 20, 2022, the BCUC established an expedited written hearing process for the review of the Reconsideration Application;
- E. On October 25, 2022, BC Hydro filed its submissions on the Reconsideration Application. On October 28, 2022, Capital Power filed its reply submissions; and
- F. The BCUC has reviewed the parties' submissions and determines the Reconsideration Application should be granted.

NOW THEREFORE the BCUC orders that the application of directive 2 of Order G-280-22 to Capital Power in the manner contemplated by the reasons attached to Order G-280-22 is rescinded and the matter is remitted back to the BCUC panel that made Order G-280-22, pending an opportunity for Capital Power to reply to BC Hydro's access request objection of October 6, 2022.

DATED at the City of Vancouver, in the Province of British Columbia, this 3rd day of November 2022.

BY ORDER

Original signed by:

A. K. Fung, KC
Commissioner

Attachment

Capital Power Corporation
Request for Reconsideration of BCUC Order G-280-22 in the matter of
the British Columbia Hydro and Power Authority 2021 Integrated Resource Plan

REASONS FOR DECISION

1.0 Background

On December 21, 2021, British Columbia Hydro and Power Authority (BC Hydro) filed its 2021 Integrated Resource Plan (IRP) Application with the British Columbia Utilities Commission (BCUC), pursuant to section 44.1 of the *Utilities Commission Act* (UCA) and in accordance with Order G-28-21 dated January 27, 2021.

On September 29, 2022, BC Hydro confidentially filed responses to certain Capital Power Corporation (Capital Power) Information Requests in the 2021 IRP proceeding. By letter dated October 3, 2022, the BCUC requested that BC Hydro file a response to, among other things, “clarify, with supporting rationale, whether [BC Hydro] is amenable to providing the above noted IR responses [those in response to IRs from each of Capital Power and the Commercial Energy Consumers Association of BC (CEC)] to those intervenors that have executed the appropriate BCUC confidentiality declaration and undertakings, or to a subset of those intervenors.”

By letter dated October 3, 2022, Capital Power filed a request with the BCUC for access to BC Hydro’s responses to Capital Power’s IRs. By letter dated October 4, 2022, the BCUC requested BC Hydro to address Capital Power’s access request within its response. On October 6, 2022, BC Hydro filed its response, which included its objection to Capital Power’s access request and certain proposed conditions should access be ordered by the BCUC in the event the BCUC ordered disclosure of the confidential responses to interveners. By Order G-280-22 dated October 7, 2022, the BCUC made certain determinations with respect to confidentiality of BC Hydro’s responses to certain Information Requests (IRs) in the 2021 IRP proceeding. Specifically, the BCUC ordered, in part, as follows:

1. BC Hydro’s responses to Capital Power Corporation (Capital Power) IRs 1.2.1.1, 1.2.1.2, 1.2.1.3, and 1.2.2.1, and Commercial Energy Consumers of BC (the CEC) IR 1.90.1 be held as confidential.
2. Under the terms outlined further in the reasons set out in Appendix A of Order G-280-22, by no later than October 13, 2022, BC Hydro must provide the responses to those interveners who:
 - a. Request access to the confidential Capital Power IR responses and/or the CEC IR 1.90.1;
 - b. Have executed the appropriate BCUC confidentiality declaration and undertakings; and
 - c. Do not have current or potential commercial interests which may conflict with BC Hydro;

With respect to directive 2.c., in the accompanying reasons for decision the BCUC stated “For greater certainty, the Panel denies Capital Power’s request to access BC Hydro’s confidential responses to Capital Power IR[s].”

The BCUC added:

With respect to Capital Power, the Panel finds that BC Hydro has sufficiently demonstrated that Capital Power has commercial interests that conflict with BC Hydro. Namely, that Capital Power

may engage in future negotiations with BC Hydro with respect to the sale of electricity. Accordingly, Capital Power's request to access the Capital Power IR responses is denied.¹

By letter dated October 12, 2022, Capital Power filed a request for a Reconsideration of BCUC Order G-280-22 on procedural fairness grounds (Reconsideration Application) pursuant to Rule 27 of the BCUC Rules of Practice and Procedure (Rules).

