

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

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

Vancouver, B.C.
December 22, 2004

PRE-HEARING CONFERENCE

BEFORE:

R. Hobbs,	Chairperson
L. Boychuk,	Commissioner
M. Birch,	Commissioner

VOLUME 4

APPEARANCES

G.A. FULTON	Commission Counsel
C. SANDERSON, Q,C, H. CANE	B. C. Hydro
L. KEOUGH	Duke Point Power Limited
P. FELDBERG S. CARPENTER	British Columbia Transmission Corporation
D, PERTTULA	Terasen Gas (Vancouver Island) Inc.
R. B. WALLACE	Joint Industry Electricity Steering Committee
D. NEWLANDS	Elk Valley Coal
F. J. WEISBERG	Green Island Energy
D. LEWIS	Village of Gold River
C. WEAVER P. COCHRANE	Commercial Energy Consumers
J. QUAIL P. MacDONALD. D. GATHERCOLE	BCOAPO (B.C. Old Age Pensioners' Organization, Council Of Senior Citizens Organizations Of B.C., End Legislated Poverty Society, Federated Anti-Poverty Groups Of B.C., Senior Citizens' Association Of B.C., And West End Seniors' Network)
W. J. ANDREWS	GSX Concerned Citizens Coalition B.C. Sustainable Energy Association
J.A. HILL	Himself
K. STEEVES	Himself
C. BOIS	Norske Canada
J. HAGUE	Himself
R. TENNANT	Vanport Sterilizers

CAARS

VANCOUVER, B.C.

December 22nd, 2004

(PROCEEDINGS RESUMED AT 8:30 A.M.)

THE CHAIRPERSON: Please be seated.

Mr. Fulton, I see you're on your feet. I was going to make a very short comment for the purposes of the record. This is the second pre-hearing conference to consider the filing by B.C. Hydro of an Energy Supply Agreement with Duke Point Power. The pre-hearing conference was established by Order G-106-04, Exhibit A-7. An agenda has been circulated by Commission letter dated December the 20th, '04, Exhibit A-14.

Now, Mr. Fulton, you may proceed.

MR. FULTON: Thank you, Mr. Chairman. I don't propose to call for appearances other than for those individuals who were not here on Friday. And so I would -- and I have recirculated the order of appearances for Friday, so that's the order that I suggest that we follow today. So beginning with party number 7, Norske Canada.

MR. BOIS: Mr. Chair, Commissioners. My name is Charles Bois, B-O-I-S, and I will be appearing on behalf of Norske Canada. And I would like to advise the Commission that Norske has recently re-evaluated its

1 role in this proceeding and will probably take a more
2 interventionist participation, rather than the passive
3 participation that it indicated before.

4 THE CHAIRPERSON: Can you provide more information with
5 respect to your interest in the proceeding?

6 MR. BOIS: Well, the interest in the proceeding is with
7 respect to whether or not this is the least-cost
8 alternative for Vancouver Island, as well as putting
9 forward evidence of an alternative, and questioning
10 whether or not this is the appropriate forum to do
11 that, as well as to examine and challenge the call for
12 the EPA agreement under consideration right now.

13 THE CHAIRPERSON: Thank you.

14 MR. BOIS: Thank you.

15 MR. FULTON: Commercial Energy Consumers.

16 MR. WEAVER: Good morning, Mr. Chairman, members of the
17 Commission. Chris Weaver appearing for the Commercial
18 Energy Consumers.

19 MR. FULTON: Thank you. BCOAPO.

20 **Proceeding Time 8:32 a.m. T2**

21 MR. GATHERCOLE: Good morning, Mr. Chairman,
22 Commissioners. Richard Gathercole appearing for
23 BCOAPO. I was here on Friday but not in any official
24 capacity, and I'm standing in today for Mr. Quail
25 who's under the weather.

26 MR. FULTON: John Hague.

1 MR. HAGUE: John Hague. I probably will not comment
2 today unless severely provoked.

3 MR. FULTON: Vanport Sterilizers.

4 MR. TENNANT: Richard Tennant, sir. Vanport Sterilizers.

5 THE CHAIRPERSON: Can you spell your last name, please?

6 MR. TENNANT: T-E-N-N-A-N-T.

7 THE CHAIRPERSON: Is there anyone else who is here who
8 was not here on Friday night?

9 Terasen Gas (Vancouver Island) Inc.

10 MR. PERTTULA: David Perttula for Terasen Gas (Vancouver
11 Island).

12 MR. FULTON: I had Mr. Perttula as being here on Friday
13 night, Mr. Chairman, so that's why I hadn't called him
14 out initially.

15 Anyone else here this morning who wasn't
16 here on Friday and who wants to appear for the record?

17 All right. There being no one else, Mr.
18 Chairman, I have received some further documents over
19 the course of the evening last night and I'm going to
20 ask that they be marked exhibits at this time. The
21 first is an e-mail from Shadybrook Farm dated December
22 22nd, 2004, on the subject of the pre-hearing
23 conference. I would ask that be marked Exhibit C33-6.

24 **Proceeding Time 8:35 a.m. T3**

25 THE CHAIRPERSON: I think that is dated December the 21st,
26 2004, and it's with respect to the proceeding today of

1 December the 22nd, 2004.

2 MR. FULTON: Thank you, Mr. Chairman. My copy of the e-
3 mail has the subject of the December -- has December
4 the 22nd on --

5 THE CHAIRPERSON: But you said the date of the e-mail was
6 December the 22nd. I think the date of the e-mail was
7 December the 21st.

8 MR. FULTON: Yes, thank you, Mr. Chairman.

9 THE CHAIRPERSON: Can you give me the exhibit number
10 again, please.

11 MR. FULTON: C33-6.

12 (E-MAIL FROM SHADYBROOK FARM DATED DECEMBER 21, 2004
13 WITH RESPECT TO HEARING OF DECEMBER 22, 2004 MARKED
14 EXHIBIT C33-6)

15 MR. FULTON: The next exhibit is an e-mail from Mairi
16 McLennan dated December 22nd, 2004, Exhibit C36-4.

17 (E-MAIL FROM MAIRI McLENNAN DATED DECEMBER 22, 2004
18 MARKED EXHIBIT C36-4)

19 MR. FULTON: I should also note that I have received an
20 e-mail from Mayor Lewis at the village of Gold River
21 that hasn't been copied or the hearing officer now has
22 indicated to me that it has been copied, and if that
23 could be Exhibit C5-4. That is an e-mail dated
24 December 21st, 2004, addressed to the secretary of the
25 Commission.

26 (E-MAIL FROM MAYOR LEWIS OF GOLD RIVER DATED DECEMBER

1 21, 2004 DATED EXHIBIT C5-4)

2 **Proceeding Time 8:37 a.m. T4**

3 MR. FULTON: And while I'm on that exhibit, Mr. Chairman,
4 Mayor Lewis refers to a conversation that he said that
5 he had with me off the record and that's on the second
6 page, second to last paragraph, the last three lines
7 or last four lines:

8 "I asked Commission Panel on December 17th,
9 2004, about the equality of the participants
10 in the process. Mr. Fulton responded off
11 the record that all participants were to be
12 treated equally."

13 It was likely the lateness of the evening, Mr.
14 Chairman, but I did respond on the record and those
15 comments are found at transcript 481, line 16,
16 beginning at line 16.

17 THE CHAIRPERSON: Thank you.

18 MR. FULTON: The last exhibit that I have, Mr. Chairman,
19 is an exhibit in the A class. We did not, on Friday,
20 mark the document which was the staff position on
21 relief sought by B.C. Hydro in Exhibit B-8, and I
22 would ask that that document be marked Exhibit A-15.
23 (BCUC STAFF POSITION ON RELIEF SOUGHT BY B.C. HYDRO
24 MARKED EXHIBIT A-15)

25 MR. FULTON: I also have a correction to the transcript
26 and this is a reference to Mr. Sanderson at transcript

1 375, line 21. I believe that reference should be to
2 myself.

3 And the one last matter that I have before
4 I turn the agenda back to you, Mr. Chairman, relates
5 to Mr. Steeves. Mr. Steeves was here on Friday night.
6 He wasn't asked to come forward and speak. He didn't
7 volunteer to come forward and speak. He approached me
8 this morning and said that he would like to say
9 something and I said that I would surface this matter
10 at the commencement of the proceedings today but I
11 have indicated to him that if he doesn't -- if he's
12 here and he doesn't say that he wants to speak then we
13 will assume that he doesn't want to speak.

14 THE CHAIRPERSON: Mr. Steeves is here this morning.

15 MR. FULTON: Yes, he is.

16 THE CHAIRPERSON: Mr. Steeves, I can give you an
17 opportunity under "Other Matters" at the end of the
18 agenda if you wish to speak.

19 MR. STEEVES: All right, thank you.

20 THE CHAIRPERSON: Okay.

21 MR. FULTON: Thank you then, Mr. Chairman.

22 THE CHAIRPERSON: I have a correction to the transcript
23 at page 557, line 14. These are my comments. "It
24 may..." -- and I was careful about this:

25 "It may be that more information will be
26 made available to the intervenors than has

1 here, what's happened in the last three working days.
2 On Friday night, when we were last here, late in the
3 evening, the responses to BCUC round 1 were filed in
4 their entirety. As I think I said on Friday night, I
5 expect it would occur; it did occur.

6 On Monday night, again as I think I
7 intended we intended to do, Hydro filed its responses
8 to BCUC round 2.

9 On Tuesday night, that is last night,
10 although from -- my e-mail stamp says 12:03, so I may
11 be corrected that it was this morning -- Hydro filed
12 the third tranche, which completes all of the IRs'
13 filings, which were part of the non-schedule A IRs, in
14 other words, the ones to which Hydro had not
15 originally taken objection that they were out of scope
16 -- with the following exceptions, and I'll just read
17 out the exceptions, because there are a few.

18 The ones that we didn't manage to get done
19 were Gold River 1.1.15, 1.3.5, 1.5.6 and 1.5.11. Mr.
20 McLennan, 1.13.1 and BC SEA 1.B-15 through -18, and
21 1.B-23, and finally Sea Breeze 2.

22 So with those limited exceptions,
23 everything in the original set has been filed. We
24 expect that we will file -- make one more filing
25 before Christmas. I'm not going to promise a day,
26 other than it will be about before noon on Christmas

1 Eve. It'll be sooner if we can do it. And that will
2 be most of the out-of-scope, per Schedule A, IRs that
3 the Commission ruled in its ruling of Monday morning
4 are in-scope.

5 So we sort of started again on those,
6 starting Monday morning, and we expect to be able to
7 file all the stragglers from the original filing that
8 I just listed, plus most of the attachment As, with
9 the exception of a number -- I think all of which
10 probably fall into a category I classified Friday
11 night as burdensome. And some of those will not be
12 done by Friday, there's just no way they can be, and
13 I'll let you know the ones I know that's true of. I
14 don't guarantee this list to be exhaustive, I think
15 it's close to complete, but there may be a couple of
16 others that don't get done by Friday, but I know the
17 following will not. BCUC 2.55.1, 2.72 and 2.73 and
18 I'll come back to those two in a minute. Those were
19 the two that were the subject of a meeting between
20 Hydro and Commission Staff on Monday, and I'll
21 elaborate that in a moment. BCOAPO 1.18.1 and Green
22 Island 11.2, 11.4, 11.5 and 11.10. Each of those
23 require some model running.

