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**VIA FACSIMILE**  
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January 6, 2005

British Columbia Hydro and Power Authority  
Call for Tenders for Capacity on Vancouver Island  
Review of Electricity Purchase Agreement

**Exhibit No. A-19**

Mr. Richard Stout  
Chief Regulatory Officer  
British Columbia Hydro and Power Authority  
17<sup>th</sup> Floor, 333 Dunsmuir Street  
Vancouver, B.C. V6B 5R3

Dear Mr. Stout:

Re: British Columbia Hydro and Power Authority  
Call For Tenders for Capacity on Vancouver Island  
Review of Electricity Purchase Agreement  
Commission Order No. G-119-04 – Reasons for Decision

As contemplated in Commission Order No. G-119-04 (Exhibit A-16) that was issued on December 24, 2004, the Commission's Reasons for Decision are attached.

Yours truly,

*Original signed by:*

*for:* Robert J. Pellatt

RJP/cms  
Enclosure(s)  
cc: Registered Intervenors and Interested Parties



IN THE MATTER OF  
THE UTILITIES COMMISSION ACT, R.S.B.C. 1996, CHAPTER 473

AND

A FILING BY BRITISH COLUMBIA HYDRO AND POWER AUTHORITY  
CALL FOR TENDERS FOR CAPACITY ON VANCOUVER ISLAND  
REVIEW OF ELECTRICITY PURCHASE AGREEMENT

**ORDER NO. G-119-04**  
**REASONS FOR DECISION**

**BEFORE:**

R.H. Hobbs, Chair  
L.A. Boychuk, Commissioner

## REASONS FOR DECISION

By Order No. G-119-04 dated December 24, 2004, the Commission directed the disclosure of Appendix 3, except sections 1.1 (hh), 1.1 (ii), and 1.1 (jj), to the Electricity Purchase Agreement (“EPA”), with reasons to follow. These are the reasons.

### INTRODUCTION

On November 30, 2004, the Commission Panel addressed the issue of confidentiality generally as follows:

The Commission Panel accepts B.C. Hydro’s proposal regarding confidentiality at page 116 to 117 of the transcript. The Commission Panel and staff will review the executed EPA, the CFT models, and the input data. Following completion of that review, the Commission Panel may hold an in-camera review with B.C. Hydro and Duke Point to consider public disclosure of confidential information (T2: 314).

These comments became the subject of several letters and applications by intervenors. The BC Old Age Pensioners Organization *et al.* (“BCOAPO”), Exhibit C3-4, and Joint Industry Electricity Steering Committee (“JIESC”), Exhibit C19-5, filed applications seeking reconsideration of the comments. At the Pre-hearing Conference on December 17, 2004, the Chair identified two possible approaches to the Commission Panel’s handling of the confidentiality issues raised in the reconsideration applications (T3: 364-366).

Subsequently, at the December 22, 2004 Pre-hearing Conference, the Commission Panel heard further submissions regarding the disclosure of documents that BC Hydro seeks to keep confidential. British Columbia Hydro and Power Authority (“BC Hydro”) acknowledged that the confidentiality of the EPA - the prices and substantial terms - was an issue that needs debate (T4: 698) and suggested that, as a matter of process, it would be up to BC Hydro and Duke Power Point Limited Partnership (“DPP”), to make submissions with respect to the need for confidentiality with response and reply to follow (T4: 704). BCOAPO agreed with BC Hydro that its reconsideration application was premature (T4: 702).

On December 24, 2004 the Commission issued Order No. G-119-04, in part, directing the disclosure of Appendix 3, except sections 1.1 (hh), 1.1 (ii) and 1.1 (jj) [incorrectly described as 1 (jj)] of the EPA. The Order also denied, as premature, the applications by BCOAPO and the JIESC for disclosure of confidential information.

Legislation, Case Law, Commission Rules and Practice, and Government Policy

On November 19, 2004, BC Hydro filed an executed EPA and Vancouver Island Generation Project (“VIGP”) Transfer Agreement and requested that the agreements be kept confidential (Exhibit B-1). The request for confidentiality was in a form similar to that which has routinely been accepted by the Commission in the past.