By Order G-291-22 dated October 20, 2022, the BCUC established an expedited written hearing process for the review of the Reconsideration Application. In addition to any other matters that BC Hydro and Capital Power consider relevant to the resolution of the Reconsideration Application, the BCUC requested that parties' submissions address, with supporting rationale, the following matters:

- a. Whether the BCUC should grant or deny the Reconsideration Application in whole or in part; and
- b. Whether the BCUC should grant or deny the relief sought by Capital Power in whole or in part, including the request for a partial stay of the 2021 IRP proceeding pending the resolution of the Reconsideration Application.

On October 25, 2022, BC Hydro filed its submissions on the Reconsideration Application. On October 28, 2022, Capital Power filed its reply submissions.

In these reasons for decision, the Panel summarizes the Reconsideration Application and the submissions made by BC Hydro and the reply submissions of Capital Power. The Panel then makes its determinations on the relief sought by Capital Power.

1.1 BCUC Rules of Practice and Procedure

Part V of the Rules governs reconsideration applications. In filing this Reconsideration Application within 60 days of the issuance of Order G-28-22, Capital Power relies on the following grounds for reconsideration set out in Rule 27.05:

- 27.05 An application for reconsideration of a decision must contain a concise statement of the grounds for reconsideration, which must include one or more of the following:
- a) the BCUC has made an error of fact, law, or jurisdiction which has a material bearing on the decision;...or
 - e) where there is otherwise just cause.

The specific subject matter of the Reconsideration Application pertains to the BCUC's decisions relating to confidentiality in Order G-280-22. Part IV of the Rules sets out the procedure for parties seeking confidential treatment of information filed in a matter before the BCUC.

Rules 19.01 and 19.02 state:

- 19.01 If a party wishes to keep confidential any information in a document filed in any matter before the BCUC, in addition to the document, at the time of filing, the party must file:
- (a) a request that all or any part of the document be held in confidence which must:
 - (i) briefly describe the nature of the information in the document and the reasons for the request for confidentiality, including the specific harm that could reasonably be expected to result if the document was made publicly available;

¹ Order G-280-22, Appendix A, p. 3.

(ii) indicate whether all or only a part of the document is the subject of the request; and

(b) a proposed redacted version of the document that the BCUC may make publicly available, where possible.

19.02 The party requesting confidentiality bears the onus of establishing why the information should be treated as confidential by the BCUC.

Rule 20.02 provides discretion to the BCUC with respect to the process to be followed in assessing confidentiality claims and the terms upon which confidentiality may be granted. More specifically, Rule 20.02 states:

The BCUC may, with or without a hearing or further process, grant a request for confidentiality on any terms it considers appropriate.

However, balanced against that broad discretion is a party's right, notwithstanding a claim of confidentiality, to request access to confidential information pursuant to the procedure set out in Rule 25. For convenience, the relevant excerpts are produced below.

Requests for access to confidential documents in a proceeding

25.01 If the BCUC grants a request for confidentiality, the BCUC, with comments from the party submitting the document, and/or any party affected by disclosure of the confidential document, may consider whether access to the confidential information may be provided to certain parties upon request.

25.02 Parties requesting access to confidential information must submit a request electronically to the BCUC, with a copy to the party who filed the document confidentially, that explains the reason(s) for the request and a statement describing how access to the information pertains to their participation in the proceeding.

...

25.04 Any party may object to a request for access to confidential information by filing an objection with reasons in a timely manner. The BCUC will give the party claiming confidentiality and the requestor an opportunity to reply to an objection.

25.05 The BCUC will render the final determination as to whether access will be granted to the confidential information and the conditions on a party's access.

2.0 Reconsideration Application

In the Reconsideration Application, Capital Power states its request to access confidential IRs dated October 3, 2022, was made pursuant to Rule 25.02. Capital Power submits it was not provided an opportunity to reply to BC Hydro's submissions dated October 6, 2022, before the BCUC issued its determinations in Order G-280-22. Capital Power further submits that the BCUC's failure to provide Capital Power an opportunity to reply to BC Hydro's submissions was in breach of the BCUC's duty of procedural fairness. This provides grounds for reconsideration of Order G-280-22 on the basis of an error of law or jurisdiction that has a material bearing on that decision within the meaning of Rule 27.05(a) or provides otherwise just cause for reconsideration.²

² Exhibit B-1, pp. 1-2.

