



LETTER NO. L-10-05

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VIA E-MAIL

February 9, 2005

TO: British Columbia Hydro and Power Authority
Registered Intervenor

Re: British Columbia Hydro and Power Authority
Call for Tenders for Capacity on Vancouver Island
A Review of Electricity Purchase Agreement
Reasons for the Disqualification Motion Decision (January 27, 2005)
Reasons for the Disqualification Motion (December 22, 2004)

Attached as Appendix A to this letter are the Reasons for Decision on the GSX Concerned Citizens Coalition, B.C. Sustainable Energy Association and the Society Promoting Environmental Conservation (collectively "GSXCCC") application (T4: 611) that the Chair be disqualified from participation in the EPA review.

Also attached as Appendix B are the Reasons for Decision on the January 23, 2005 (Exhibit C20-35) GSXCCC application for an Order that the Commission Panel disqualify itself on the grounds of a reasonable apprehension of bias and denial of procedural fairness and natural justice during the hearing.

Yours truly,

Original signed by:

Robert J. Pellatt

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Attachments

REASONS FOR DECISION

Decision dated December 22, 2004 on the GSX Concerned Citizens Coalition Motion to Disqualify the Chair

These Reasons are being issued in conjunction with the Reasons for the disqualification motion decided by the Panel on January 27, 2005 (Appendix B). In reaching its decision, the Commission Panel considered and applied the legal principles for disqualification on the basis of bias discussed in those Reasons. Those same principles were argued before the Commission Panel on December 22, 2004.

Following the pre-hearing conference on December 17, 2004, a further pre-hearing conference was held on December 22, 2004. On December 22, 2004, GSX Concerned Citizens Coalition and B.C. Sustainable Energy Association (collectively “GSXCCC”) made an application for an order that Commissioner Birch, a member of the Commission Panel presiding over the proceedings, should be disqualified from participating in the EPA review on the basis of a reasonable apprehension of bias. The challenge arose as a result of Commissioner Birch's position as an interim president of both the Alliance Canadian and U.S. Pipelines. GSXCCC submitted that all three members of the Commission Panel should hear the disqualification motion. There was discussion regarding whether Commissioner Birch alone or some other composition of the Panel should be the decision-maker on the application. GSXCCC submitted that if all three Panel members decided the application, it would not raise any further objection related to a possible improper composition of the Commission Panel. The Commission Panel proceeded to hear the application on that basis.

GSXCCC also made a second application that the Chair be disqualified for a reasonable apprehension of bias in relation to the decision-making regarding Commissioner Birch's position on the Panel (T4: 611). The second application was based on certain comments made by the Chair at the December 17, 2004 pre-hearing conference and his role as Chair and Chief Executive Officer of the Commission in the appointment process of Commissioners, including the appointment of Commissioner Birch to this Panel (T4: 604-5). GSXCCC advised that it did not seek to disqualify the Chair from considering the first application regarding Commissioner Birch. Rather, it sought to disqualify the Chair from further participation in the EPA review on the basis of a reasonable apprehension of bias. GSXCCC confirmed that its position was that the Panel as a whole had the obligation to hear and make decisions on both of the motions (T4: 633).

With regard to the application to disqualify Commissioner Birch, all parties who spoke to the matter, including BC Hydro and Duke Point Power Limited Partnership ("DPP") supported the application made by GSXCCC although the latter two expressed great reluctance and skepticism that the application had any merit (T4: 675). However, BC Hydro and DPP supported the application because they considered the risk of further difficulties or appeals arising from Commissioner Birch's involvement as an unacceptable risk to take in these specific circumstances (T4: 675, 687).

With regard to the application to disqualify the Chair, GSXCCC submitted that the Chair having made an initial comment that Commissioner Birch's involvement was not an issue with him raised a reasonable apprehension of bias that the Chair was not impartial on the issue of whether Commissioner Birch ought to remain on the Panel. GSXCCC also submitted that an apprehension of bias arose as a result of the information exchanged between the Chair and Commissioner Birch whereby Commissioner Birch informed the Chair of his acceptance of the interim president's position. The apprehension of bias was alleged to have arisen as a result of the parties not being privy to the information exchanged between the Chair and Commissioner Birch. The motion to disqualify the Chair was not supported by any other party.