24 **Proceeding Time 8:45 a.m. T6**

25 All those ones I've listed I think all
26 require model running. And some of them involve

1 Generation staff, and I need to explain a little bit
2 internally within Hydro. The team that has been
3 responsible for preparation of IR responses and
4 generally the application is a team within the
5 Distribution line of business. A number of the IRs
6 that are outstanding that I just mentioned asked
7 questions about generation, particularly the dispatch
8 of Hydro over the next 25 years, which is the Green
9 Island ones, and I think one of the BCUC ones also
10 touches on generation, and that requires model running
11 within Generation. We're certainly endeavouring to do
12 it, but the staff who do that are not all available to
13 us at the moment and we haven't anticipated the need
14 for them to be available. Perhaps we should have but
15 we didn't. So there's going to be a slight delay, I
16 think, until the first week of the new year for those
17 to be completed and checked.

18 I should comment, I think at this point,
19 that those filings do represent, I think, the most
20 extraordinary effort I've seen of an applicant in a
21 reduced period of time. There's been a number -- I
22 make that comment because there's a number of comments
23 filed by intervenors which cast doubt on that effort.
24 And I'm not critical of that. I think people just
25 simply don't understand what it takes to do what's
26 been filed in the last three working days. But the

1 staff at Hydro, particularly the regulatory staff,
2 Alice Ferrara and her group, have put in hours that I
3 wouldn't wish on anybody. And I think it would be
4 unfair if the record didn't reflect that effort.

5 I may say as well that whether or not what
6 got filed is as organized and as internally consistent
7 and whatever as we'd like, I don't guarantee, I simply
8 don't know. We're not going to know until we start
9 using it, because the systems are really being
10 stretched. And so whether or not we've succeeded in
11 being as convenient for intervenors as we'd like to
12 be, have as good cross-referencing et cetera as we
13 normally hope to do, I can't guarantee that we have
14 done our best, I can't guarantee that.

15 I said I would go back to 2.72. There was
16 filed in response to Exhibit A-13, which is the
17 Commission's December 20th decision with respect to
18 what is in and out, yesterday, a letter from Mr. Stout
19 memorializing the outcome of a meeting between
20 Commission Staff and Hydro which took place in
21 accordance with the exchange in the transcript Volume
22 3, page 453 and 454 -- and I'll just turn there for a
23 minute.

24 And I think that the simplest thing to
25 quote is some comments of my own at 454, line 12,
26 where I said this:

1 "What I have in mind is the Commission Staff
2 and Hydro Staff meet for the exclusive
3 purpose of defining the question. The
4 question would then become part of the
5 public record, and then Hydro's response
6 would either become part of the public
7 record or not, but visibly so. That is, if
8 Hydro invokes confidence with respect to the
9 response, then it would be treated like all
10 other confidential responses so that I have
11 in mind the process be transparent and the
12 transparency be reflected in the final
13 question that is asked of Hydro."

14 That meeting as contemplated in that form did occur
15 and it's memorialized in a letter, as I say, December
16 21st, 2004, that has been filed electronically and I
17 think served on everyone.

18 **Proceeding Time 8:50 a.m. T7**

19 MR. FULTON: The shrugging, Mr. Chairman, is that the
20 Commission received a letter marked confidential so
21 we're not sure -- at this point at least we're
22 treating it as confidential. It's over to Mr.
23 Sanderson to determine whether it's going to be
24 available.

25 THE CHAIRPERSON: Thank you.

26 MR. SANDERSON: Mr. Chairman, I think it's marked

1 confidential in error. I had not noticed that. It
2 comes as surprise to me frankly. And I don't think
3 that's consistent with what either I proposed or the
4 Commission ordered. So whether or not it was intended
5 to be confidential, I frankly don't think I have a
6 basis for urging confidentiality of this letter on you
7 and indeed think it inconsistent with the approach
8 that ought to be taken. So I will endeavour over a
9 break to make copies of the letter.

10 You will note, and parties will note, when
11 they see it that the proposal does fall into two
12 parts, a confidential and non-confidential part. And
13 just to elaborate on that, the proposal is that B.C.
14 Hydro respond to BCUC IR-14.3 with respect to four of
15 the five scenarios identified there, and what's left
16 out, pursuant to the Commission decision at page 453
17 of Volume 3, is the sensitivity analysis that look at
18 the unsuccessful Tier 1, the second-best Tier 1
19 proposals consistent with the Commission's ruling.
20 That one will be dropped but the other four will be
21 run:

22 "...showing the annual supply load balance for
23 both capacity and energy identifying the
24 resource additions and when they occur for
25 each of the four portfolios."

26 It is not proposed that that response be confidential.

1 That response will be filed on the record.

2 There is additional information which Hydro
3 undertakes confidentially to file in response to 272
4 and 273 and that's the population of the template.
5 That shows then the assumptions that came from each
6 bid that went into it and the request for confidence
7 in that respect rests on the same basis that the
8 request for confidence with respect to the EPA
9 redactions rests. And in respect of the non-
10 successful bids, that is the Tier 2 bid and the no
11 award -- the components of the no-award bid, it rests
12 on the additional proposition that unsuccessful
13 bidders should be afforded even more protection in the
14 circumstance like this. So there's sort of a two-
15 tiered argument.

16 I don't propose to make that argument now
17 because I think it flows out of the later agenda item
18 on confidentiality we already have here, so rather
19 than address it separately. But I just wanted to
20 alert the parties that for these additional responses
21 to 272 and 273, we will be seeking to file those
22 responses in confidence.

23 I think that's all I'll say about IR
24 responses, Mr. Chairman. The next thing is a separate
25 matter, and that is -- I've asked Mr. Fulton to help
26 me out with an exhibit number but while he's looking,

1 BCTC --

2 MR. FULTON: C6-2.

3 MR. SANDERSON: Mr. Fulton has helpfully told me that
4 it's Exhibit C6-2, which is a letter of BCTC, British
5 Columbia Transmission Corporation, filed December 17th,
6 and I'll just briefly read it into the record because
7 it's quite short. It says:

8 "BCTC files with the British Columbia
9 Utilities Commission response to the
10 information request number 1 from the
11 Commission..."

12 and then the relevant part for this submission:

13 "In response to the Chair's question at page
14 309 of the November 30th procedural
15 conference transcript BCTC is not aware of
16 any change in circumstances material to the
17 VIGP decision determination that HVDC should
18 be zero rated for planning purposes for the
19 winter of 2007-08.

20 With respect to the request to file a
21 report addressing the current expected
22 timing of the 230 KV option with milestone
23 dates this matter is addressed in BCTC's
24 response to the Commission's information
25 request number 2.2."

26 **Proceeding Time 8:55 a.m. T8**

1 And then the rest of the letter goes on to
2 say how it's been filed. That paragraph that I just
3 read contains all the information B.C. Hydro has. In
4 other words, the request at page 309 was for a joint
5 filing from BCTC and B.C. Hydro. While this is a
6 unilateral filing from BCTC, B.C. Hydro has no
7 information beyond what's disclosed in this letter.

8 THE CHAIRPERSON: Because the HPDC line is BCTC's line.

9 MR. SANDERSON: Correct. Well, they're responsible for
10 it in terms of planning it and administering it under
11 the terms of the Master Agreement between BCTC and
12 B.C. Hydro. And so the responsibility for that sort
13 of planning, et cetera, lies with them.

14 Finally, Mr. Chairman, there was filed with
15 the Commission yesterday, I believe -- I don't think
16 it needs to be an exhibit in this proceeding so I
17 don't propose that it be marked, but I just want it on
18 the record that it had been done -- a letter which
19 confirms a public announcement that Hydro made earlier
20 this week together with Williams Pipelines that the
21 Georgia Strait Crossing Pipeline project had been
22 cancelled. In the words of Ms. Farrell, in the press
23 release:

24 "Cancelling the project now will stop all
25 further expenditures on the project, and
26 also eliminate it as an issue in on-going

1 regulatory processes relating to Terasen and
2 the Duke Point Power project."

3 Now, I think it already had been eliminated
4 in this proceeding, but nevertheless, I thought it was
5 useful to put on the record that, in fact, that
6 project has been cancelled.

7 THE CHAIRPERSON: Thank you. We will return to the
8 regulatory timetable on the agenda, and the comments
9 that Mr. Sanderson, I think, has made will be helpful
10 in that regard.

11 So let's now -- unless there are any other
12 preliminary matters -- is there one?

13 MR. TENNANT: Mr. Chairman, B.C. Hydro didn't mention our
14 Exhibit C-39-1, C-39-2. And our letter of today was
15 not marked as an exhibit.

16 THE CHAIRPERSON: And your question is?

17 MR. TENNANT: Could these be mentioned as B.C. Hydro's
18 for response, please?

19 THE CHAIRPERSON: Are you suggesting that C-39-1 and C-
20 39-2 are Information Requests?

21 MR. TENNANT: Yes, Mr. Chairman.

22 THE CHAIRPERSON: Can you tell me what the question is
23 that you're asking in C-39-1?

24 MR. TENNANT: The cost-effectiveness of the Energy
25 Purchase Agreement. The risk analysis portion of it
26 did not include an analysis of pumped hydro or cold

1 water stage fuel. And we view that it should have.
2 We'd like B.C. Hydro to respond as to whether they
3 think that's a viable question.

4 **Proceeding Time 9:00 a.m. T9**

5 THE CHAIRPERSON: Mr. Sanderson, it would be my
6 impression that that's one that's going to require you
7 to take some instructions on before you can respond to
8 it.

9 MR. SANDERSON: Yes, Mr. Chairman. Unfortunately Mr.
10 Tennant's efforts in this respect have been going on
11 for a week and I don't want to leave him feeling as if
12 the buck keeps passed, because it isn't intentionally.
13 But my difficulty is that Ms. Jones of B.C. Hydro's
14 Regulatory Staff was aware of these, brought these to
15 my attention just before the Friday session, and just
16 in the crush of events we haven't returned to it and I
17 really don't know the status.

18 I know that I looked at Exhibit 39-1 and
19 didn't feel there was a question in there which took a
20 form that we could respond to and felt that it was
21 entirely appropriate for Mr. Tennant to pursue
22 whatever issue he has, but that 39-1 at least wasn't
23 really in a form that a response from Hydro was
24 appropriate to. It was more a statement of the issue
25 that he wanted to pursue, and that's something that he
26 has every right to do, subject to whatever scoping

1 issues that might arise.

2 I have not looked recently at 39-2 so I'm
3 not going to speak to it. I'll look at over the
4 morning and maybe catch Mr. Tennant at the break and
5 see if we can't deal with it off the record, and if we
6 can't invite Mr. Tennant then to address whatever
7 position he has perhaps under "Other Matters" at the
8 end of the agenda.

