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**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER A-5-15**

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

and

British Columbia Pensioners' and Seniors' Organization, *et al.*
Application for Reconsideration of Order A-1-13
in the Matter of the Active Energy Corp. Compliance Inquiry

BEFORE: L. F. Kelsey, Commissioner
D. A. Cote, Commissioner
R. D. Revel, Commissioner

July 15, 2015

O R D E R

WHEREAS:

- A. On March 8, 2012, the British Columbia Utilities Commission (Commission), by Order A-5-12, established a compliance inquiry into 24 customer disputes against Active Renewable Marketing Ltd. (Active Energy). As part of that inquiry the Business Practices and Consumer Protection Authority (Consumer Protection BC) was retained to complete an inquiry report (report);
- B. On January 30, 2013, the Commission issued Order A-1-13, which contains Directive 3 that states: "[t]he Consumer Protection BC Report dated June 18, 2012 is expunged from the record of this Proceeding and will not be made public." The reasons for decision attached to Order A-1-13 provided the Commission's reasons for this directive;
- C. On February 3, 2013, the British Columbia Pensioners' and Seniors' Organization, *et al.* (BCOAPO) (then known as BCPSO) applied for reconsideration of that portion of Directive 3 which states "...and will not be made public" pursuant to section 99 of the *Utilities Commission Act*. BCOAPO's application for reconsideration also contained a request for the report pursuant to Section 5 of the *Freedom of Information and Protection of Privacy Act* (FOIPPA);
- D. On February 20, 2013, the Commission established phase one of the reconsideration process wherein comments were sought from Active Energy and other interested stakeholders on whether BCOAPO had made a *prima facie* case warranting moving to phase two where Order A-1-13 would be reconsidered;
- E. Comments were received from Active Energy on February 28, 2013, and a reply submission was made by BCOAPO on March 7, 2013;

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- F. At the same time as the Commission was considering the submissions on the reconsideration application, the Commission was assessing BCOAPO's request for the report under FOIPPA. As Active Energy objected to the release of the report under *FOIPPA*, the issue was forwarded to the Office of Information and Privacy Commissioner for British Columbia (OIPC). On February 19, 2015, that office released Order F15-06 which determined that section 61(2)(c) of the *Administrative Tribunals Act* excludes the report from FOIPPA's application;
- G. On May 26, 2015, the Commission requested additional comments on phase one of the reconsideration process given the contents of the order from the OIPC;
- H. Active Energy submitted comments on June 4, 11 and 19, 2015 and BCOAPO submitted comments on June 15, 2015; and
- I. The Commission considered all comments received in phase one of the reconsideration process and determines that reconsideration of Order A-1-13 is not warranted.

NOW THEREFORE for the reasons attached as Appendix A and pursuant to section 99 of the *Utilities Commission Act*, the British Columbia Utilities Commission orders that the British Columbia Pensioners' and Seniors' Organization, *et al.*'s application for reconsideration of Order A-1-13 is denied.

DATED at the City of Vancouver, in the Province of British Columbia, this 15th day of July 2015.

BY ORDER

Original signed by:

L. F. Kelsey
Commissioner

Attachment

British Columbia Pensioners' and Seniors' Organization, *et al.*
Application for Reconsideration of Order A-1-13
in the Matter of the Active Energy Corp. Compliance Inquiry

REASONS FOR DECISION

1.0 INTRODUCTION

This reasons for decision addresses whether the British Columbia Utilities Commission (Commission) should reconsider Order A-1-13 as requested by the British Columbia Pensioners' and Seniors' Organization *et al.* (BCPSO) (now known as the British Columbia Old Age Pensioners' and Seniors' Organization *et al.* (BCOAPO)).

2.0 BACKGROUND

On March 8, 2012, the Commission, by Order A-5-12, established a compliance inquiry into 24 commercial customer disputes against Active Renewable Marketing Ltd. (Active Energy). As part of that inquiry, the Business Practices and Consumer Protection Authority (Consumer Protection BC) was retained to complete an inquiry report (report). At the conclusion of the compliance inquiry, on January 30, 2013, the Commission issued Order A-1-13 which states in Directive 3: "[t]he Consumer Protection BC Report dated June 18, 2012 is expunged from the record of this Proceeding and will not be made public." The reasons for decision attached to Order A-1-13 provided the Commission's reasons for this directive:

"The Panel agrees with Active Energy and the Compliance Team that the investigation report goes well beyond its proper scope. The Report not only sets forth certain evidence gathered in the investigation, but also contains expressions of opinion about Active Energy's conduct and reaches legal conclusions both of which are properly the domain of the Panel or other authorities. The Panel considered whether it could release certain parts of the Consumer Protection BC Report through redaction of the offensive portions but concludes that it is not possible to do so because the offensive portions are too intermingled with the evidentiary portions. Instead, the Panel reviewed the Proposed Settlement Agreement and the consolidated summaries for the complaints and concludes that all the necessary evidentiary components from the Consumer Protection BC Report have been adequately captured in the Proposed Settlement Agreement. Therefore, the individual complainants will have access to the necessary evidence for adjudication and resolution of the individual complaint affecting them without unfairly and unnecessarily imposing a substantial expectation of harm to the financial and economic interests of Active Energy, which would occur if the Consumer Protection BC Report was made available to the public. The Commission Panel's view is that the Proposed Settlement Agreement provides an adequate evidentiary record for the purposes of the Compliance Inquiry, and for the purposes of this Inquiry, replaces the proper evidentiary record that was contained in the Consumer Protection BC Report. The Commission Panel therefore expunges the Consumer Protection BC Report from the evidentiary record of this Proceeding. Given that the report is expunged, and that the Panel finds that there is a reasonable and substantial expectation of harm to Active Energy if the report is released, the Commission Panel has determined that the Consumer Protection BC Report will not be made available to the public."

3.0 BCOAPO'S APPLICATION FOR RECONSIDERATION

BCOAPO is an organization that represents senior and low-income residential ratepayers in regulatory proceedings before the Commission. BCOAPO was not a participant in the compliance inquiry. Only Active Energy and the Commission Compliance Team were participants. On February 3, 2013, BCOAPO applied, pursuant to section 99 of the *Utilities Commission Act*, for reconsideration of the portion of Directive 3 of Order A-1-13 which states "...and will not be made public." By letter dated February 20, 2013, the Commission sought submissions from BCOAPO and Active Energy as to whether BCOAPO had established a *prima facie* case warranting moving to phase two of the reconsideration process.¹ In its application for reconsideration BCOAPO submits that the Commission made the following two errors of law in ordering the report not be made public:

- i. inappropriately exercising a decision making power granted to the Information and Privacy Commissioner by section 42 of FOIPPA [*Freedom of Information and Protection of Privacy Act*]; and
- ii. erring in its interpretation and/or application section [*sic*] 21 of FOIPPA.²

On February 19, 2015, the Office of the Information and Privacy Commissioner, by Order F15-06, held that section 61(2)(c) of the *Administrative Tribunals Act* (ATA) excludes the Consumer Protection BC Report from FOIPPA's application and effectively denied BCOAPO's request for access to the Consumer Protection BC Report.

In its subsequent comments to the Commission dated June 15, 2015, BCOAPO submits that the Commission made an additional three errors that have material implications and that there has been a fundamental change in circumstances:

- i. failure to raise relevant basic principles. Specifically BCOAPO submits:

"[t]he Commission Panel's decision to hold the Report confidential because the Report contained opinions and legal conclusions and because making the Report public could cause harm to Active Energy's financial interests fails to recognize that only certain types of information and only certain types of economic interests can be protected at the expense of public access to tribunal processes..."³
- ii. error of law in holding the report confidential because it contained opinions and legal conclusions, and disclosing it would potentially cause financial harm to Active Energy. BCOAPO submits:

"[t]here is no relationship between expressing opinion/legal conclusions and confidentiality...In addition, it was an error of law for the Commission to deny public access to the Report on the basis that making it public had the potential to cause financial harm to Active Energy. Every type of document critical of a company has the potential to cause financial harm. This is not the test for whether a document should be held confidential."⁴

¹ Exhibit A-1

² Exhibit B-1, pp. 1-2

³ Exhibit B-3, p. 9

⁴ Ibid, pp. 9-10

BCOAPO further submits:

BCOAPO also cites the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 which stresses the importance of the Open Court Principle and sets out the following test for deciding when documents should be made confidential.⁵

"A confidentiality order should only be granted when (1) such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings. Three important elements are subsumed under the first branch of the test. First, the risk must be real and substantial, well grounded in evidence, posing a serious threat to the commercial interest in question. Second, the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question."⁶

"In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality... the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" (emphasis added)."⁷

BCOAPO concludes its submission by saying that the Commission appears to have made the information confidential solely on the basis that it is embarrassing to Active Energy and potentially damaging to their marketing efforts and that these are not factors that are recognized legally as adequate reasons to make a confidentiality order.⁸

iii. Error of fact in finding that the Report went beyond its proper scope.