Following submissions from the parties on the application to disqualify Commissioner Birch and the Chair, the Commission Panel adjourned. Commissioner Birch recused himself from the Panel and the EPA review and therefore no decision from the Commission Panel was required on the motion to disqualify him.

The Chair and Commissioner Boychuk then considered the submissions related to the GSXCCC application to disqualify the Chair. The Panel dismissed the application with reasons to follow (T4: 683). These are those Reasons.

The Commission Panel considered the submissions from GSXCCC and concluded that there was no reasonable factual or legal basis upon which an informed person, viewing the matter realistically and practically – and having thought the matter through – would conclude that it was more likely than not that the Chair would not decide the issues in the EPA proceeding fairly. The Commission Panel considers that the steps taken by the Chair in his capacity as both Chair and CEO of the Commission are typical, appropriate and practical in respect of the appointment of members to Commission Panels. The Chair stated on the record the fact that Commissioner Birch had accepted an appointment as interim president of Alliance Pipelines thereby providing

notice and information to the parties upon which they could decide whether they wished to raise an issue. This is a customary and reasonable practice and leaves it to the parties to decide, as GSXCCC has done, whether to raise any procedural issues or objections resulting from the disclosure.

The Commission Panel does not accept that the Chair's comments (T3:518) taken in context support the conclusion that he had a closed mind. It is to be noted that the Chair raised the relevant facts (T4: 604) so that parties could, as appropriate, address the issue. The Commission Panel concludes that there was no reasonable basis for the application to disqualify the Chair.

REASONS FOR DECISION

Decision dated January 27, 2005 on the Application for Commission Panel Disqualification Motion
by the GSX Concerned Citizens Coalition, BC Sustainable Energy Association
and Society Promoting Environmental Conservation

By letter dated January 23, 2005 (Exhibit C20-35), GSX Concerned Citizens Coalition, B.C. Sustainable Energy Association and the Society Promoting Environmental Conservation (collectively “GSXCCC”) applied for an Order that the Commission Panel disqualify itself on the grounds of a reasonable apprehension of bias and denial of procedural fairness and natural justice during the hearing. In Exhibit C20-35, GSXCCC lists ten points of argument in support of the motion. As summarized by counsel for GSXCCC, there are two basic themes that run through the reasonable apprehension of bias argument. The first is that the Commission Panel made up its mind without having heard all of the evidence. The second is that the Panel has indicated that it favours BC Hydro by providing special advantages not provided to other parties and by expressing an intention to help BC Hydro (T13: 2671-2).

The matters leading to the allegation of a reasonable apprehension of bias and denial of procedural fairness and natural justice arise from the Commission Panel's decision to enter into an in-camera session on January 19, 2005 and the matters spoken to during that session.

GSXCCC was supported in its motion by the Joint Industry Electricity Steering Committee (“JIESC”). The JIESC also submitted that in addition to the grounds relied upon by GSXCCC, the Commission Panel had demonstrated a reasonable apprehension of bias based on a series of procedural rulings and orders made during the pre-hearing and oral hearing stages of this application.

B.C. Old Age Pensioners Organizations et al (“BCOAPO”), Green Island Energy Limited (“Green Island”), Commercial Energy Consumers British Columbia, the Village of Gold River, Mr. Steeves, Shadybrook Farm and Mr. Hill supported the submissions put forward by GSXCCC and the JIESC. Commission counsel filed and the Commission Panel considered correspondence received from Mr. Hill (Exhibit C13-6), Mr. McKechnie (Exhibit C22-8), Mr. Hague (Exhibit C26-8), Ms. McLennan (Exhibit C36-15), Mr. Anderson (Exhibit C37-8), The Islands Trust (Exhibit C38-2), and a number of non-intervenors (Exhibit E-282) all in support of the GSXCCC application.

BC Hydro, Duke Point Power Limited Partnership (“DPP”) and Terasen Gas (Vancouver Island) Inc. (“Terasen”) opposed the motion. In summary, these parties submit that the Commission Panel properly went into an in-camera session, restricted itself to appropriate lines of inquiry and followed procedures which accorded with the principles of natural justice and procedural fairness.