The EPA was filed by BC Hydro pursuant to section 71 of the Utilities Commission Act (“the Act”). Section 71(5) of the Act provides:

An energy supply contract or other information ... must be made available to the public unless the commission considers disclosure not to be in the public interest.

Section 1.9 of the Commission's Energy Supply Contracts - Rules states:

A Contract filed pursuant to section 71 shall be made available to the public except where the Commission considers that disclosure is not in the public interest. Parties shall provide written submissions in support of any requests that contracts be kept confidential. The Commission will consider the jurisdiction provided and make a ruling on the request for confidentiality.

Neither the Act nor the Rules provide for third party input as of right into the matter of the Commission's determination of whether disclosure of an energy supply contract or other information is not in the public interest.

**The Commission Panel concludes that the filings by BC Hydro, together with the oral submissions by both BC Hydro and DPP on the record of this proceeding, satisfy the filing requirements that may apply to documents that are not made available to the public.**

During the December 22, 2004 Pre-hearing Conference, the Commission Panel was referred to two court decisions: *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.R. 522, and *Office and Professional Employees' Int'l Union et al v. B.C. Hydro et al* 2004 BCSC 422 (T4: 707 and 802).

The Commission Panel accepts that the *Sierra Club* decision is relevant to the confidentiality issues raised by the evidence filed in this proceeding. Iacobucci, J. in delivering the judgment of the Court states at paragraph 53:

A confidentiality order ... should only be granted when:

Such an order is necessary in order 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

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 the context includes the public interest in open and accessible court proceedings.

In the *Sierra Club* case, the relevant statutory provision on confidentiality was Rule 151 of the Federal Court rules, 1998, SOR/98-106 which provided as follows:

- 151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.
- (2) Before making an order under subsection(1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

Counsel for BC Hydro further submitted (T4: 710-711) that the *Sierra Club* decision has to be considered in light of section 42 of the *Administrative Tribunals Act, SBC 2004, Chapter 45* which provides:

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 the terms the tribunal considers necessary, if the tribunal is of the opinion that the nature of the information or documents require that direction to ensure the proper administration of justice.

As identified in the *Sierra Club* decision, there are competing public interests relevant to the disclosure of the documents that have been filed, but not disclosed, in this proceeding. A presumption of disclosure might be relevant to a determination of the weight to be given to the competing public interests. However, the Commission Panel does not accept that section 71(5) directs the Panel as to the weight to be given to the competing public interests. Section 71(5) merely establishes that the EPA and information filed with the EPA may not be disclosed if the Commission considers disclosure not to be in the public interest. The Commission Panel accepts that the protection of commercial interests, is a public interest which must be balanced and evaluated against whatever other public interest is being compromised by confidentiality, including, as appropriate, an open and transparent process (T4: 708).

The Provincial Government issued the Energy Plan in November 2002. Policy Action #13 states that the private sector will develop new electricity generation in this province. DPP submits that the effect of Policy Action #13 is to establish competitive bidding processes as an important means to secure future supply. In this regard, the Commission Panel accepts the submissions of DPP's counsel (T4: 724-725).

#### The Confidential Information

The documents that BC Hydro seeks to keep confidential in this proceeding were created for the purpose of selecting, within a competitive bid process (Call for Tenders "CFT" process), on island generation to meet the load requirements on Vancouver Island. The documents were created during the CFT process, as a result of subsequent analysis by BC Hydro management, or as a result of responses to information requests made of BC Hydro and/or DPP during this proceeding. For the purpose of these reasons, the Commission Panel accepts that the documents BC Hydro seeks to keep confidential are relevant to the matters to be considered in this proceeding. The subject documents are a matter of record in the proceeding and will not be listed for the purpose of these reasons.

Following the Procedural Conference held on November 29 and 30, 2004, BC Hydro filed a redacted, executed EPA as Exhibit B-6. At the December 22, 2004 Pre-hearing Conference, counsel for DPP stated at T4: 730 that the following sections of the EPA would be made available:

- (a) Definition number 33, page 46;
- (b) Definition number 87, page 52;
- (c) The Table at pages 73 and 74, except one line; and
- (d) The site map at page 77.