BCOAPO submits that the contract between the Commission and Consumer Protection BC required Consumer Protection BC to express opinions and conclusions and make "civil findings" and that opinions and conclusions are commonly and properly expressed at the investigative stage of regulatory proceedings and are not reason to hold information confidential.⁹

⁵ Ibid, pp. 6-7

⁶ *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, headnote

⁷ Ibid, para. 55

⁸ Exhibit B-3, p. 7

⁹ Exhibit B-3, p. 10

iv. Material Implications

BCOAPO further submits that the alleged errors have material implications as holding the report from the public denies customers and the general public the opportunity to know and understand the allegations made and information about Active Energy's marketing and training that may prevent occurrences such as those that led to the compliance inquiry from being repeated when the customer choice program expands to new territories. As well, BCOAPO submits that confidentiality orders have a material implication on the core values of freedom of expression and seeking the truth and that they undermine public confidence in decision making bodies.¹⁰

v. Fundamental change in circumstances:

Finally, BCOAPO submits that there has been a fundamental change in circumstances warranting reconsideration. It states:

"Even after the Commission Panel's decision in Appendix A to Order A-1-13, the Commission agreed with BCOAPO that the Report was producible under FOIPPA s. 21 and notified Active Energy of its intention to provide BCOAPO with the Report. However, during the course of proceeding before the Information and Privacy Commissioner Active abandoned its s.21 argument and came to rely on ATA s.61 which renders FOIPPA inapplicable to documents ordered to be confidential by a tribunal. However, in holding the Report confidential, the Commission Panel erred in its application of CFPD provision 7, which appears intended to align with FOIPPA s.21. Consequently, it is only the sequence of events in this case that have rendered the Report not producible under FOIPPA."

4.0 ACTIVE ENERGY'S POSITION

Active Energy submits that BCOAPO has not established a *prima facie* case warranting reconsideration and that its application for reconsideration should be denied.¹¹

Specifically, Active Energy submits that BCOAPO has mischaracterized the Commission's decision because the Commission made Order A-1-13 pursuant to the *Utilities Commission Act* and not pursuant to FOIPPA as BCOAPO claims.¹²

Active Energy refers to sections 41(2)(a) and 42 of the ATA which state:

41 (2) ...the tribunal may direct that all or part of the information be received to the exclusion of the public if the tribunal is of the opinion that

(a) the desirability of avoiding disclosure in the interests of any person or party affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public...

¹⁰ Exhibit B-3, pp. 10-11

¹¹ Exhibit C1-3, p. 1

¹² Exhibit C1-1, p. 2

42 The tribunal may direct that all or part of the evidence of a witness or documentary evidence be received by it in confidence to the exclusion of a party or parties or any interveners, on terms the tribunal considers necessary, if the tribunal is of the opinion that the nature of the information or documents requires that direction to ensure the proper administration of justice.

Active Energy submits that the Commission has the authority to determine what evidence will become part of the public record and that the Commission's decision shows "a careful consideration of the issues, and a balancing of the public interest in disclosure of documents with the interests of the parties."¹³

In relation to BCOAPO's allegation that the Commission erred in fact in finding that the report went beyond its proper scope, Active Energy submits that this is simply BCOAPO stating its disagreement with the Commission's conclusion.¹⁴

Active Energy rebuts BCOAPO's views that the Commission did not abide by the open court principle and test from *Sierra Club of Canada v. Canada (Minister of Finance)* by citing the Commission's statement "all the necessary evidentiary components from the...Report have been adequately captured in the Proposed Settlement Agreement....the individual complainants will have access to the necessary evidence for adjudication and resolution of the individual complaint affecting them without unfairly and unnecessarily imposing a substantial expectation of harm to the financial and economic interests of Active Energy..." shows that the Commission expressly considered whether the beneficial aspects of making the report unavailable to the public outweighed the potential deleterious effects of doing so.¹⁵

5.0 COMMISSION DETERMINATION

The Commission Panel has considered the submissions of both parties and for the reasons below, **determines that reconsideration of Order A-1-13 is not warranted as BCOAPO has not established a *prima facie* case that the Commission erred. BCOAPO has also not established that one or more of the alleged errors has material implications. BCOAPO's application for reconsideration is denied.**

The Commission acknowledges the paramount importance of transparency and open access to its regulatory processes. However, in this case, the Commission properly weighed the interests at play and exercised its authority to hold the report confidential.

