

William J. Andrews

Barrister & Solicitor

1958 Parkside Lane, North Vancouver, BC, Canada, V7G 1X5
Phone: 604-924-0921, Fax: 604-924-0918, Email: wjandrews@shaw.ca

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British Columbia Utilities Commission
Sixth Floor, 900 Howe Street, Box 250
Vancouver, BC, V6Z 2N3
Attn: Mr. Robert J. Pellatt, Secretary
By email: commission.secretary@bcuc.com

BRITISH COLUMBIA UTILITIES COMMISSION		
EXHIBIT C 20-35		
DAY	ENTERED BY	DATE
12	Andrews	Jan 24/05

Dear Sir:

Re: Project No. 3698354, BCUC Order G-106-04, BC Hydro VI CFT EPA Review

I am counsel for the intervenors GSXCCC, BCSEA and SPEC (GSXCCC, et al.) in this proceeding.

This is an 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. This written notice of motion and submissions will be filed by January 24, 2005, 4:30 p.m., pursuant to the Panel's directions (T:11:2487).

Please note that this application is based on grounds broader than those I identified orally on January 22, 2005 (T:11:2467). I anticipate that other parties may choose to support this motion for reasons of their own that may or may not coincide precisely with the reasons set out herein.

The leading statement of the test for reasonable apprehension of bias is by De Grandpre, J., dissenting, in the Supreme Court of Canada's decision in *Committee For Justice And Liberty et al. v. National Energy Board et al.*, 68 D.L.R. (3d) 716, reversing 65 D.L.R. (3d) 660:

... 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. ... 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 following are the key arguments in support of this motion:

1. The Commission Panel excluded all parties except BC Hydro from the January 19, 2005, *ex parte*, *in camera* hearing. While the Commission Panel does have legal authority to receive evidence in confidence in appropriate circumstances, the Commission Panel failed to implement the least-restrictive procedural mechanism for handling confidential information without violating the rights of the parties other than BC Hydro.

2. The Commission Panel chose to enter an *ex parte, in camera* hearing with BC Hydro not for the permissible purpose of receiving confidential information from BC Hydro's witnesses but for the purposes of obtaining BC Hydro's confirmation of the Panel's conclusion that the EPA (DPPP without duct firing) is *not* the most cost-effective option, obtaining BC Hydro's concurrence with the Panel's conclusion that a specific other project *is* the most cost-effective option, obtaining BC Hydro's agreement with the Panel's intention to achieve an electricity purchase agreement for the other project, and obtaining BC Hydro's input regarding *how* the Commission could achieve its desired outcome of an electricity purchase agreement for a project different than the one that 'won' the CFT.
3. The Commission Panel clearly told BC Hydro during the January 19, 2005, *ex parte, in camera* session that based on confidential evidence not available to the other parties the Commission Panel believes that the Electricity Purchase Agreement that is the subject of this proceeding is *not* the most cost-effective option for meeting the identified capacity need on Vancouver Island. This conclusion goes to the heart of the principal issue in this proceeding. It is clear that the Panel's conclusion in this regard is firm and definite, having been confirmed by BC Hydro both before (unbeknownst to the other parties) and during the *ex parte, in camera* session.
4. The Commission Panel also clearly told BC Hydro during the January 19, 2005, *ex parte, in camera* session that a project different than the one that 'won' the CFT *is* the most cost-effective option. Again, it is clear that the Panel's conclusion in this regard is firm and definite, having been confirmed by BC Hydro both before and during the *ex parte, in camera* session.
5. The Commission Panel came to these conclusions – i.e., that the EPA is *not* the most cost-effective option, and that some other project *is* the most cost-effective option – before having heard all of the evidence, and, in particular, before having heard the direct evidence and cross-examination of witnesses for the intervenors whose positions are inconsistent with the outcome adopted by the Commission Panel.
6. The Commission Panel identified the project that it has concluded is the most cost-effective option by using confidential references that only BC Hydro would understand (being the source of the confidential information), leaving the other parties to speculate as to which project is the Commission Panel's desired outcome.
7. Rather than bringing its findings to the attention of the parties other than BC Hydro, the Commission Panel proposed one or more additional *ex parte, in camera* exchanges of information between the Commission Panel and BC Hydro, orally or in writing, regarding the topic of how the Commission could achieve its desired outcome of the proceeding.
8. The Commission Panel sought and obtained submissions from BC Hydro during the January 19, 2005, *ex parte, in camera* session, in the absence of the other parties, regarding the jurisdiction of the Commission to achieve the Panel's desired outcome; and the Panel indicated an intention to pursue further legal submissions from BC Hydro regarding the Commission's jurisdiction through ongoing *ex parte, in camera* oral or

written proceedings, in the absence of the other parties. In doing so, the Commission Panel showed no awareness that there was even a possibility that this approach might violate the rights of the other parties.

9. During the January 19, 2005, *ex parte*, *in camera* session, the Commission Panel spoke in terms that implied that there is a common understanding between the Commission Panel and BC Hydro regarding the desired outcome of this proceeding and a common purpose in finding a way to achieve that outcome. Further, the Commission Panel implied that additional *ex parte*, *in camera* communications between the Panel and BC Hydro would be used to facilitate accomplishment of this joint objective.
10. In retrospect, the fact that the Commission Panel's January 13, 2005, Hearing Schedule (Exhibit A-38) included a time for the Commission Panel to have an *in camera* session with BC Hydro witness Panel 2 (on January 19), even though BC Hydro had apparently not asked for this *in camera* session, leaves the impression that the Commission Panel knew as early as January 13, 2005, that it would conclude that the EPA was *not* the most cost-effective option and that a specific other project *is* the most cost-effective option – and that the Commission Panel consciously refrained from bringing this issue to the attention of the parties (other than BC Hydro in the January 19 *in camera* session).

In conclusion, I respectfully submit that a person informed of the circumstances described above, viewing the matter realistically and practically, and having thought the matter through, would conclude that it is more likely than not that the Commission Panel, whether consciously or unconsciously, would not decide this proceeding fairly. Accordingly, the Panel should disqualify itself.

All the above is respectfully submitted.

Yours truly,

William J. Andrews



Barrister & Solicitor

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