#### Expectations of DPP and BC Hydro

The confidentiality of the documents created for the purpose of the CFT process was addressed in the CFT and also in the EPA. The relevant confidentiality provision of the CFT is section 18.15, Appendix B and that of the EPA is subsection 22.8 (respectively, Appendix B of Exhibit B-1 and Exhibit B-6). As stated by counsel for BC Hydro:

There are commitments made by B.C. Hydro to maintain confidence subject, it's acknowledged, to order of this Commission and this regulatory process, but there is nevertheless commitments in that agreement for B.C. Hydro to use its best efforts to keep confidential the information which is being provided in the EPA and the terms of the EPA and that's what it here seeks to do. That is a legitimate interest which it, I think, serves Hydro and through Hydro it's ratepayers to have protected (T4: 712-713).

He further commented:

I think first and most fundamentally, information with respect to anybody other than Duke should be absolutely confidential—that is, the population of the models, et cetera—because to add insult to injury, as I put it before, for non-successful bidders would be devastating to future process (T4: 716).

The Commission Panel's decision in this matter assumes that DPP will make public the sections of the EPA identified by its counsel at T4: 730.

Intervenor Requests for the Production of Documents

During the December 22, 2004 Pre-hearing Conference, the focus of the intervenors submissions regarding production of documents was Appendix 3 of the EPA. Counsel for JIESC stated:

You've asked about what areas we want disclosed, and at least in general terms I'd like to start out by saying what we want disclosed is Appendix 3, the tariff. There may be some other items, but they really provide most of the costs that get the demand charge, the energy charge, startups and matters like that. With that information, to put it in a positive light, it means that we will know or the customers will know what this project is going to cost them.

.....

If we have that information, we can then also run scenarios to have some idea, both of when – of what may develop down the road, and how things could be seen, and bring that to this Commission. Without that, it is very difficult to do, if not impossible. And I tend toward the impossibility side (T4: 743-744).

Later he commented:

And I might point out there that we are not seeking disclosure of the non-winning bids. We don't think that's necessary. It probably would be helpful to put together different combinations, but we can probably live, in a spirit of compromise, with the pricing elements of the successful bidder (T4: 747).

Counsel for Norske Canada stated that it was only looking at the DPP project as being the one that ratepayers are going to have to pay for and commented that the disclosure of non-winning bids is not necessarily helpful (T4: 760). Counsel for the Commercial Energy Consumers of BC ("CECBC") requested the non-winning bids, but on a no-name basis (T4: 779). Counsel for GSXCCC also focussed on the redacted EPA (T4: 785) and submitted that s. 71(5) of the Act does not apply to the unsuccessful bids (T4: 786).

Counsel for the BCOAPO made a request for the information referred to in Exhibit C3-3, BCOAPO 1.22.1, which is a request for the annual amount of energy and payments to DPP.

Appendix 3 of the EPA includes the pricing terms that determine the payments by BC Hydro to DPP during the term of the EPA. Such payments can reasonably be expected to be recovered from ratepayers. For this reason, the public disclosure of Appendix 3 of the EPA was the focus of comments from intervenors during the December 22, 2004 Pre-hearing Conference.

Although there may be other documents that the intervenors may seek to be produced, the Commission Panel does not expect that disclosure of documents other than Appendix 3 of the EPA is necessary at this time for the intervenors to fully participate in this proceeding. Therefore, the focus of these reasons will be the release of Appendix 3 of the EPA.

#### Submissions of BC Hydro and Duke Point Power

During the December 22, 2004 Pre-hearing Conference, counsel for BC Hydro relied on four reasons for keeping the pricing terms confidential:

- (a) The threat to the commercial interests of DPP;
- (b) The integrity of commitments made during the CFT process;
- (c) The threat to future bid processes; and
- (d) Impacts on dispatch of the DPP plant.

(T4: 711-714; 805-807)

Regarding the requirement for evidence for keeping documents confidential, the Commission Panel accepts the submission of counsel for BC Hydro that:

... it doesn't require sophisticated evidence or indeed really any evidence beyond the Commission's general understanding of the value of the competitive process to understand how that [disclosure] would compromise Hydro's ability to get participation in future calls (T4: 713).