9 THE CHAIRPERSON: I think that's -- Mr. Fulton?

10 MR. FULTON: Yes, I was going to say, Mr. Chairman, I
11 haven't seen a copy of the third letter that Mr.
12 Tennant was referring to, and so if he has a copy of
13 it here today, I would ask the Hearing Officer to make
14 copies so that we'll know what's being discussed. We
15 certainly have 39-2 -- that was filed on Friday -- and
16 39-1, but I don't have a third document, and I
17 understood that he had provided one to B.C. Hydro
18 either today or yesterday.

19 MR. TENNANT: It's on the table in the back.

20 THE CHAIRPERSON: Maybe we can get it entered as an
21 exhibit now, and then if Mr. Sanderson's suggestion is
22 satisfactory to you, Mr. Tennant, why don't we proceed
23 in the manner suggested by --

24 MR. TENNANT: B.C. Hydro has said they will respond to
25 me, Mr. Chairman. Thank you.

26 THE CHAIRPERSON: Okay, thank you. You're correct, Mr.

1 Andrews. I think that brings us to your application.
2 MR. FULTON: Mr. Chairman, anticipating the item on the
3 agenda list, there are two aspects to the application,
4 in my submission. The first is who should decide the
5 application, and the second is the applicable test.
6 And I think before we get started on the application,
7 we should have a decision as to who is going to make
8 the decision that Mr. Andrews is seeking. He hasn't
9 told us at this point the reasons for the allegations,
10 but before we get into that I think we should do that,
11 make that decision.

12 And in terms of the procedure, whether it's
13 Commissioner Birch or the whole Panel or yourself, Mr.
14 Chair and Commissioner Boychuk, I can say that on a
15 review of the cases there doesn't appear to be any
16 consistent approach as to who makes a decision, other
17 than that the recent trend, and I'll refer to the
18 cases, is that the party against whom bias is alleged
19 should be the decision-maker. That is a position that
20 is consistent with what the courts do when a trial
21 Judge is challenged on the issue of bias, the trial
22 Judge makes that decision.

23 **Proceeding Time 9:05 a.m. T10**

24 The first case that I wish to refer you to,
25 and I may be coming back to it later on the test to be
26 applied in this instance, and in fact I likely will

1 be, is the case of *Bennett v. British Columbia*
2 *Superintendent of Brokers*. And I'll ask the Hearing
3 Officer to circulate that case. And there were a
4 series of decisions in these proceedings, Mr.
5 Chairman. I am, at this point, only going to refer to
6 the Court of Appeal decision of -- which was given by
7 Madam Justice Southin on December the 2nd, 1993.

8 And at this point, I'm only dealing with
9 the procedure point and what this case cannot be said
10 to be taken as a proposition for, in my submission.
11 This, briefly, was a case where a Commissioner of the
12 B.C. Securities Commission was challenged on an
13 appearance of bias because he was a member of a panel
14 and that was a director of Crestbrook Forest
15 Industries Limited, a company in the forest products
16 industry. Mr. Doman, who was one of the parties who
17 was a subject of the Securities Commission
18 proceedings, was the majority shareholder and Chairman
19 of the Board, President, and Chief Executive Officer
20 of Doman, also in the forest products industry. And
21 the allegation was that Crestbrook and Doman are
22 competitors in the forest industry, and the respondent
23 said that they could not receive a fair hearing in
24 those circumstances.

25 The only comment about what happened in the
26 decision-making process, other than the fact that Mr.

1 Devine, who was the person who was challenged, recused
2 himself from the decision, is at paragraph 14, and it
3 is that the ruling was made by the other two
4 Commissioners, and Mr. Devine took no part. And
5 nowhere in the decision does the court comment on what
6 the proper procedure was.

7 The next case I wish to refer you to is the
8 case of *Samson Indian Nation Band vs. Canada*, a
9 decision of the Federal Court Trial division, 1998, 3
10 Federal Court Reports 3.

11 And in that case the argument was that the
12 Judge should not have heard the application and that
13 it should have been heard by another Judge. And Mr.
14 Justice Teitelbaum ruled that the Judge against whom a
15 disqualification application is made should hear the
16 application for recusal. And then he went on to rule
17 that there was no basis for a reasonable apprehension
18 of bias, and the Court of Appeal ultimately upheld his
19 decision on the issue of bias.

20 **Proceeding Time 9:10 a.m. T11**

21 But I wish to refer you to page 22 of 23,
22 which is the second to the last page, and it's under
23 the heading "Apprehension of Bias Arising from the
24 Fact that I am Deciding the Reasonable Apprehension of
25 Bias Issue". There's a reference to the *Middlekamp*
26 case in the main body of that page where Madam Justice

1 Boyd determined that she could hear and did hear the
2 allegations of apprehension of bias against here.

3 And in the last paragraph Mr. Justice
4 Teitelbaum concludes with a comment:

5 "I agree with what Boyd J. states. I also
6 take from this case..."

7 that is, the *Middlekamp* case,

8 "...that the judge against whom a
9 disqualification application is made should
10 hear the application for recusal."

11 The next case that I wish to refer you to
12 is an older authority of the Federal Court of Appeal,
13 the case of *Flamborough (Town) v. Canada National*
14 *Energy Board* which is at (1985) 55 NR 95. An
15 application for leave to appeal that case to the
16 Supreme Court of Canada was brought and refused by the
17 Supreme Court.

18 In *Flamborough*, the Federal Court of Appeal
19 considered a bias issue that had arisen during a --
20 regarding a panel member hearing a pipeline company's
21 application to the NEB. Counsel argued that the
22 member could not participate in the bias ruling. The
23 court rejected that argument, and I would refer you to
24 paragraph 43 where it's stated the following:

25 "I should have added that the proposition
26 that a member of a tribunal against whom an

1 allegation of an apprehension of bias has
2 been made cannot himself dispose of or
3 participate in disposing of that allegation,
4 is utterly fatuous. The practical effect,
5 if that were the law, would be the paralysis
6 of tribunals and trial courts at the whim of
7 anyone willing to allege bias. The
8 availability of judicial review and appeal
9 ensures that such charges will ultimately be
10 dealt with by a disinterested judiciary."

11 The next case that I wish to refer you to
12 is the case of Mr. Justice Bastarache of the Supreme
13 Court of Canada in *Arsenault-Cameron v. Prince Edward*
14 *Island*, (1993) 3 Supreme Court Reports 851. And there
15 again was an application for recusal on the basis of
16 apprehension of bias, and Mr. Justice Bastarache,
17 against whom the allegation was made, made the ruling
18 on the issue himself, stating that he considered the
19 notice of motion as if it was addressed to him in the
20 form of an application for recusal on the basis of
21 apprehension of bias, and he refused the motion. So
22 again there's an instance of the party who is
23 challenged on bias making that decision.

24 Now the next series of cases I wish to
25 refer you to all arise out of the Somalia inquiry, and
26 these cases, and it's one case but a series of

1 decisions, suggest that not the entire Panel should
2 make the decision, but simply the Panel member against
3 whom the apprehension of bias is made should make the
4 decision.

5 And I'll start with the report at 1997,
6 144, Dominion Law Reports 4-493 in the Federal Court
7 Trial division, a decision on this issue of Mr.
8 Justice Campbell.

9 **Proceeding Time 9:15 a.m. T12**

10 In this case, Mr. Chairman, Mr. Justice
11 Campbell considered the procedure on bias applications
12 in the context of a motion that the Chair of the
13 enquiry should be disqualified for bias. And Mr.
14 Justice Campbell stated that once a bias concern has
15 been brought to the decision-maker's attention, it is
16 for the decision-maker to hear the submission and
17 decide whether to stand aside as requested. And if
18 the decision-maker decides not to stand down, then of
19 course the party has the right to take their concern
20 to a higher authority.

21 And the discussion on that point can be
22 found beginning at page 13. And there had been an
23 earlier proceeding in the same enquiry that came on
24 before the Federal Court of Appeal, where leave to
25 intervene on the issue of bias had been sought. And
26 there I wish to refer to some comments of Mr. Justice

1 Pratte.

2 If you turn to page four of six, the
3 footnote at the bottom, where Mr. Justice Pratte
4 comments:

5 "The Judge of first instance seems to have
6 assumed that the Commission had the
7 jurisdiction to rule on the ability of its
8 Chairman to participate in an enquiry, and
9 that the only question raised by Beno's
10 application for judicial review related to
11 the legality of the decision. He
12 accordingly held that the judicial review
13 proceedings would be decided only on the
14 basis of the evidence that the Commission
15 had before it.

16 We doubt the correctness of those
17 assumptions and of that conclusion. We
18 incline to think that the Commission lacked
19 the jurisdiction to rule on the
20 disqualification of its Chairman, and that
21 on an application for judicial review and
22 prohibition based on a reasonable
23 apprehension of bias on the part of a member
24 of a tribunal, the applicant is always
25 entitled to adduce in support of his
26 application any evidence tending to show the

1 the sake of completeness, and the reference to the
2 Court of Appeal's ruling on the point is at page 7 of
3 13, the second full paragraph beginning with the words
4 "In the reasons."

5 And so in my submission the jurisprudence
6 is clear that the person, the proper person to rule on
7 the bias application at the very least is the
8 decision-maker against whom the apprehension of bias
9 is made, but the more recent authorities suggest that
10 it is only that person so that the remaining members
11 of the Panel, while they can remain where they are,
12 would not participate in the proceedings.

13 And I have one last reference that I wish
14 to make on this point, Mr. Chairman, and it's to
15 Macaulay's *The Practice and Procedures before*
16 *Administrative Tribunals* and volume 4, and at pages
17 39NC-45 and 39NC-46. And there he is commenting on
18 the procedure on bias applications. He is critical of
19 a panel in some disciplinary proceedings before the
20 College of Nurses in Ontario which decided the issue
21 in the absence of the person against whom reasonable
22 apprehension of bias was alleged. That party had
23 recused themselves and Mr. -- or the editors of
24 Macaulay's view is similar to that of the court in
25 *Beno*. And I've just lost my reference. If I might
26 just have a --.

1 and for that member to determine whether his
2 or her continued participation would give
3 rise to a reasonable apprehension of bias."

4 And there is the reference to the *Arsenault* case in
5 the Supreme Court of Canada that I referred to, Mr.
6 Chairman, and there's a reference to the legal
7 reasoning for that.

8 And continuing on to the next page, second
9 paragraph:

10 "Treating the panel as a decision-maker and
11 the product requested as an order to
12 withdraw, raises many procedural problems
13 and concerns."

14 He outlines the concerns as he sees them, and then
15 concludes with the paragraph:

16 "Requests that a member step down due to
17 concerns of bias should simply be made not
18 as a formal motion or request for a formal
19 decision or order, but rather as a simple
20 process by which the party brings certain
21 matters to the attention of the member in
22 question and requests that the member
23 consider whether or not to recuse himself or
24 herself. Failure of the member to do so can
25 be challenged subsequently, not before the
26 panel but on appeal or judicial review,

1 challenging the proceedings on the basis of
2 taint -- but not formally challenging the
3 decision."