The Commission Panel heard submissions from the parties on the applicable legal principles to be considered in a motion for disqualification. In considering this application for disqualification, the Commission Panel is guided by the decision in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, 2003 S.C.C. 45 (“*Wewaykum*”). In that case, the Court states at paragraph 60:

In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, *supra*, at p. 394, is the reasonable apprehension of bias:

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

The Commission Panel is also guided by the comments made by the Court in *Wewaykum* at paragraphs 76 and 77. The standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. Further, this is an inquiry that remains highly fact specific. Whether the facts, as established, point to financial or personal interests of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts. On January 27, 2005, the Commission Panel dismissed the application with Reasons to follow. These are the Reasons for the decision to dismiss.

ANALYSIS

Pursuant to the terms of the Call For Tender (“CFT”) and Commission Order No. G-119-04 (Exhibit A-16) and related Reasons for Decision (Exhibit A-19), BC Hydro was obligated to keep in confidence certain information of a confidential nature related to non-successful bids. In its Reasons for Decision, the Commission Panel

considered that in view of the unique circumstances of the EPA and the public interest in disclosure, the pricing terms related to the successful bid would be disclosed, however, in balancing the competing public interests, the Commission Panel concluded that information related to the unsuccessful bids should not be disclosed. Accordingly, the Commission Panel took certain steps to protect the confidential information supplied by non-successful bidders. One of the procedures employed was the use of an in-camera session to receive information of a confidential nature.

Near the end of cross-examination of BC Hydro Panel Two, which dealt with the CFT process, the QEM model and outcome, the Chair questioned the witness panel members as to whether the third portfolio of Tier 1 provided better value to customers than the Tier 1 bid which had won the CFT process. Ms. Hemmingsen, a member of the witness panel, confirmed this to be so (T8: 1718).

As a result of the response from Ms. Hemmingsen, the Chair stated that he wished to pursue the issue and believed that, in order to do so, the Commission Panel needed to go into an in-camera session unless there were objections to the contrary (T8: 1719). Counsel for GSXCCC requested a characterization of the matters to be discussed in the in-camera session so that parties who were not privy to the confidential information would know what the topics to be discussed were. The topics were characterized as addressing results from the QEM that are apparent from the model in terms of some of the total valuations of different portfolios that were analyzed; inquiring from a ratepayer impact perspective the comparative impacts between one portfolio and another portfolio; and what conclusions the Commission could properly draw from those differences. Further, there was to be further explanation of the differences and the ranking the QEM model then placed on the different portfolios in light of those differences (T8: 1721).

GSXCCC submits that a review of the transcript of the in-camera session discerns four distinct purposes. The first was to obtain BC Hydro's confirmation of the Panel's conclusion that DPP without duct firing is not the most cost-effective option. The second was to obtain BC Hydro's concurrence or agreement with the Panel's conclusion that a specific other project is the most cost-effective option. The third was to obtain BC Hydro's agreement with the Panel's expressed intention to achieve in some way an electricity purchase agreement for some other project other than the one selected by the CFT process. The fourth purpose was to obtain BC Hydro's input regarding how, legally and jurisdictionally, the Commission could achieve its stated desired outcome of an EPA for DPP with duct firing even though there was no such application in front of the Commission Panel (T13: 2670-1).

Dealing first with the issue of the decision to move to an in-camera session, the Chair decided to move to an in-camera session to eliminate the possibility that confidential information relating to a non-successful bidder might be inadvertently disclosed. In this case, as was subsequently revealed on January 24, 2005, the non-successful bid identified by the Chair and confirmed by Ms. Hemmingsen as providing better value to the customer was an alternate proposal from DPP. However, GSXCCC and others who supported the motion submit that one of the purposes was to compare the cost-effectiveness of Tier 1 options to other possible projects that either were or could be put forward. The Commission Panel rejects these submissions. The Commission Panel restricted its inquiry to an analysis of Tier 1 outcomes and not the cost-effectiveness of other projects or a comparison of Tier 1 projects to other possible outcomes. The in-camera session was, and was intended to be, limited in scope and was not directed to the overall principal issue identified for this proceeding.

