



**LETTER NO. L-3-01**

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To Interested Parties:

Re: Negotiated Settlement Process  
Review of the Commission's Policy, Procedures and Guidelines

The Commission has completed the review of its Negotiated Settlement Process: Policy, Procedure and Guidelines ("NSP Guidelines") and thanks all of those who contributed advice, comments or material to assist the Commission in its review. A copy of the revised Guidelines, approved by the Commission and dated January 2001, is enclosed.

The major differences between the revised January 2001 NSP Guidelines and the previous January 1996 Guidelines are listed below. Although this list is not exhaustive, the revised Guidelines:

- set out the key considerations to be used by the Commission in determining when to refer an application to an NSP;
- provide participants with the opportunity to request the services of an external facilitator to conduct the negotiations; and
- amplifies the roles of the facilitator, Commission staff and the Commission at various stages in the process.

Additional copies of the January 2001 Guidelines are available from the Commission on request and on the Commission's web site at <http://www.bcuc.com> (click on Misc Documents button).

Yours truly,

*Original signed by:*

Robert J. Pellatt

JWF/cms  
Enclosure



# **Negotiated Settlement Process**

## **Policy, Procedures and Guidelines**

January 2001

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# **NEGOTIATED SETTLEMENT PROCESS**

## **Policy, Procedures and Guidelines of the British Columbia Utilities Commission**

### **I POLICY STATEMENT**

The Commission's policy 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 will be implemented.

### **II BACKGROUND**

To improve the effectiveness and efficiency of energy regulation in British Columbia, the British Columbia Utilities Commission (the "Commission") is adopting processes that are alternative or complementary to its traditional regulatory process. For example, the Commission is using technical workshops, issues meetings, and discussion groups to encourage regulatory participants to discuss issues in an open, flexible and informal manner. On a number of occasions, the Commission has used a negotiated settlement process to seek agreements among regulatory participants about matters before the Commission.

There are a number of issues associated with the use of such alternative dispute resolution processes in a quasi-judicial, decision-making environment, particularly in the context of energy utility regulation. To address these issues the Commission initially issued discussion papers and received useful comments from interested parties, and this procedure was repeated in a subsequent review of the process.

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 what, if any, of the issues are amenable to the negotiated settlement process. Considerations to be taken into account are listed in section III.

The negotiated settlement process is a tool that complements the traditional regulatory process. The Commission continues to administer its responsibilities under the Utilities Commission Act and cannot delegate decision-making power to others; however, the negotiated settlement process is a tool that provides considerable flexibility to the Commission and participants.

### **III WHEN IS THE NEGOTIATED SETTLEMENT PROCEDURE APPROPRIATE?**

To assist in determining when to use the negotiated settlement process, all or portions of an application should be evaluated in light of certain 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.
- 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 PROCEDURES FOR THE NEGOTIATED SETTLEMENT PROCESS**

#### **1. Initiation of the Process**

The decision to initiate the negotiated settlement process that is outlined in section IV.3, will be made by the Commission and confirmed by order, after consideration of the application, the preference of the applicant, and likely interests of affected parties.

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

## **2. The Right to Participate**

The right to participate in settlements is recognized by the Commission. The Commission does not exclude or prohibit participation unless the party in question has no reasonable interest in the subject matter of the settlement discussions.

It may also be the case that, in some circumstances, too large a number of interested parties could preclude an effective settlement process. When this occurs, either a settlement will not be attempted, the application will be divided into sub-issues to reduce the number of participants at any one discussion, or participants representing similar issues may be encouraged to work together.

Interested parties cannot be forced to participate in a settlement process. A decision not to participate will not abrogate the right of the party to comment, for the Commission's consideration, on a resulting settlement agreement.

Proper notice is important to ensuring that all parties have the opportunity to participate in settlement discussions. Notice requirements will be the same as for a public hearing before the Commission.

Sufficient information will be available to registered intervenors so that issues can be assessed and the negotiated settlement process can begin. In most cases this will mean filing of the application, information requests, and responses to those requests.

Negotiated Settlement Processes are considered "proceedings" for the purpose of cost awards under section 118 of the Utilities Commission Act. 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 on account of a full public hearing.

### **3. Steps in the Negotiated Settlement Process**

Before settlement discussions begin, the Commission will 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. Once the pre-settlement processes are established, a division of the Commission (“panel”) will be designated.

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, meetings of interested parties and Commission staff will normally take place at which participants will be invited to identify issues arising from the application to be addressed through negotiation.
- ii) Commission staff will advise the Commission panel of the appropriateness of referring all, or portions of, an application to negotiation, making reference to the criteria listed in section III. The panel will determine whether all, or selected portions, of the application will be negotiated. The panel will also identify those issues of particular concern to it, and this information will be passed on to the participants in written form.
- iii) The negotiated settlement process timetable, and opportunities for information requests and responses from the utility, will be specified by the Commission panel prior to the start of negotiations.
- iv) Intervenors 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 sections V and VI, as a precondition of their participation.
- v) During the negotiation meetings, participants will present their positions on each issue.
- vi) The participants will seek a consensus resolution of each issue. Any proposed settlement agreement will allow dissenting participants to pursue their position directly with the Commission panel as set out in paragraph 6 below.