4 So that concludes, Mr. Chairman, my
5 discussion on the cases on the procedural point as to
6 who should hear this matter.

7 It appears, on the present trend of the
8 authorities and on the basis of what appears in
9 Macaulay, that the appropriate individual to hear this
10 application would be Commissioner Birch.

11 THE CHAIRPERSON: I think, Mr. Andrews, because it is
12 your application, we should hear from you first with
13 respect to who should hear your application.

14 COMMISSIONER BOYCHUK: Maybe before Mr. Andrews begins,
15 I'd like to ask Mr. Fulton a question.

16 I'm just wondering, in terms of the
17 analysis or the logic of, as you call it, the recent
18 trend, what would happen in the case -- I realize that
19 in our jurisdiction we are able to make -- a
20 commissioner has the opportunity to constitute a
21 quorum, one commissioner, to decide matters. But the
22 logic that flows from the cases that you have been
23 describing, I'm not sure how that would work in the
24 case of a tribunal, for instance, that requires three
25 individuals as a quorum to make any decisions of that
26 tribunal. Would this trend be modifying that as well,

1 that perception or that legal requirement that the
2 three panel members in other cases, not the two of the
3 three not hear an allegation of bias against one
4 member?

5 MR. FULTON: I haven't looked at the other cases in the
6 context of what the quorums were for decision-making
7 purposes, but it seems to me, Commissioner Boychuk,
8 that what would happen was for the purposes of that
9 discrete decision, the other panel members would sit
10 but not participate.

11 COMMISSIONER BOYCHUK: And in this case, this panel of
12 three has been given the authority to hear this
13 particular application that's before us. So what
14 you're suggesting, then, is that the application made
15 by Mr. Andrews would be somewhat separate and apart
16 from the authority that's been given to us to hear the
17 CFT review?

18 MR. FULTON: No, you're hearing the entire review. This
19 is if -- and I'm not sure how Mr. Andrews wishes -- is
20 going to approach this application, if he's going to
21 follow the procedure that's suggested in Macaulay, or
22 he has some other approach that he intends to take.
23 Macaulay has suggested the approach that should be
24 taken, and to my view, the best approach in these
25 circumstances is to follow what appears to be the
26 trend in the authorities and to allow Commissioner

1 Birch to make the decision on the reasonable
2 apprehension of bias issue.

3 **Proceeding Time 9:30 a.m. T15**

4 COMMISSIONER BOYCHUK: Thank you, Mr. Fulton.

5 MR. ANDREWS: Mr. Chairman, members of the Panel, I
6 should say since this is my first time on my feet that
7 I am now representing both the GSX CCC and the B.C.
8 Sustainable Energy Association, BCSEA, and where I
9 refer to my client as GSX CCC, please understand that
10 to include BCSEA if I don't include all those
11 initials.

12 My response to the issue that Mr. Fulton
13 has raised is -- and first let me say that this is an
14 intellectually challenging issue. The application
15 that I am bringing is one of reasonable apprehension
16 of bias. It is an objective standard which I will
17 urge you to apply. It is not an application of bias,
18 and therefore I distinguish the case that the editors
19 of Macaulay refer to, and my position would be that
20 the full panel ought to make the decision regarding
21 the application for disqualification of one member of
22 the panel.

23 My sense is that the notion that a party
24 ask one individual member of a panel to disqualify
25 himself or herself probably stems from the practice in
26 courts in which judges often disqualify themselves

1 even though they are not required to do so legally.
2 I'm not sure whether an individual member of a panel
3 has any standing under this statute whatsoever to make
4 a decision on an objective standard. They can, as a
5 personal matter, make their own personal choice, but
6 that is not the application that I'm raising here.
7 I'm not asking -- I'm not alleging personal bias, and
8 I'm not asking for a personal decision. The issue is
9 an objective standard of reasonable apprehension of
10 bias.

11 And by way of authority at least in part,
12 I'd like to refer you to the recent Supreme Court of
13 Canada decision in the *Wewaykum*, W-E-W-A-Y-K-U-M case,
14 at -- this was one of the cases referred to by counsel
15 for the Panel on Friday.

16 What I've asked to be handed up to you is
17 merely the headnote, the full decision is 53 pages.
18 This is -- and that's all the copies I have.

19 MR. FULTON: Mr. Chairman, I suppose we need to know
20 whether Mr. Andrews is moving from the procedural
21 point to the substantive point.

22 MR. ANDREWS: No, this is on a procedural point.

23 MR. FULTON: Okay.

24 MR. ANDREWS: And the issue there involved Mr. Justice
25 Binnie sitting on a panel of the Supreme Court of
26 Canada. The facts are not exactly the same because,

1 in that case, the application occurred after the
2 hearing rather than before it, and I'm not going to
3 suggest that the procedure that the Supreme Court
4 followed is what I'm asking you to draw from that
5 case. What I am bringing to your attention is what I
6 believe is support for my contention that it is an
7 objective standard that is to be applied, and has to
8 be applied by the panel as a whole.

9 **Proceeding Time 9:35 a.m. T16**

10 MR. ANDREWS: And if I may have the liberty of referring
11 to the headnote rather than dive into the lengthy
12 decision itself, on page 3 of 53 in the reasons for
13 the court's decision, about the middle of the page,
14 the summary states:

15 "It is necessary to clarify the relationship
16 of this objective standard to two other
17 factors, the subjective consideration of
18 actual bias and the notion of automatic
19 disqualification."

20 And those are the two that I say are not involved
21 here. This is not a situation that would require
22 automatic disqualification and is not an allegation of
23 actual bias.

24 The summary goes on and it's wandering into
25 the merits of the application which is not why I'm
26 raising this here, but I draw to your attention the

1 sentence that begins:

2 "This third justification for the objective
3 standard of reasonable apprehension of bias
4 envisions the possibility that a judge may
5 be totally impartial in circumstances which
6 nevertheless create a reasonable
7 apprehension of bias requiring his or her
8 disqualification. The idea that justice
9 must be seen to be done cannot be severed
10 from the standard of reasonable apprehension
11 of bias. The relevant inquiry is not
12 whether there was in fact either conscious
13 or unconscious bias on the part of the judge
14 but whether a reasonable person properly
15 informed would apprehend that there was."

16 So in short my submission is that the full
17 panel is the body which has the statutory authority to
18 make that determination on this application.

19 MR. FULTON: Well, Mr. Chairman, I think I can say this
20 then: If my friend's position is that in these
21 circumstances the full panel should decide and no
22 objection is going to be made by him later to the full
23 panel taking that approach, that approach is
24 consistent with the historical approach in
25 *Flamborough*, then it seems to me unless there is
26 someone else here that strongly objects to that

1 procedure, then I am satisfied that you can proceed
2 that way given that's my friend's position and there
3 won't be an objection down the road.

4 Certainly on the cases that go to the Court
5 of Appeal, and *Bennett's* one of them, the courts don't
6 say anything if nobody complains that the procedure
7 that was taken on the application for apprehension
8 bias is not argued. And from what the position that
9 Mr. Andrews is now taking is to my mind one that it
10 would be very challenging and next to impossible for
11 his clients to argue down the road that this panel
12 took the inappropriate path when it's a path that he
13 has asked the panel to take.

14 MR. SANDERSON: Mr. Chairman, I just rise to agree with
15 Mr. Fulton with one clarification.

16 I think it's right to say that if Mr.
17 Andrews proposes and thereby accepts the procedure of
18 the panel hearing it, that puts an end to the debate
19 provided that the line of concern expressed in
20 Somalia, the Somalia inquiry, which I took to be
21 interchange between the panelists with respect to the
22 facts that weren't on the record. In other words,
23 what seemed to be being said in the cases that Mr.
24 Fulton referred you to was how can it be that the full
25 panel can bring an objective perspective to this if
26 they've acquired information off the public record

1 from their fellow commissioner.

2 And I think all I would ask is that Mr.
3 Andrews accept that the full extent of communications
4 and facts with respect to this issue are on the public
5 record. I would ask that if there are any other facts
6 that need to be on the public record they be put
7 there. I'm not for a minute suggesting that I expect
8 there are any, but if there were, then they should be
9 on the public record and it should be on the record
10 that all parties accept there has been full disclosure
11 and in the face of that full disclosure all parties
12 accept that the full panel hear and decide the matter.

13 And with that done then I fully agree with
14 Mr. Fulton.

15 **Proceeding Time 9:40 a.m. T17**

16 MR. FULTON: No one else? Does anyone else wish to
17 address this point?

18 No responses, Mr. Chairman.

19 If I might just reply to Mr. Sanderson's
20 comment on the facts, the facts that are in evidence
21 at this point in terms of what the involvement of
22 Commissioner Birch is are found at page 369 of the
23 transcript. Those facts may have been sufficient if
24 there was no general objection taken to Commissioner
25 Birch's continuing involvement. There may be some
26 additional facts that the Commissioner wishes to put

1 on the record at this point in the event that there is
2 a later challenge in another forum.

3 So for example, I have in mind that there
4 is a reference to his interim presidency of the
5 Alliance Canadian and U.S. Pipelines, but there is
6 nothing in that statement, although it would be common
7 knowledge to those of us involved in proceedings of
8 this nature, that neither of the Alliance Pipelines
9 are public utilities, for example, within the
10 definition of the *Public Utilities Act*.

11 THE CHAIRPERSON: Mr. Andrews, before you speak to this
12 issue, I think there is one thing that I need to add
13 to this.

14 In my role as Chair and CEO of the
15 Utilities Commission, I make appointments to panels.
16 And Commissioner Birch did bring to my attention his
17 role as the interim president of Alliance. I made a
18 comment on the record on Friday when this issue first
19 came up, and we may not be able to get to it quickly
20 enough, but I think it's worth noting that when the
21 matter first arose, I said something to the effect
22 that from my perspective it was not an issue but you
23 should have an opportunity to be heard. And I did say
24 that because of discussions that I had with
25 Commissioner Birch because of my role in appointing
26 Commissioner Birch to this panel. So there was

1 consideration by me with respect to his role as
2 interim president of Alliance, and that was reflected
3 in my comments on the record when this issue first
4 arose.

5 So I think you need to be made aware of
6 that as well. I would not be sitting here today with
7 this Panel if I had at the outset had any concerns
8 with respect to this. However, I do think you should
9 have an opportunity to be heard, and my views that
10 were expressed on Friday are of course subject to
11 further consideration given the submissions that you
12 may make today. But I do think it's necessary for you
13 to be aware of that as well.

14 MR. FULTON: The transcript reference, Mr. Chairman, is
15 transcript 518.

16 THE CHAIRPERSON: 518, thank you.

17 MR. FULTON: Lines 10 to 13.

18 THE CHAIRPERSON: And I'll read it in the record here:

19 "Mr. Andrews, I'm satisfied that it's not an
20 issue."

21 That's what I just spoke to.

22 "If you are concerned, then you should have
23 an opportunity to be heard, and I'm thinking
24 it should be tonight."

25 So I think Mr. Sanderson's points are correct, and you
26 should also make your determination with respect to

1 the comments I've just made as well.