Further, the Commission Panel rejects the submissions to the effect that by moving into an in-camera session, other parties were disadvantaged by not being aware of the items discussed and that the Commission Panel was lending assistance to BC Hydro that was not made available to other parties. In particular, the Commission Panel notes that the Chair first asked for any objections with regard to it moving into an in-camera session. None were received. A transcript was created for that session and, as soon as practicable, and following review of the transcript by Commission counsel and counsel for BC Hydro and then the Commission Panel, a redacted version of the transcript was released on January 21, 2005. The redactions related to information that would disclose the names of the parties or projects or rankings and the future negotiating positions of any parties in the event of future negotiations became necessary (T10: 2267-68). On January 24, 2005, following the agreement of counsel for DPP and further review of the redacted transcript, a virtually complete transcript from the in-camera session was released to all participants. The only part of the original transcript not disclosed covers some 7 lines at T8: 1744 (T12: 2516) relating to a potential negotiating position of BC Hydro.

For greater certainty, and in response to a request by DPP (T12: 2497) and suggestion by BC Hydro, the Chair identified the issues that the Commission Panel believes, subject to the views of participants, were raised in the in-camera session to be dealt with in the proceeding (T12: 2517-18). The Chair noted that:

We expect that participants will want to draw their own conclusions from this new evidence, and may also identify additional issues that may arise from the evidence, and this will be particularly important in the context of the legislative parameters for us and what options are available to us under section 71 of the Act.

The Commission Panel rejects any assertion that the parties have not had a full opportunity to address the case they have to meet. To the extent that legal and jurisdictional topics were discussed in the in-camera session, those topics were fully available to all parties for consideration, review and final Argument.

In support of the submissions that the Commission Panel has closed its mind to persuasion before all the evidence and arguments have been heard, references were made to various extracts from the in-camera proceedings held on January 19, 2005. The Commission Panel acknowledges that if certain isolated portions of the transcript are taken alone and not put in their context, there might be a concern as to whether the Commission Panel members had closed their minds to persuasion before all the evidence and argument had been heard.

However, the Commission Panel is guided by the principles in the *Wewaykum* decision. The facts must be examined in their entire context. The imputed comments and questions from the Commission Panel members must be read in their entire context. In many instances, the comments were conditional, and in the spirit of judicial inquiry should have been accepted to be conditional, in the sense that they address what might occur if something happens or a particular decision is made. To the extent that legal and jurisdictional issues were discussed, this was in relation to the specific issue raised by the evidence and the comments of BC Hydro concerning the ability of the two parties to amend the agreement (T8: 1743) and with the intention of flagging for BC Hydro and the other parties the matters they may need to address in their final Arguments.

The Commission Panel rejects the assertion that an informed person, viewing the matter realistically and practically – and having thought the matter through - would conclude that it was more likely than not that whether consciously or unconsciously the Panel members would not decide the issue before them fairly.

Further, the conduct and questioning of the Commission Panel both immediately before and following the in-camera session does not suggest that the Commission Panel had taken a position or could reasonably have taken a position during the in-camera session concerning the principal or other issues raised by parties. At the conclusion of parties' cross-examination of Panel 2 and immediately prior to the in-camera session, questions by the Commission Panel to BC Hydro witnesses had contemplated the possibility of the Commission Panel not accepting or not 'approving' the EPA in circumstances where, for example, design bias or other issues raised by parties may be found to exist (T8: 1716; 1733). The Commission Panel does not accept that an informed person viewing the matter realistically and practically – and having thought the matter through – would conclude that comments in the in-camera session (less than 30 pages later in the transcript and following identification by the

Chair of a new issue related to the QEM model and the Tier 1 results) suggest that the Commission Panel had then made up or closed its mind on the issues and related evidence before it filed by parties in the proceeding. The Commission Panel does not accept Green Island's assertion that the Commission Panel had made conclusions, as suggested at T13: 2732-2735, including, for example, conclusions concerning the privative or non-compliance clauses in Section 17.3 and 18.17 of the CFT or matters related to potential resource option or design bias.

The Commission Panel does not consider that GSXCCC and the parties who support its motion have raised substantial grounds to support an apprehension of bias, as contemplated by Mr. Justice de Grandpré in the *Committee for Justice and Liberty v. the National Energy Board* [1978] 1 S.C.R. 394-95 (T13: 2785), especially in the specific context and facts of this case.