Capital Power notes that in its October 6, 2022 submissions, BC Hydro provided additional detail with respect to its concerns around the potential misuse by Capital Power and other third parties with respect to BC Hydro's responses to the Capital Power IRs. Capital Power submits that procedural fairness requires that Capital Power be provided an opportunity to be heard after being apprised of BC Hydro's full position. Additionally, Capital Power submits that Rule 25.04 establishes a legitimate expectation that the BCUC "will" provide the requestor of access an opportunity to reply to objections made by other parties before a "final determination" is made on the request, consistent with natural justice.³

Capital Power requests the following remedies:

1. That the BCUC grant Capital Power's request for reconsideration of Order G-280-22 and suspend the application of directive 2 of said Order to Capital Power in the manner contemplated by the reasons attached to said Order pending an opportunity for Capital Power to reply to BC Hydro's access request objection of October 6, 2022 prior to the BCUC's redetermination of Capital Power's access request of October 3, 2022;
2. That the BCUC postpone the second round IR filing deadline of October 20, 2022 for any potential Capital Power IRs pertaining to the Capital Power IR responses pending a redetermination of Capital Power's access request; and,
3. That the BCUC exercise its discretion under sections 4.02 and 4.03 of the Rules to decide this matter without the reconsideration hearing procedure contemplated by section 30 of the Rules, or that any such hearing be conducted in writing on an expedited basis in the interests of an efficient IR process.⁴

2.1 BC Hydro Submissions

BC Hydro notes that in its Reasons for Decision to Order G-280-22, the BCUC determined that:

- The information contained in BC Hydro's responses to Capital Power information requests 1.2.1.1, 1.2.1.2, 1.2.1.3 and 1.2.2.1 would provide a potential advantage to parties who may undertake commercial negotiations with BC Hydro, and would therefore prejudice BC Hydro's negotiating position, which in turn may potentially harm ratepayers;
- Capital Power may engage in future negotiations with BC Hydro with respect to the sale of electricity; and
- BC Hydro has sufficiently demonstrated that Capital Power has commercial interests that conflict with BC Hydro.

BC Hydro submits that these determinations were correct and that the facts that informed these determinations would not change upon further submissions from Capital Power. Accordingly, BC Hydro submits that the BCUC should deny the Reconsideration Application. If the BCUC grants Capital Power's reconsideration request and provides Capital Power with the opportunity to reply to BC Hydro's October 6, 2022 submissions in the 2021 IRP proceeding, however, BC Hydro submits that this reply should be for the limited purpose of providing the BCUC with an opportunity to consider alternatives that may address concerns regarding confidentiality that arise from the fact that Capital Power has commercial interests that conflict with those of BC Hydro. Furthermore, if the BCUC grants the reconsideration request to allow Capital Power to make reply submissions in the 2021 IRP

³ Exhibit B-1, pp. 2-3.

⁴ Ibid., p. 5.

proceeding on potential alternatives for access to BC Hydro's responses to Capital Power IRs 1.2.1.1, 1.2.1.2, 1.2.1.3 and 1.2.2.1, BC Hydro would want to have the opportunity to reply to any alternatives put forward by Capital Power at that time.⁵

BC Hydro submits that Capital Power's request for a partial stay of the 2021 IRP proceeding pending the resolution of the Reconsideration Application is not required at this time. If the opportunity for a reply from Capital Power is granted, the panel for the 2021 IRP proceeding can consider that submission and BC Hydro's reply, and then consider any implications for the regulatory timetable in the 2021 IRP proceeding.⁶

2.2 Capital Power Reply

Capital Power notes that BC Hydro does not directly contest the substance of Capital Power's Reconsideration Application, which, rather than being premised on a challenge to the factual determinations underlying Order G-280-22 (i.e., errors of fact), is premised on that decision having been issued in a procedurally unfair manner (i.e., an error of law or jurisdiction) or, alternatively, there being "otherwise just cause" for reconsideration. Furthermore, Capital Power notes that BC Hydro does not attempt to specifically rebut Capital Power's submissions with respect to either ground for reconsideration.⁷