2 **Proceeding Time 9:45 a.m. T18**

3 MR. ANDREWS: Mr. Chairman, I wonder if this would be a
4 suitable time for the -- an early-morning break. This
5 raises a number of issues. I'm going to have to, I
6 must say, get clarification from Mr. Sanderson as to
7 what his comment was regarding the facts. It strikes
8 me, if I may elaborate a bit, there are at least three
9 different issues that are now on the table.

10 One of them is whether the Chair is subject
11 to a reasonable apprehension of bias having -- because
12 of having received information from panel member Birch
13 that caused the Chair to conclude that there was no
14 reasonable apprehension of bias by Mr. Birch, prior to
15 having heard any submissions on the point from the
16 parties.

17 The other is, the facts on which this panel
18 will make its determination regarding the
19 disqualification request specific to Mr. Birch, and
20 the question of whether the statement in the
21 transcript by the Chair constitutes facts and, if so,
22 does that make the Chair subject to cross-examination,
23 and if not, what facts are before the tribunal on the
24 application for disqualification.

25 I have filings which I intend to request,
26 to file as exhibits. Just to let you know that the

1 substance of them is a copy of the media release
2 confirming the appointment, a few pages about Alliance
3 Pipeline, its vision, its system, its histories, are
4 all available from the Internet on its site. Two
5 short excerpts from the Fort Chicago, one of the
6 owners of Alliance Pipeline, and another similar one
7 from Endbridge, the co-owner of Alliance Pipeline.
8 And lastly some excerpts that confirm that Alliance
9 Pipeline is an emitter of greenhouse gases and is a
10 party in the policy debate regarding the proper
11 treatment of greenhouse gas liability.

12 So I've touched there on a number of
13 different issues which are now on the table, and we
14 started with the issue of whether this Panel is the
15 appropriate body to hear the application versus
16 whether Mr. Birch is the appropriate party. In that
17 context, I'm not entirely I understand what Mr.
18 Sanderson's position was, and I'm in your hands at
19 this point.

20 THE CHAIRPERSON: That's -- Mr. Sanderson?

21 MR. SANDERSON: Mr. Chairman, I thought I'd been, but if
22 I wasn't, I apologize for not being clear. I just
23 want it to be absolutely clear on the record that if
24 Mr. Andrews is accepting this panel to make the
25 decision, he's doing that in its entirety. That is,
26 knowing what he knows, knowing what we all know, on

1 the record, he's saying "It's this panel I'd like to
2 make this decision." If he does that, then I agree
3 with Mr. Fulton, that it does not lie in either his or
4 his client's mouth, in another forum, to subsequently
5 challenge the procedure that's being adopted this
6 morning. And I don't want that challenge to occur by
7 reason of him later saying, "Oh, but wait a minute,
8 there were additional facts or additional material to
9 which I'm now taking objection."

10 I think he's saying that he is, in light of
11 your disclosure this morning, and in light of all we
12 know on the record, content with this panel making a
13 decision. But I just want that to be crystal-clear,
14 that's all I ask.

15 MR. ANDREWS: If I may briefly clarify my response, then.
16 There are two issues that -- one is, and I can confirm
17 that my clients will not challenge that the panel is
18 the appropriate body to hear this application.

19 There is another question as to the
20 admissibility of further evidence at a higher level of
21 review. And I am not by adopting -- by taking the
22 position that this panel is the appropriate one to
23 consider this application, expressing any view or
24 foreclosing any options regarding what would be
25 appropriate in further review.

26 MR. FULTON: Well, Mr. Chairman, I believe that I would

1 take the position that the evidence that the --
2 whatever the review entity would be, and in our
3 instance it would be the Court of Appeal, but the
4 evidence before it needs to be the evidence before
5 this panel, and because the decision-maker here is
6 going to be deciding the test as to whether or not
7 there's a reasonable apprehension of bias on the basis
8 of the facts before it. So it will not, in my
9 submission, be open to my friend, and I would strongly
10 object to him taking an approach that he asks the
11 panel here to make a ruling based on certain facts and
12 then arrives in the Court of Appeal with other facts.
13 And I don't think from a -- well, I'm satisfied from
14 the way the Court of Appeal works that it would be a
15 tough road for him to follow to get the Court of
16 Appeal to agree to view other facts than the facts
17 that were before this panel when it decided the issue
18 of reasonable apprehension of bias.

19 And so what I am going to suggest, if my
20 friend wants to take a break I would suggest that the
21 documents that he wishes to refer to be circulated at
22 this time so everybody has them, everybody can use the
23 break efficiently and if there is anything further
24 that Commissioner Birch wishes to say, he may wish to
25 say it at this time. He may wish to wait until he's
26 reviewed the material and then comment on the

1 material. He may choose to do both.

2 **Proceeding Time 9:50 a.m. T19**

3 THE CHAIRPERSON: Mr. Andrews.

4 MR. ANDREWS: It may help, as people go to think about
5 this over the break, although the statutory right of
6 appeal with leave is to the Court of Appeal there is
7 the possibility of judicial review to the Supreme
8 Court. Madam Justice Southin, in the *Bennett* case,
9 commented on the difference in the record before the
10 Court of Appeal when a case arises by way of an appeal
11 from the Supreme Court on judicial review versus when
12 it arrives straight, as it were, from this Commission
13 on statutory appeal with leave.

14 My submission will be that the
15 admissibility of evidence at the Court of Appeal or at
16 the Supreme Court is for those bodies to decide and my
17 position is that it's not relevant to the
18 determination of what is the appropriate body to
19 decide my application.

20 MR. FULTON: I'll leave this on one point, Mr. Chairman,
21 and that's this, my friend can make those arguments
22 that he says he's going to make. My position is that
23 I don't think they're likely to be successful but in
24 any event my understanding of the *Administrative*
25 *Tribunal Act* is that it did not remove, as it did with
26 the case of some tribunals, the provisions in the

1 *Utilities Commission Act* that the appropriate
2 procedure for challenging a decision of this
3 Commission was by way of leave to appeal.

4 THE CHAIRPERSON: That may be something you want to
5 consider as well, Mr. Andrews. In any case, I think
6 we do take a 15 minute break now and we'll come back
7 to you after the break, Mr. Andrews.

8 MR. FULTON: Are you going to circulate the materials,
9 Mr. Chairman?

10 THE CHAIRPERSON: And the materials should be circulated,
11 yes.

12 **(PROCEEDINGS ADJOURNED AT 9:53 A.M.)**

13 **(PROCEEDINGS RESUMED AT 10:08 A.M.)** **T20**

14 THE CHAIRPERSON: Please be seated. Mr. Andrews, I think
15 it's for you to tell us if you accept this panel to
16 hear your application or not.

17 MR. ANDREWS: Mr. Chair, I accept this panel to hear my
18 application for disqualification of panel member
19 Birch. I would like to put you on notice, because I'm
20 -- I gather Mr. Fulton may have more remarks to make
21 -- that I will also be making a motion that the Chair
22 be disqualified due to a reasonable apprehension of
23 bias in relation to the decision-making regarding the
24 Commissioner Birch's position on the panel.

25 THE CHAIRPERSON: So you are not accepting the panel, you
26 are accepting Commissioner Boychuk and Commissioner

1 Birch to hear your application. Is that correct?

2 MR. ANDREWS: No. My position is that the proper
3 procedure is that this panel as presently constituted
4 under the Statute, has the jurisdiction and the
5 responsibility to make a decision on an application
6 that one or more of its members be disqualified. And
7 that is what I'm asking this panel to do, and I will
8 ask to do it at this -- what I'm giving notice of is
9 that there will be two separate rounds for motions for
10 disqualification, both of which should be dealt with
11 by this panel.

12 THE CHAIRPERSON: I understand. Thank you. Do you want
13 to have the applications heard at the same time?

14 **Proceeding Time 10:10 a.m. T21**

15 MR. ANDREWS: Yes, I would. I was just conferring with
16 Mr. Fulton about the question of what the appropriate
17 standard of review is, and I will address the standard
18 in my remarks, and of course he may want to add to
19 that.

20 Mr. Chair, I would begin by asking to file
21 as evidence Exhibit C20-10, which is a package of
22 print-outs from Internet websites. There is a table
23 of contents on the first page, which identifies the
24 items. I would propose to deal with each specific
25 item as I come to it in my argument. If other parties
26 wish to challenge the admissibility, then I'm in your

1 hands as to whether we should discuss that now or as
2 these points arise.

3 THE CHAIRPERSON: I think you should proceed through to
4 the end of your submissions.

5 MR. ANDREWS: Thank you. The starting point for this
6 motion is transcript volume 3, page 369, lines 7 to
7 13. And I'm going to address first my motion
8 regarding Commissioner Birch. The Chair states:

9 "I will add that Commissioner Birch is the
10 interim president of both Alliance Canadian
11 and U.S. Pipelines. Alliance trades no gas
12 and all supply is locked up with long-term
13 contracts. There are no rate or other
14 issues with B.C. Hydro that would affect
15 Alliance in any material way."

16 The first of the attached items in Exhibit
17 C20-10 is a December 9, 2004 media release from the
18 Alliance Pipeline website announcing that Mr. Murray
19 Birch has joined Alliance Pipeline as interim
20 president effective immediately and I submit that the
21 combination of the evidence provided by the Chair and
22 this media release confirms that the president of
23 Alliance Pipeline and the Commissioner are one and the
24 same.

25 **Proceeding Time 10:13 a.m. T22**

26 I want to emphasize at the outset what this

1 application is not about. It is not about personal
2 integrity. It is not about the oath of office taken
3 by any commissioner. It's not about a conflict of
4 interest, a violation or perceived violation of
5 Section 11 of the *B.C. Utilities Commission Act*. It's
6 not about a direct pecuniary interest. It is about
7 fairness and natural justice. It's about the concept
8 that justice must be seen to be done. It's about the
9 reasonable apprehension of bias, the reasonable fear
10 of bias.

11 I submit that the test, the legal test, and
12 I'll go to the law first, the legal test is not likely
13 to be controversial. And I would also submit knowing
14 the legal test is not ultimately going to help the
15 panel decide one way or the other, other than giving
16 you the framework within which to make a judgment, and
17 that ultimately this is a judgment call, but the
18 starting point is the decision of the Supreme Court of
19 Canada in the *Committee for Justice and Liberty*, and
20 this again is one of the cases that was referred to by
21 counsel for the panel.

22 MR. FULTON: Yes, I provided the panel with copies of the
23 three cases that I referred to on Friday.

24 MR. ANDREWS: The passage -- perhaps I should begin --
25 because this case is so familiar to administrative law
26 lawyers it sometimes is missed what the factual basis

1 for it was and perhaps I can note that distinction.
2 The issue in this case had to do with the National
3 Energy Board and Mr. Crow and his prior involvement in
4 the pipeline proposal and question in the hearing
5 before the National Energy Board that gave rise to the
6 Supreme Court of Canada decision. The distinction is
7 that -- and I want this to be very clear -- the
8 objection is not to the panel member. And when I say
9 throughout this argument "the panel member", I'm
10 referring to Panel Member Birch.