At best, the Commission Panel is of the view that the impugned portions of the transcript show no more than that members of the Commission Panel were coming to or developing certain conclusions with respect to the Tier 1 results, not that they had been definitely reached. Again, it is important to consider the specific facts and the limited context and purpose of the in-camera session.

The minds of the Commission Panel members were open and remain open to persuasion. As noted above, in an effort to assist the parties to deal with the matters raised and to, for example, provide further evidence upon which a final decision could be made, the Commission Panel invited submissions for procedural requests the parties might have that arose from the matters that were raised during the in-camera session flowing from Ms. Hemmingsen's acknowledgment that another Tier 1 outcome other than the successful bid provided better value to customers (T14: 2887). GSXCCC requested that Ms. Hemmingsen be recalled for cross-examination to have her confirm and explain whether it was true that DPP without duct firing is not the most cost-effective option for meeting the capacity shortfall on Vancouver Island and to confirm her opinion that DPP with duct firing was the most cost-effective option for meeting the perceived capacity shortfall. BCOAPO and the Village of Gold River opposed the motion to recall Ms. Hemmingsen and submitted that her evidence on those points had already been received and was fully adequate for purposes of argument and did not require any further clarification. BC Hydro agreed with the submissions and provided further arguments relating to scope and jurisdiction in opposing the motion. The Commission Panel agreed with those opposing the motion and dismissed the motion.

As mentioned earlier, the JIESC also submitted that certain procedural rulings and orders made by the Commission Panel during the course of these proceedings displayed a reasonable apprehension of bias by denying procedural fairness and affording the principles of natural justice to the parties. Most, if not all, of the items raised by the JIESC in its submission have already been ruled upon in previous reconsideration decisions in this proceeding. The Commission Panel does not agree that the parties have not been afforded procedural fairness or treated in a manner other than in accordance with the principles of natural justice.

The Panel acknowledges that the controversy surrounding its treatment of confidential information in this proceeding suggests a need to review and formalize its practices and procedures regarding confidential information in future proceedings. The Commission Panel is, however, of the view that the handling of the confidential information in this proceeding was appropriate to safeguard the commercially sensitive nature of the information from non-successful bids, while at the same time allowing the parties to this proceeding to have as much disclosure as possible so that the public interest could be served. Further, the Commission Panel invited the parties to comment on whether its procedures were objectionable. Two clear instances of the Commission Panel's invitations have been referenced in these Reasons. In the first instance, input was sought from the parties as to whether there was an objection for the Commission Panel to go into an in-camera session. None were received. Secondly, as a result of the matters disclosed as a result of the in-camera session, the Commission Panel once again sought input from the parties as to what further steps, if any, should be taken to address outstanding substantive and evidentiary concerns of the parties. In the latter instance, the Commission Panel ruled against the motion to recall Ms. Hemmingsen as the apparent purpose was no more than to once again confirm what she had already stated.

In coming to the conclusion that it would not disqualify itself, the Commission Panel considered the extensive time resources and efforts to reach the stage of the proceedings at which the disqualification motion was brought. As the motion sought to disqualify both Panel members, the result would have been, if granted, that these proceedings were effectively at an end as there would be no remaining Panel member to adjudicate upon the issues. This factor was not an overriding or conclusive factor in the Commission Panel members' deliberations in reaching the decision to dismiss the disqualification motion. Rather, it was one factor the Commission Panel considered in deciding that there were no serious grounds upon which the application rested.

In summary, the Commission Panel has yet to reach a conclusion on the substantive aspects of the section 71 filing. It did not make any final decisions before all the evidence was heard. Further, the Commission Panel rejects the assertion that it has provided assistance to BC Hydro that is not available to others in this proceeding. The Commission Panel, both in the in-camera and public sessions, has tried to raise issues, both legal and factual, for all parties to consider so that they would be appropriately addressed in evidence as appropriate and argument. The only information redacted was that of a confidential nature relating to a potential negotiating position of BC Hydro and consists of some seven lines at T8: 1744 (T12: 2516). The parties are in the same position with respect to the disputed items as they would have been if the matters were discussed in the open hearing process.