The Commission has authority to hold the report from the public pursuant to sections 41(2)(a) and 42 of the ATA. These sections of the Act require evidence and information received by the Commission to be made public *unless* certain conditions are met. Sections 41(2)(a) and 42 of the ATA set out those conditions as being when "the public interest outweighs the desirability of adhering to the principle that hearings be open to the public" and "if the tribunal is of the opinion that the nature of the information or documents requires that direction to ensure the proper administration of justice." The Panel also takes guidance from *Sierra Club of Canada v. Canada (Minister of Finance)* in interpreting these conditions. Although the ATA applies directly to the Commission as a tribunal and *Sierra Club* was written for the court system, that decision from the Supreme

¹³ Exhibit C1-1, pp. 3-4

¹⁴ Exhibit C1-4, p. 3

¹⁵ Exhibit C1-4, p. 2

Court of Canada has helpful guidance for applying the broad test set out in the ATA. The Commission's Confidential Filing Practice Directive is based upon the principles set forth in these sections of the ATA.

The Commission considered the requirements of the ATA, the Confidential Filing Practice Directive and case law when making the decision that led to Order A-1-13 and the attached reasons. The Commission concluded that there was a public interest in preventing unwarranted harm to Active Energy, which outweighed the need to have the report available to the public. Keeping the Consumer Protection BC report confidential while making the relevant information available to the public ensured the proper administration of justice because it all owed, in the most expeditious manner possible and without causing harm, resolution of the 24 individual disputes against Active Energy. As the Commission said in the reasons attached to Order A-1-13, the evidence required to resolve the 24 complaints was made available without the necessity of having to release the report. The Commission made the assessment that releasing the report to the public would reasonably be expected to harm Active Energy, without a corresponding positive benefit to the public interest through disclosure of the report. This is because the evidence required for the resolution of the complaints, and thus the evidence required to benefit the public interest through the expeditious and proper administration of justice, was made available without the necessity of releasing the report.

The Commission also considered whether some of the report could be made public by redacting certain portions and determined it could not because the offensive portions were too intermingled with the evidentiary portions such that redaction was not possible. Regardless of whether the error is characterized as an error of fact or law, or an error to consider relevant principles, the key issue is whether the Commission properly balanced and conserved the public interest by deciding to withhold release of the report instead of making it a public document. For the reasons expressed by the Commission in the reasons for Order A-1-13, it decided to withhold the report while making the key evidence available and determined that the public interest was properly preserved by withholding the report.

This Panel does not accept BCOAPO's submission that there has been a fundamental change in circumstances warranting reconsideration. This submission appears to be based on events related to BCOAPO's FOIPPA request that concluded with Order F15-06 from the Office of the Information and Privacy Commissioner but do not relate to any substantive fundamental change in the circumstances for either Active Energy or BCOAPO. In any case the Commission did not apply FOIPPA when making its decision in Order A-1-13 and this ground for reconsideration is denied.

BCOAPO submits that the alleged errors have material implications such that knowledge of Active Energy's marketing and training may prevent occurrences such as those that led to the compliance inquiry from being repeated when the customer choice program expands to new territories. The Panel notes that the compliance inquiry was concerned with commercial customer disputes and not residential customers. To that extent, while BCOAPO's clients might be interested in marketing techniques used for commercial customers, there is no material effect upon the residential customers as the inquiry did not deal with residential complaints. Further, the Commission notes that all of the complaints arising from the compliance inquiry have been resolved to customers' satisfaction and Active Energy no longer operates in BC. These factors also lead the Panel to the conclusion that Active Energy's marketing techniques in which BCOAPO has interest are no longer in play and therefore lack material implications. Regarding BCOAPO's claim that there are material implications on core values, this Panel has already addressed this submission in its reasons above. The Commission was well aware of the competing interests in confidentiality and disclosure.