11 **Proceeding Time 10:17 a.m. T23**

12 The objection is not to the panel member's
13 past history of employment in the gas industry. It's
14 not his experience. Indeed, that's entirely
15 commendable and suitable. The objection has to do
16 with his current employment, as of December 9th,
17 effective immediately, interim president of Alliance
18 Pipeline. So in that respect the facts of the
19 Committee for Justice and Liberty are quite different,
20 because there they're referring -- the whole emphasis
21 has to do with the effect of actions taken by the
22 panel member prior to the decision before the
23 tribunal.

24 Somewhat ironically, it's the dissenting
25 reasons which frame the test which has been repeated
26 over and over again in the courts of Canada. In my

1 copy, it's at the bottom of page nine -- excuse me,
2 the bottom of page 19. But I see that the copy that
3 has been distributed is a different version.

4 MR. FULTON: I suspect that what Mr. Andrews is referring
5 to is page 394 of the Supreme Court Reports, under the
6 heading Roman numeral I, where Mr. Justice de Grandpré
7 speaks to the proper test to be applied in a matter of
8 this type.

9 MR. ANDREWS: Thank you, that is indeed the passage that
10 I'm referring to.

11 I quote:

12 "The proper test to be applied in a matter
13 of this type was correctly expressed by the
14 Court of Appeal. As already seen by the
15 quotation above, the apprehension of bias
16 must be a reasonable one, held by reasonable
17 and right-minded persons, applying
18 themselves to the question and obtaining
19 thereon the required information. In the
20 words of the Court of Appeal, the test is,
21 'What would an informed person, viewing the
22 matter realistically and practically, and
23 having thought the matter through, conclude?
24 Would he think that it is more likely than
25 not that Mr. Crowe..."

26 the Panel member in that case,

1 "...whether consciously or
2 unconsciously, would not decide fairly?'"

3 That, I submit, is the test that the Panel
4 ought to apply to the motion.

5 **Proceeding Time 10:20 a.m. T24**

6 And the only other case that I'd like to
7 bring to your attention is *Bennett v. British*
8 *Columbia*. This case was referred to by Mr. Fulton.
9 The reason that I am citing this case formally is to
10 do with the correct application of the test. In this
11 case, and perhaps I'll also make the point which I'm
12 not citing this case for but to again distinguish and
13 clarify. On the facts, I'm not citing this case for
14 the facts. The facts of this case had to do with an
15 allegation that the board member in question, Mr.
16 Devine, was associated with a company that was in a
17 competitive position with one of the respondents to
18 the complaint which the panel on which Mr. Devine was
19 sitting was being heard. So there was a direct
20 competition in the marketplace between the panel
21 member's company and the respondent's company.

22 That is not what we allege is the basis of
23 the reasonable apprehension of bias here. However, in
24 that case, the court comments that there was an
25 enormous amount of evidence produced at the *Securities*
26 *Act* Tribunal Level as to the exact nature, the exact

1 mechanisms of competition between the panel member's
2 company and the respondent's company.

3 And at paragraph 18 in my QuickLaw version,
4 it's page 6 of 10, Madam Justice Southin comments that
5 the appellants called substantial evidence in an
6 attempt to establish that Doman and Crestbrook, the
7 two companies, are competitors in selling their
8 products into essentially the same markets, and
9 raising funds in the same marketplaces. She then
10 says:

11 "The difficulty I had with that approach and
12 with the approach taken by the panel, which
13 was to consider in minute detail the
14 evidence as to how Doman might suffer and
15 Crestbrook benefit, is that it becomes
16 dangerously close to mere speculation."

17 And at paragraph 26 she says:

18 "I prefer to approach the matter
19 differently."

20 And then she says:

21 "It is an underlying principle of our legal
22 system that he who judges shall be impartial
23 and appear to be so."

24 She recites *Jeremy Bentham*, and in paragraph 32, or
25 let me say in 31 she says:

26 "In the case at bar, no one has pointed to

1 the slightest shred of evidence that Mr.
2 Devine does not have the cold neutrality of
3 the impartial judge, that he has 'affection'
4 for the superintendent's case or 'ill will'
5 towards that of the appellants. Thus
6 partiality in fact does not concern us. We
7 are concerned only with the apprehension of
8 partiality."

9 And then she cites further cases and in paragraph 35
10 says:

11 "Thus, *Dimes v. Grand Junction Canal* is not
12 about being influenced by one's personal
13 interest, but the appearance of labouring
14 under such an influence."

15 And then finally in paragraph 37 she poses the
16 question as is pertinent to the facts of that case.

17 In my submission, determining the issue
18 here requires a comparison of the issues that are
19 before the Panel in the substance of the proceeding,
20 and the interests of Alliance Pipeline as they relate
21 to the issues before the panel.

22 **Proceeding Time 10:25 a.m. T25**

23 Briefly, a number of the issues in the --
24 before the panel that I am going to argue are relevant
25 are:

26 Firstly, the panel's obligation to

1 determine under Section 71(5) of the *Act* whether all
2 or portions of the material filed under Section 71
3 ought not to be available to the public;

4 Secondly, whether certain evidence
5 proffered by B.C. Hydro ought not to be disclosed to
6 the parties, pursuant to the panel's general authority
7 under the *Utilities Commission Act*, and under the
8 *Administrative Tribunals Act*;

9 The question of whether and when and on
10 what basis the panel should have an *ex parte in camera*
11 meeting with B.C. Hydro and Duke Point Power, to the
12 exclusion of the other parties;

13 Whether, to put the point simply, a gas-
14 fired generation project is more cost effective than
15 non-gas-fired generation, and other alternatives in
16 the circumstances specific to this application;

17 The issue of the levelized price of natural
18 gas, that is, gas price forecasts, within North
19 America;

20 The treatment of greenhouse gas liabilities
21 coming from the combustion or release of natural gas;

22 And the merits, at least indirectly, of the
23 expansion of a gas pipeline versus early construction
24 of an electricity transmission line.

25 Turning to Alliance Pipeline itself.
26 Alliance Pipeline, as members of the panel no doubt

1 are much more aware than myself or my clients are, was
2 formed by a number of companies active in British
3 Columbia, but is currently owned by two companies,
4 Fort Chicago and Enbridge. Alliance itself, and I
5 would refer to page 4 of Exhibit C20.10, Alliance was
6 created, and I'm quoting:

7 "...to align the interests of producers,
8 shippers, consumers, marketers and the
9 equity owners of the pipeline system."

10 It continues:

11 "To be successful we've undertaken a
12 proactive cooperative approach with land-
13 owners and communities..."

14 and so on. My submission here is that it's
15 fundamentally in Alliance Pipeline's commercial
16 interest to expand the use of natural gas, so that the
17 demand for its product, which is the transportation of
18 natural gas, will go up.

19 **Proceeding Time 10:30 a.m. T26**

20 It's clear from both those particular
21 words, from Alliance Pipeline and from the position of
22 the pipeline in the North American Gas industry that
23 the health and vigour of the gas industry and the
24 health and vigour of Alliance Pipeline are closely
25 interconnected.

26 On page 6 of Exhibit C20.10 there is a

1 description of the pipeline. It runs from
2 northeastern British Columbia to the Chicago area. My
3 submission is that it's not relevant or even
4 determinable whether molecules of gas go from
5 northeastern B.C. via an Alliance Pipeline pipe to or
6 would go to the DPP Project. The point is that there
7 is a North American gas market for gas, North American
8 transportation systems. Any gas that flows through
9 the Alliance Pipeline would not be available to flow
10 through the pipelines that may more realistically end
11 up feeding the Duke Point Power Plant and so Alliance
12 Pipeline is very much part of the gas transportation
13 system upon which the proposed power plant would rely.

14 On page 8 of Exhibit C20.10 there is a
15 history of the development of the pipeline. Included
16 in that history are references to National Energy
17 Board hearings. It's a matter of public record that
18 Alliance Pipeline is a frequent participant in
19 National Energy Board proceedings both currently in
20 terms of its annual tolling applications and in terms
21 of applications for approval of laterals as well as
22 intervening in other applications. The conclusion
23 that I ask you to draw from that is not that there is
24 something specific about the content of those
25 applications before the National Energy Board but that
26 Alliance Pipeline is a regulated utility. It's not

1 regulated by this board. It's regulated by another
2 board, by the National Energy Board, and in my
3 submission the -- at least certain of the issues,
4 particularly the ones regarding confidentiality and
5 alleged confidential business information, arise as
6 much at the NEB level as they do at this Commission's
7 level. And I'll refer to that in more detail.

8 Fort Chicago is one of the owners of the
9 Alliance Pipeline. At page 9 and 10 there are details
10 of Fort Chicago's profile. I don't propose to go
11 through this in detail except to say that Fort Chicago
12 is a gigantic, multi-faceted corporation active in all
13 aspects of natural gas and energy more broadly in
14 North America and in other parts of the world.

15 At page 11 there is somewhat similar
16 information regarding Enbridge. Enbridge II is a
17 large conglomerate which has operations in a variety
18 of countries within North America and outside. It has
19 operations within all aspects of the natural gas
20 industry and energy more broadly.

21 **Proceeding Time 10:34 a.m. T27**

22 At page 13 of Exhibit C-20.10, there are
23 excerpts from a PowerPoint presentation by Alliance
24 Pipeline dated September 12, 2002. My purpose in
25 referring to these is to establish that Alliance
26 Pipeline has a material interest in climate change and

1 the emissions of greenhouse gases.

2 On page 14 there's a pie chart showing
3 Alliance's greenhouse gas emissions. It establishes
4 total emissions of 909.4 kilotonnes of CO₂ equivalent.
5 It breaks these down into the comparative sources,
6 combustion which is in their compressors is 93.5
7 percent, natural gas venting is 2.6 percent, fugitive
8 equipment links, leaks 1.6 percent, indirect
9 electrical power consumption they have rated at 2.3
10 percent of their greenhouse gas emissions.

11 On page 15, the concluding remarks in this
12 particular presentation indicates in point 3 the view
13 expressed at that time that ratification of Kyoto
14 without a plan and without involvement by the U.S.
15 will hurt Canada's economy, I point to that because
16 it's an indication that Alliance Pipeline is playing
17 an active role in climate change policy development in
18 Canada.

19 So what I've done by this point is I've set
20 out the legal test. I have outlined the issues in
21 this hearing that I say intersect with Alliance
22 Pipeline's interests. And my submission in conclusion
23 is that a reasonable person informed of the
24 involvement of Alliance Pipeline in, for example,
25 greenhouse gas policy, and informed of the fact that
26 greenhouse gas liability is an issue in this hearing,

1 would tend to conclude that there was a likelihood
2 that the panel member would not be able to be partial
3 [sic].