Regardless, Capital Power submits two reasons why the Panel should reject BC Hydro's claim that reply submissions from Capital Power would not change the BCUC's assessment of the facts informing the three determinations made by the BCUC in its Reasons for Decision to Order G-280-22. First, Capital Power states that this claim is itself entirely speculative on BC Hydro's part—not least without Capital Power having had any opportunity to date to address the BC Hydro letter of October 6, 2022 that informed the BCUC's determinations. Second, BC Hydro's claim does not resolve the larger matter of whether, even if the determinations BC Hydro cites are factually correct, the BCUC could have granted Capital Power's request for access to the relevant IR responses on other grounds that Capital Power may have been able to put forward had it been granted an opportunity to reply to BC Hydro's submissions.⁸

Regarding BC Hydro's proposal to limit the scope of Capital Power's reply (if granted), Capital Power submits this would only replace one procedural unfairness issue with another. Rule 25.04 specifically contemplates an access requestor being given "an opportunity to reply to an objection" and in so doing, imposes no limit on the scope of that reply. By contrast, the limited-scope reply BC Hydro seeks would prevent the BCUC from hearing, for example, reasons why an objection to a request for access to confidential documents may rest on unfounded or overstated factual premises.⁹

As for BC Hydro's request to have an opportunity to file its own reply should the Reconsideration Application be granted, Capital Power observes that Rule 25 contemplates a clear sequence of submissions following an access request: (1) timely objections to access, with reasons, from any party; and (2) replies to any such objections from the party claiming confidentiality and the requestor. Since BC Hydro cannot, as both the objector and the party claiming confidentiality, reply to itself, Capital Power submits the Rules clearly grant Capital Power the last word in this case.¹⁰

⁵ Exhibit C1-1, pp. 2-3.

⁶ Ibid., p. 3.

⁷ Exhibit B-2, pp. 1-2.

⁸ Ibid.2, p. 3.

⁹ Ibid., p. 4.

¹⁰ Ibid., p. 3.

Capital Power submits that if the BCUC were to grant Capital Power's request for a reply on the grounds outlined in the Reconsideration Application and in its submissions, the implications of such relief for the 2021 IRP proceeding's timetable could be determined separately within that proceeding. As such, Capital Power does not disagree with BC Hydro's comments in this regard.¹¹

Panel Determination

The Panel finds that Capital Power has established grounds for granting the Reconsideration Application. The BCUC's failure to provide Capital Power with an opportunity to reply to BC Hydro's submissions of October 6, 2022 is procedurally unfair and is contrary to the *audi alteram partem* rule fundamental to natural justice, which ensures that parties to a fair hearing are not judged without the benefit of responding to the evidence against them. Accordingly, the Panel rescinds the application of directive 2 of Order G-280-22 to Capital Power in the manner contemplated by the reasons attached to Order G-280-22, pending an opportunity for Capital Power to reply to BC Hydro's access request objection of October 6, 2022. The Panel outlines its reasons for these determinations below.

In issuing Order G-280-22, the BCUC was dealing with two distinct, albeit related issues: firstly, BC Hydro's initial request for confidential treatment of certain IR responses filed on September 29, 2022, made at the time of the filing of its IR responses; and secondly, Capital Power's request, made on October 3, 2022, to access BC Hydro's responses to Capital Power's IRs. The Panel acknowledges that pursuant to Rule 20.02, the BCUC was entitled to make a determination on BC Hydro's confidentiality request of September 29, 2022, based on its submissions at that time, without a hearing or further process and to establish the terms of that confidentiality as it considered appropriate. Had the BCUC determined based on the information filed by BC Hydro in support of confidentiality at the time of filing of its IR responses that BC Hydro had sufficiently met the onus of establishing why the IR responses should be kept confidential by the BCUC without a hearing or further process pursuant to Rules 19.02 and 20.02, there would be no basis for reconsideration of that decision. However, the BCUC did not do that.