It is the responsibility of the negotiation participants to ensure that the proposed settlement agreement contains sufficient evidence to support the proposal. In particular, provisions of the proposed settlement agreement that relate to issues identified by the Commission panel, or any other matters that may affect the public or non-participant parties, must be supported by explicit rationales.

- vii) The proposed settlement agreement will be circulated amongst the participants and upon the written concurrence of the participants will then be distributed to all other interested parties and to the Commission panel. Normally a member of staff who has not been present in the settlement proceedings will review the proposed settlement agreement prior to the Commission panel's deliberations. This function is intended to provide support for the panel as to the impact of the proposed settlement agreement on all parties, whether or not they were participants in the negotiations.
- viii) 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.

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

To foster open, frank, and innovative settlement discussions, bargaining 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 some 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. The parties must agree to the confidentiality agreement set out in section VI below, or they will not be permitted to participate in the negotiated settlement process. The confidentiality agreement will be made at the start 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 during negotiations. Further, the Commission panel will require that representatives who sign a proposed settlement agreement have been given the authority to do so by their group or client.

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

The right of parties to dissent from a proposed agreement is explicitly recognized by the Commission. If a party 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 party retains the right to present evidence and to cross-examine or to rebut the evidence of others if there is a written hearing.

## **7. The Appointment of a Facilitator**

The Commission will normally provide a facilitator from staff. However, if any active participant in a negotiated settlement process requests someone other than Commission staff to facilitate or chair the negotiating sessions, that request, with supporting reasons, should be submitted in writing to the Commission panel. The requester must also submit the name and credentials of an alternate facilitator. The other active participants in the negotiated settlement process will be given an opportunity to comment on the request.

The Commission panel will approve the selection or advise the participants why the proposed facilitator is unacceptable.

## **8. The Role of the Facilitator**

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.

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

In summary, the function 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. Parties to the negotiation are responsible for the substance of the proposed settlement and the supporting rationales.

## **9. The Role of Commission Staff in the Negotiations**

Staff participation in settlement discussions, and alternative dispute resolution generally, is important to the effectiveness of the process. Staff provide certain skills, knowledge and experience that may otherwise not be available to all participants.

The responsibilities of staff present in the negotiations 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 precedents recognized by the Commission; and
- ensuring that the participants are aware of concerns of the Commission panel insofar as they are known.

In summary, the responsibility of staff is to ensure that the interests of all affected parties are taken into account, while refraining from endorsing a particular position. Staff who attend settlement discussions will not disclose to the Commission any positions or offers presented during the settlement discussions without the consent of all participants.

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

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

The Commission panel may approve agreements as “packages” rather than line-by-line. At the same time, the Commission panel will not accept individual terms that, in its judgment, contravene the Commission’s obligations under the Utilities Commission Act.

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 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 settlement agreement, then where possible, an entirely new panel will be constituted to decide the application through a public hearing.

It is important that the Commission panel has sufficient information on the public record to evaluate a settlement agreement. In most cases, the following minimum information will be available: 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. Always, the onus of ensuring that sufficient information is on the record will rest with the proponents of the agreement.

The Commission panel may evaluate settlements through either an oral or a written public hearing. The responses of participants and interested parties will be distributed to all registered intervenors before a settlement hearing begins. The Commission panel may approve the settlement agreement provided the Commission panel believes the settlement satisfies the public interest.

## **11. 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.

- i) The Commission panel will normally accept or reject the entire settlement package but if the Commission panel decides to suggest changes to the settlement it will give registered intervenors full opportunity to address any proposed change, including sufficient time to make submissions on the impact of any change to the validity of the overall settlement;
- ii) One or more participants may become aware of important new information that was not reasonably available to them at the time of the settlement discussions and which has a significant bearing on the assumptions upon which the settlement was reached;  
or
- iii) All participants may 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 settlement.

When participants sign off a proposed settlement they agree to provide their support to the agreement and agree to waive their right to present evidence and cross-examine on matters dealt with by the agreement.

## **V GUIDELINES FOR THE NEGOTIATED SETTLEMENT PROCESS**

1. All negotiations are on a without prejudice basis for each issue until that issue has been signed off.
2. Once an issue has been signed off, the participants signing off agree not to dispute that issue at a hearing on the settlement agreement (settlement hearing) unless new material information becomes available that was not reasonably available at the time of the negotiations.
3. Participants dissenting from a proposed agreement may 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 party 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.
4. Participants to the negotiations agree that they will not raise at a settlement hearing any position taken by other participants during the negotiations.
5. Participants to the negotiations agree that they will not communicate the positions taken at the negotiations to third parties unless all the participants to the negotiations agree.
6. Once the negotiations are completed, and all issues are signed off, the proposed settlement agreement will be circulated to all other interested parties 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.

7. The Commission panel will be provided with the proposed settlement agreement and supporting information at the time it is circulated to all other interested parties. The Commission panel will also be provided with any comments submitted by interested parties.
8. The Commission panel will not be provided with any information about the negotiations per se unless the participants to the negotiations agree.

## **VI CONFIDENTIALITY AGREEMENT OF PARTICIPANTS TO THE NEGOTIATED SETTLEMENT PROCESS**

As discussed in section IV, paragraph 4 above, “Discussions Without Prejudice and Confidential”, bargaining positions presented during the settlement discussions will be without prejudice and confidential. All parties in attendance during 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.

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.