4 Regarding the confidentiality issues, the
5 connection is in a sense extreme from the point of
6 view of the informed member of the public, because I
7 think it has to be taken that the informed member of
8 the public is not informed as to the contents of the
9 confidential portions of the information which this
10 panel has decided not to release. So if this were to
11 unfold with the panel member continuing, you would
12 have the president of Alliance Pipeline deciding which
13 portions of B.C. Hydro's documents are confidential
14 business information, which would then be known to
15 Alliance Pipeline but not to members of the public or
16 the parties in the proceeding, and not to other
17 members -- other parties in the industry which it is
18 argued would receive a competitive advantage by
19 knowing that information. The information would only
20 have been held to be confidential if the panel has
21 concluded that Hydro has something to lose by that
22 information being made public. So from a bystander --
23 from a reasonably informed person's point of view,
24 they don't know what it is that caused the panel to
25 conclude that the information ought to be
26 confidential. So, what you have is the Alliance

1 Pipeline is the only company in the industry that
2 knows the confidential business information that B.C.
3 Hydro, by hypothesis, has successfully persuaded the
4 panel should be kept confidential.

5 **Proceeding Time 10:40 a.m. T28**

6 COMMISSIONER BOYCHUK: Mr. Andrews, is that a bias
7 allegation, or is that something that, if it were
8 accepted, that Duke Point Power would object to?

9 MR. ANDREWS: It's a reasonable apprehension of bias.
10 It's that when someone is looking at this situation
11 from the outside, they would be scratching their heads
12 and wondering, "Now did the President of Alliance
13 Pipeline rule in favour of that information being
14 confidential because he wanted to know it and he
15 didn't want the other participants in the industry to
16 know it? Or did he rule it because of the merits
17 before the Commission?"

18 And I'm not alleging anything about actual
19 bias. I'm saying, a reasonably informed person would
20 have no way to know that the interests of Alliance
21 Pipeline were not involved. Or even on the flip side,
22 to know whether Alliance Pipeline had some interest in
23 disclosing publicly that information. If that panel
24 were to decide that the information is not
25 confidential, is that because Alliance Pipeline gets
26 something if the whole industry is aware of that

1 information? The reasonably informed person doesn't
2 know. And that's particularly exacerbated when you
3 don't even know what the information is. By
4 definition, the reasonably informed person doesn't
5 know the confidential information.

6 COMMISSIONER BOYCHUK: Mr. Andrews, wouldn't the
7 reasonably informed person have to also have some
8 sense of some connection between Alliance Pipeline and
9 the project that's before this panel? Like wouldn't
10 there have to be that link or that nexus before you
11 can go to your next point in your argument, that there
12 is arguably a bias either in favour of or against
13 Alliance? Shouldn't there be a connection there
14 first, in the mind of the reasonably informed person?

15 MR. ANDREWS: The connection is that Alliance Pipeline is
16 in the gas industry business, that Duke Point Power
17 proposes to burn gas in a gas-fired generator. They
18 say it's the least-cost alternative. If they're
19 right, then CCGTs are bolstered as an alternative for
20 new resource capacity additions. If they're wrong --
21 and Hydro has argued here that it's a matter of simple
22 assertion that the least-cost next addition is CCGT
23 power. If this Panel -- and that DPP is an example of
24 that, and has been proven by their cost-effectiveness
25 analysis. If this Panel were to hold that that were
26 not the case, then it would bolster the arguments that

1 go on around across North America about the relative
2 merits of CCGTs versus other forms of new capacity.
3 And in particular, it would not only be the voice of
4 this Commission pronouncing on the relative merits of
5 a proposed CCGT plant, it would be the voice of the
6 President of Alliance Pipeline pronouncing on the
7 merits of the proposed CCGT plant.

8 Alliance Pipeline is in business to move
9 the gas, to get to the generators, among other uses of
10 that gas. If there's a chill on new CCGTs, it's
11 utterly reasonable to expect that that would be a
12 problem for Alliance Pipeline.

13 I would also argue that, as I mentioned
14 early on, that the levelized price of gas is a key
15 issue in this hearing. Hydro has acknowledged, in its
16 cost-effectiveness analysis, that if the levelized
17 price is \$7 per gigajoule, the proposed DPP is not as
18 cost-effective as other options. So the Commission
19 will no doubt be called upon to reach some conclusions
20 about the levelized price of gas.

21 Now, the reasonable member of the public is
22 going to ask, "Well, now, is that panel's conclusion
23 the conclusion of Alliance Pipeline?" And when
24 Alliance Pipeline goes into negotiations with other
25 parties, and they're arguing about the effect of the
26 price of gas, which can easily be a term -- the

1 business terms of agreements are routinely based on,
2 among other things, the price of gas, either levelized
3 or on a go-forward basis.

4 **Proceeding Time 10:45 a.m. T29**

5 Everybody in the industry is scrambling to
6 figure out who has the best forecast of future gas
7 prices and who is willing to put their money where
8 their mouth is behind one particular projection. So
9 when this panel comes down with a decision regarding
10 the future price of gas it will have to be seen if the
11 member is on the panel as a decision by Alliance
12 Pipeline.

13 Now this is not a case where that
14 particular issue says Alliance is obviously interested
15 in a high price or a low price. The point is that
16 it's involved in the price and it would be here making
17 a decision that would leave people wondering whether
18 it was the panel's decision or -- well, it would
19 actually have to be both. It would have to be the
20 panel's decision and the Alliance Pipeline's decision.

21 What really distinguishes this fact
22 situation is that the member is currently the
23 president of an active participant in the gas
24 industry. This is not like someone who comes to a
25 commission with an extensive background in the
26 industry. This is saying that if this is approved

1 that it is okay that the industry regulate itself.
2 Alliance Pipeline is part of the natural gas industry
3 in North America. If it's okay for the member to sit
4 on this panel then the conclusion would be that it's
5 okay for the natural gas industry in North America to
6 regulate B.C. Hydro and in my submission that is
7 wrong, that it's desirable to have experience on the
8 panel, but it is completely inappropriate to have a
9 current active participant in the natural gas industry
10 sitting on this panel of the Commission.

11 I am going to address now my motion that
12 the Chair be disqualified for a reasonable
13 apprehension of bias. In my submission the test is
14 the same, that is the test from the Committee for
15 Justice and Liberty case. The material facts, as they
16 are now apparent from the statements that have been
17 made today and on December 17th, are that the Chair
18 talked with Panel Member Birch, received information.
19 We don't know the extent of the information which the
20 Chair received beyond that it included that the panel
21 member is the interim president of Alliance Pipeline.
22 And then the Chair decided that it was not a problem
23 for Commissioner Birch to remain on the panel.

24 And it's significant that the Chair did not
25 come to the hearing on December 17th and say that this
26 issue has arised and the Chair is inviting submissions

1 on the question, and that's not the way the Chair
2 explicitly put it. The first time it arose was on
3 page 369 when the Chair simply stated that
4 Commissioner Birch is the interim president of
5 Alliance Pipeline and then stated two points which are
6 apparently rationale for the conclusion that there is
7 no problem with Commissioner Birch remaining on the
8 Panel.

9 Now as for those two particular points,
10 that Alliance trades no gas and supply is locked up
11 with long-term contracts, and the second being that
12 there is no rate or other issues with B.C. Hydro that
13 would affect Alliance, I would submit that those are
14 not persuasive facts in support of the decision, but
15 nevertheless, they are apparently offered by way of
16 reasons for decision that there is no problem.

17 **Proceeding Time 10:50 a.m. T30**

18 And then, at page 518 of the transcript,
19 the Chair, after I had raised the reasonable
20 apprehension of bias issue, the Chair's statement is:

21 "Mr. Andrews, I am satisfied that it's not
22 an issue. If you were concerned, then you
23 should have an opportunity to be heard..."

24 and so on, and this is my opportunity to be heard.

25 But my respectful submission is that a
26 reasonably informed person would come to the

1 conclusion that the Chair of the panel had already
2 heard what he felt was sufficient information to
3 determine that Commissioner Birch's presence on the
4 panel was not a problem, and that that is confirmed by
5 the fact that the Chair did not invite submissions on
6 the issue, and that the Chair is therefore not in a
7 position to be impartial on the question of whether
8 Commissioner Birch ought to remain on the panel,
9 because the Chair, already having expressed a view on
10 the matter, has some credibility at stake if he should
11 decide to change his mind, based on further
12 submissions.

13 I would add that one of the factors there
14 is that the public and the parties don't know what it
15 was that Commissioner Birch told the Chair, that
16 caused the Chair to conclude that there was no problem
17 with Commissioner Birch being on the panel.

18 Subject to any questions from the panel,
19 those are my submissions on both motions.

20 THE CHAIRPERSON: Thank you.

21 MR. FULTON: Mr. Chairman, can I ask a question of
22 clarification before we proceed down the line to see
23 if other people have comments, and before I make my
24 submissions?

25 I'm uncertain at this point. Mr. Andrews
26 has taken a position that the panel as a whole can

1 determine the issue of reasonable apprehension of bias
2 related to Commissioner Birch. From what I just
3 heard, it wasn't clear to me, it may be that he's
4 suggesting that the Chair be disqualified from a
5 reasonable apprehension of bias standpoint, for the
6 comment that you made at 8:35, or thereabouts, on
7 Friday night, in relation to Mr. Birch alone, or is he
8 now saying simply that the Chair should not
9 participate in the determination of the reasonable
10 apprehension of bias as it relates to Commissioner
11 Birch?

12 Because as I understand it, the basis of
13 his challenge of the Chair is on that comment that
14 appears in the transcript that he just referenced.

15 MR. ANDREWS: My position is that the panel as a whole
16 has the obligation to determine applications for
17 disqualification, and further, to clarify, it's not a
18 particular statement made by the Chair that's the
19 basis of my argument. That statement is in the
20 context of the whole chain of events, which I won't
21 repeat, but just to clarify again, in my view, it's
22 the responsibility of the panel as a whole to make
23 decisions on both of the two applications that I've
24 made.

25 THE CHAIRPERSON: But you are making a motion that I
26 recuse myself from the consideration of the filing.

1 That I recuse myself from this proceeding. Is that
2 correct?

3 MR. ANDREWS: That is correct.

4 MR. FULTON: What I propose, then, Mr. Chairman, is that
5 we follow the order of appearances from Friday as
6 amended by today, for those corporations and
7 individuals who, first of all, support the application
8 and then we'll deal with those who oppose the
9 application.

10 **Proceeding Time 10:55 a.m. T31**

11 MR. FULTON: So in terms of those who support the
12 application: Mr. Wallace.

13 MR. WALLACE: Thank you. Mr. Chairman, this is a
14 difficult motion both for myself and for my clients.
15 It is the first time either of us have been involved
16 in challenging a sitting commissioner. It is not
17 something we undertake lightly, but it is extremely
18 important, and accordingly we feel that we must.

19 The principles have been set out in a
20 number of cases by the Supreme Court of Canada and
21 provincial courts of appeal. Mr. Andrews has gone
22 through those cases, and I think went a little more
23 quickly than maybe I would because I think the
24 principles, while well known, I guess, to
25 administrative lawyers, are in fact ones we don't run
26 into very often, and I suspect the Board and I know

1 this Board or Commission has not run into it often, if
2 at all. I don't recall it having come up before.