Instead, by letter dated October 3, 2022, following receipt of Capital Power's request to access BC Hydro's IR responses and without having made any determinations as to BC Hydro's confidentiality request, the BCUC asked BC Hydro to provide submissions "to clarify, with supporting rationale, whether [BC Hydro] is amenable to providing the above noted IR responses [those in response to IRs from each of Capital Power and the Commercial Energy Consumers Association of BC (the CEC)] to those intervenors that have executed the appropriate BCUC confidentiality declaration and undertakings, or to a subset of those intervenors." On October 6, 2022, in response to the BCUC request, BC Hydro filed submissions objecting to interveners' access requests. Following receipt of BC Hydro's submissions, the BCUC issued Order G-280-22 on October 7, 2022, containing the directives which form the subject matter of this Reconsideration Application. Notably, the BCUC did not provide Capital Power or other interveners with an opportunity to reply to BC Hydro's October 6, 2022 submissions before issuing said order. By failing to do so, the BCUC co-mingled the request for confidentiality made by BC Hydro with the request for access made by Capital Power, treating them as one and the same, and thereby failed to abide by the procedure for dealing with these requests as established by the BCUC's own Rules.

As noted by Capital Power, Rule 25.04 contemplates that a party requesting access to confidential information (Capital Power in this case) will be afforded the right of reply where there is an objection to such a request for access from a party claiming confidentiality (BC Hydro). In this case, that objection was outlined in BC Hydro's letter dated October 6, 2022. While the language in Rule 25.04 is not mandatory, it clearly contemplates that

¹¹ Exhibit B-2, p. 3

absent any special circumstances, the requestor of the information “will have an opportunity to reply to the objection.” In short, it created a reasonable expectation on the part of Capital Power that before the BCUC made a final decision on Capital Power’s request for access, it would have an opportunity to respond to BC Hydro’s objections to the access request.

In the Panel’s view, Rule 25.04 codifies the *audi alteram partem* rule, which is fundamental to natural justice, whereby parties to a fair hearing are entitled to respond to the evidence against them before a final decision is made. The Panel finds that by failing to follow that rule before issuing Order G-280-22, the BCUC made an error of law or jurisdiction which warrants granting the Reconsideration Application.

The Panel further notes, as did Capital Power, that BC Hydro does not dispute the specific grounds (error of law or jurisdiction or otherwise just cause) Capital Power put forward for reconsideration of Order G-280-22, but instead, premised its submissions for dismissal of the Reconsideration Application on the speculation that the BCUC would have made the same determinations it did notwithstanding any reply from Capital Power. In the Panel’s view, whether the BCUC would have made the same determinations after hearing from Capital Power is irrelevant to the question of whether it is procedurally fair to deprive Capital Power of the opportunity to respond to BC Hydro’s submissions. The Panel notes there is no evidence of any special circumstances which would have warranted a specific waiver by the BCUC of the provisions in the Rules. However, since no intervenor in the 2021 IRP proceeding other than Capital Power has sought reconsideration of the directives in Order G-280-22, the Panel sees no need to rescind the effect of the directives with respect to the other interveners in the 2021 IRP proceeding.

The Panel rejects BC Hydro’s submissions in this proceeding that should the Reconsideration Application be granted, the 2021 IRP panel should only permit Capital Power to provide a reply submission for the limited purpose of allowing the BCUC to consider alternatives that may address concerns regarding confidentiality that arise from the fact that Capital Power has commercial interests that conflict with those of BC Hydro. As noted by Capital Power, nothing in Rule 25.04 limits the scope of the submissions of a party responding to objections to its access request to providing only alternatives for addressing the objecting party’s confidentiality concerns. Such submissions may well include establishing that BC Hydro’s confidentiality concerns vis-a-vis Capital Power are ill-founded or overstated in the first instance. In any event, it is speculative for this Panel to opine on the nature or impact of Capital Power’s potential reply submissions on the 2021 IRP panel’s determinations in Order G-280-22, as that is ultimately a matter for consideration and review by the panel in the 2021 IRP proceeding.

As for BC Hydro’s submissions that it should in turn have a right to respond to Capital Power’s reply to BC Hydro’s objections to the access request in the 2021 IRP proceeding, the Panel observes that would in practice amount to a sur-reply which is granted by the BCUC only in exceptional circumstances. In any event, this is also a matter that should be determined not by this Panel but rather, by the panel in the 2021 IRP proceeding after reviewing Capital Power’s reply.

Finally, the Panel agrees with both parties that there is no need to stay the 2021 IRP proceeding pending the filing of Capital Power’s reply, and any amendments to the regulatory timetable in that proceeding can be addressed by the 2021 IRP panel as necessary.