### Submissions of Norske Canada and Green Island Energy

During the December 22, 2004 Pre-hearing Conference, Green Island Energy first expressed the intention to disclose its bid in NPV terms (T4: 772), and later offered to disclose its bid, but conditioned on the disclosure of all bids that were submitted in the CFT process as of August 13, 2004 (T4: 827). The Commission Panel notes the unwillingness of Green Island Energy to disclose its competitive position relative to the other bidders before the other bids are disclosed, and notes that the release of the DPP bid will provide commercially sensitive information to Green Island Energy that will not be released in-kind by Green Island Energy or other unsuccessful bidders.

Norske Canada stated that it will file the financial terms and conditions of its demand side management proposal in the proceeding (T4: 767).

### Competing Public Interests

Comments made by several participants during the December 22, 2004 Pre-hearing Conference suggest a general acceptance that there are competing public interests that need to be considered (JIESC, T4: 755; Green Island Energy, T4: 771; DPP, T4: 722-723). For the purpose of these reasons, the Commission Panel accepts that the following public interest considerations are relevant to the production of documents, including Appendix 3:

1. The production of Appendix 3 poses a threat to the commercial interests of DPP, but with minimal effects on future bid processes;
2. The production of unsuccessful bidder documents and any information arising from those documents poses a threat to the commercial interests of the unsuccessful bidders and is likely to cause deleterious effects to future bid processes; and
3. The release of dispatch information is likely to cause harm to ratepayers.

The Commission Panel accepts that these public interests must be weighed against the public interest that is being compromised by confidentiality. The Commission Panel concludes that the competing public interests need to be weighed in the context of the specific information that is being considered for disclosure.

### Commission Decision

The Commission's practice to date has been to treat as confidential documents that are filed under s. 71 of the Act with a request that the document be kept confidential. To date there has not been a challenge in this regard and public processes have not frequently or typically been invoked to consider s. 71 filings. In these circumstances, however, in view of the unique characteristics of the EPA and the public interest in disclosure of the pricing terms, the Commission Panel accepts that a departure from its previous practice is appropriate.

This by no means is a typical s. 71 filing. Rather, as submitted by parties, the EPA and the process by which it was entered into are unique. All parties to the earlier 'VIGP process', including BC Hydro, clearly contemplated that some form of public process would be required to consider any EPA filed (or Certificate of Public Convenience and Necessity application for that matter) that may result from a CFT conducted by BC Hydro following the Commission's September 2003 VIGP decision.

In the Commission Panel's view, however, this same analysis and logic does not strictly follow for information related to the unsuccessful bids. The Commission Panel accepts that the disclosure of such information would be detrimental to future competitive bidding processes and, in balancing the competing public interests, concludes that such information should not be disclosed. As noted in the November 30 ruling, the Commission Panel considers that it should be up to parties who are unsuccessful bidders to adduce whatever evidence or information they consider necessary to support positions they may take within the scope of this proceeding.

**The Commission Panel accepts that public interest in disclosure of Appendix 3, except sections 1.1 (hh), 1.1 (ii), and 1 (jj), should be paramount to the public interest in protecting the commercial interests of the winning bidder, DPP. The Commission Panel also accepts, however, that the disclosure of the unsuccessful bids can reasonably be expected to cause serious deleterious effects to future bid processes with minimal public interest benefits arising from disclosure. Further, the public interest of disclosure of unsuccessful bids is not paramount to the ratepayers interests in successful future bid processes.**

Despite having found that the public interest of disclosure of the pricing terms should be paramount to the public interest in protecting the commercial interests of DPP, the Commission Panel also finds that the public interest of disclosure of Appendix 3 should not be paramount to the deleterious effects of the public disclosure of the pricing terms related to dispatch of the plant. The release of such pricing terms may not only cause harm to DPP but also may have deleterious effects on the future economics of the plant. **Therefore, the Commission Panel concludes sections 1.1 (hh), 1.1 (ii) and 1.1 (jj) related to the dispatch of the plant should not be disclosed.**

The Commission Panel expects additional documents will be created and filed in this proceeding that will contain information that goes beyond the information that has been made available to the public pursuant to Order No. G-119-04. These reasons are intended to assist the Participants to assess the weight that may be given to the relevant public interests. Intervenors should not, without a further Order of the Commission Panel, expect disclosure of documents that are created based on information that has previously not been made available or has not been made public by Order No. G-119-04. BC Hydro and DPP, however, are encouraged to make public all documents, including information request responses, that contain information or are created using information that has been made public pursuant to Order No. G-119-04.