3 The case that was mentioned was the
4 *Newfoundland Telephone* -- or one of the cases
5 mentioned by Mr. Fulton was the *Newfoundland Telephone*
6 *Company v. Telephone Board of Commissioners of Public*
7 *Utilities*. At paragraph 24 of that decision -- and
8 unfortunately we may again be in the case where there
9 isn't correspondence. I think more recently we have
10 better correspondence between printed reports and
11 electronic ones. But it's a very short paragraph, and
12 maybe if I could just simply read it to you, and if
13 necessary I'll provide you the paragraph later if Mr.
14 Fulton doesn't spot it as he did in the previous case
15 fairly quickly. And it is talking --

16 COMMISSIONER BOYCHUK: Mr. Wallace, this is the same
17 version.

18 MR. WALLACE: Pardon?

19 COMMISSIONER BOYCHUK: This is the same version.

20 MR. WALLACE: Yes.

21 COMMISSIONER BOYCHUK: And there's no paragraph 24.

22 MR. WALLACE: Mine was a numbered electronic version. I
23 know it's not going to coincide with yours.

24 COMMISSIONER BOYCHUK: Okay.

25 MR. WALLACE: So if I can simply read the paragraph, and
26 if Mr. Fulton spots the correspondence then we'll name

1 it, and if necessary I can provide it after, right? I
2 think it's -- the points probably are not terribly
3 controversial but they're worth recalling.

4 And the statement was in discussing the
5 decision in *The Committee for Justice v. The National*
6 *Energy Board*, the court commented:

7 "The standard the board was required to
8 apply in considering the applications was
9 one of public convenience and necessity."
10 And that's why I raise it, because it's a very close
11 parallel.

12 "Chief Justice Laskin held that the member's
13 prior activity raised a reasonable
14 apprehension of bias. He observed that the
15 National Energy Board was charged with the
16 duty to consider the public interest.
17 Public confidence in the impartiality of
18 Board decisions was required to further the
19 public interest."

20 And as I guess Mr. Fulton found it, it's at page 637.

21 It starts, it's the second paragraph, the
22 paragraph starting, "This principle was relied upon..."
23 and it starts halfway through, "The standard the Board
24 was required to apply..."

25 And the reason I've cited this is twofold,
26 because it applies to the National Energy Board, which

1 has a very applicable or similar mandate to the
2 mandate you have, and because of the emphasis on
3 public confidence in the context of public interest.

4 In examining this issue, I really do ask
5 you to take yourselves outside your role of
6 commissioners where you know you are trying to do a
7 good job, you know each other and everybody is working
8 for a positive goal, and look at from the public point
9 of view, from that independent reasonable man judging
10 the circumstances.

11 The question of reasonable apprehension of
12 bias -- and again it is apprehension of bias, it is
13 not bias, and we are not in any way seeking to impugn
14 the integrity of Commissioner Birch -- was discussed
15 quite extensively in the *Wewaykum*, if I have that
16 right, *Indian Band v. Canada*. And I think here, the
17 paragraph numbers actually should coincide.

18 **Proceeding Time 11:00 a.m. T32**

19 And in paragraph 57, under the title "The
20 Importance of Impartiality" and I'm going to quote
21 fairly extensively here. Paragraph 57:

22 "The motions brought by the parties require
23 that we examine the circumstances of this
24 case in light of the well-settled
25 foundational principle of impartiality of
26 courts of justice. There is no need to

1 reaffirm here the importance of this
2 principle which has been matter of renewed
3 attention across the common law world over
4 the past decade. Simply put public
5 confidence in our legal system is rooted in
6 the fundamental belief that those who
7 adjudicate in law must always do so without
8 bias or prejudice and must be perceived to
9 do so."

10 And I emphasize "perceived to do so."

11 "The essence of impartiality lies in the
12 requirement of a judge to approach the case
13 to be adjudicated with an open mind.
14 Conversely, bias or prejudice has been
15 defined as a leaning, inclination, bent or
16 predisposition towards one side or another
17 or a particular result. In its application
18 to legal proceedings it represents a
19 predisposition to decide an issue or cause
20 in a certain way which does not leave the
21 judicial mind perfectly open to conviction.
22 Bias is a condition or state of mind which
23 sways judgment and renders a judicial
24 officer unable to exercise his or her
25 functions impartially in a particular case."

26 And in paragraph 60 the court adopts the criteria for

1 the disqualification from the Committee for Justice
2 and Liberty which was quoted to you by Mr. Andrews and
3 read in earlier, and I won't do that again.

4 In paragraph 65 there is a statement that
5 -- and it's about halfway through that paragraph, and
6 quoting from a prior decision:

7 "Bias is or may be an unconscious thing and
8 a man may honestly say that he was not
9 actually biased and did not allow his
10 interest to affect his mind although
11 nevertheless he may have allowed it
12 unconsciously to do so. The matter must be
13 determined on the probabilities to be
14 inferred from the circumstances in which the
15 justices sit."

16 And:

17 "As framed some of the arguments presented
18 by the parties suggest they are preoccupied
19 that Binne J. may have been unconsciously
20 biased despite his good faith."

21 Paragraph 66:

22 "Finally when parties concede there was no
23 actual bias they may be suggesting that
24 looking for real bias is simply not the
25 relevant inquiry. In the present case, as
26 is most common, parties have relied on Lord

1 Hewart C.J.'s aphorism that 'it is not
2 merely of some importance but is of
3 fundamental importance that justice should
4 not only be done but should manifestly and
5 undoubtedly be seen to be done.'

6 And I emphasize "manifestly and undoubtedly be seen to
7 be done."

8 "To put it differently where
9 disqualification is argued, the relevant
10 inquiry is not whether there was in fact
11 either conscious or unconscious bias on part
12 of the judge but whether a reasonable
13 person, properly informed, would apprehend
14 that there was. In that sense the
15 reasonable apprehension of bias is not a
16 surrogate for unavailable evidence or an
17 evidentiary device to establish the
18 likelihood of unconscious bias, but the
19 manifestation of a broader preoccupation
20 about the image of justice. As was said by
21 Lord Goff in *Gough*...'there is an overriding
22 public interest that there should be
23 confidence in the integrity of the
24 administration of justice.'

25 And I would suggest to you that it's the same test for
26 confidence in the integrity of the administrative

1 process of this Commission.

2 Paragraph 67:

3 "Of the three justifications for the
4 objective standard of reasonable
5 apprehension of bias the last is the most
6 demanding for the judicial system because it
7 countenances the possibility that justice
8 might not be seen to be done even where it
9 is undoubtedly done. That is it envisages
10 the possibility that a decision-maker may be
11 totally impartial in circumstances which
12 nevertheless create a reasonable
13 apprehension of bias requiring his or her
14 disqualification. But even where the
15 principle is understood in these terms the
16 criterion of disqualification still goes to
17 the judge's state of mind, albeit viewed
18 from the objective perspective of the
19 reasonable person. The reasonable person is
20 asked to imagine the decision-maker's state
21 of mind under the circumstances. In that
22 sense the oft-stated idea that 'justice must
23 be seen to be done', which is invoked by
24 counsel for the Bands, cannot be severed
25 from the standard of reasonable apprehension
26 of bias."

Proceeding Time 11:05 a.m. T33

MR. WALLACE: And I would like then to turn more specifically to this case, but before I do that, one more quote from the *Wewaykum* decision, paragraph 77, where the court recognized the fact-specific nature of this type of decision and controversy:

"Second, this is an inquiry that remains highly fact-specific. In *Man O'War Station v. Auckland City Council*...Lord Steyn stated that 'This is a corner of the law in which the context and the particular circumstances are of supreme importance.' As a result, it cannot be address through preemptory rules and contrary to what was submitted during oral argument, there are no 'textbook' instances. Whether the facts, as established, point to a financial or personal interest of the decision-maker; present or past link with a party, council or judge; earlier participation or knowledge of the litigation; or expression of views and activities, and we must stress carefully in the light of the entire context, there are no shortcuts.'"

And in summary, and I'm going to summary before I start, it is our submission that a reasonable

1 man would view Commissioner Birch's current position
2 as president of Alliance Pipelines as one that could
3 lead to bias, conscious or unconscious. And it is, as
4 was with Mr. Andrews, the focus on that position as
5 president of a utility, and a major and prestigious
6 utility in Canada, that we address this. I think it
7 is no more appropriate for Commissioner Birch to be on
8 this panel or to, for that matter, partake in
9 deliberations of the Commission as an active president
10 of a utility than it would be for the head of the
11 Industrial Power Consumers Association in Alberta,
12 while holding that position, to be on the Utilities
13 Commission.

14 Retirement is different. Change of careers
15 is different. We very often see executives come from
16 the utility industry and other areas, and they bring
17 valuable experience to sit. But we do not see
18 presidents of utilities appointed to the Utilities
19 Commission while they are actively on it, to the
20 National Energy Board, to my knowledge, and we do not
21 see active consumer head of their organizations -- the
22 head of the Consumers' Association of Canada does not
23 sit on a utility board at the same time. A retired
24 person may be perfectly appropriate, but that
25 distinction is the active nature of the role.

26 COMMISSIONER BOYCHUK: Mr. --

1 MR. WALLACE: In my -- I'm sorry.

2 COMMISSIONER BOYCHUK: I'm sorry, Mr. Wallace. I just
3 wanted to ask you if -- I'm familiar with the National
4 Energy Board, and of course in that case the members
5 who are full-time members must devote themselves to
6 the full --

7 MR. WALLACE: Yes.

8 COMMISSIONER BOYCHUK: -- employment in their positions
9 as members.

10 And here at the British Columbia Utilities
11 Commission we have temporary commissioners, which
12 Commissioner Birch is one. And as I understand it,
13 the position that he's occupying at Alliance is the
14 interim president, so maybe I'll call it temporary
15 president. Does that have any bearing on it? Because
16 when you draw the distinct- -- or you make the
17 comparison to the National Energy Board, I just want
18 to get a sense of that, if that is as a strong a
19 comparison as it would otherwise be.

20 MR. WALLACE: Well, there may be a distinction because
21 physically I guess you can't be full-time at two
22 places at one. But in principle, no, I do not believe
23 on boards that do have part-time members that I'm
24 aware of, that I have seen a president -- you know,
25 the president of BC Gas or the president of Nova has
26 not sat on a B.C. board while actively a president. I

1 think we've had retired people. Our current chair, of
2 course, had a senior position in a utility, but then
3 he retired and came to this Commission. I am not aware
4 of people having senior positions.

5 And I do distinguish that in part too, that
6 in both cases Mr. Birch's position as president of
7 Alliance, acting or not, is a very senior position in
8 the industry. And when Mr. Birch speaks on something,
9 I think, with respect, it's probably a news item. And
10 when a commissioner declares on something, it can be
11 news item too.

12 These are both very high-profile, important
13 positions that you do not find normally combined in
14 one role, and I think there's good reason for that.
15 One, of course, as you've mentioned, it's hard to
16 carry on two of those roles at once. But the other I
17 suggest to you is perception of bias, that it simply
18 doesn't look good to have an active utility president
19 sitting judging on the conduct of another utility,
20 from either the utility -- we'll find out about the
21 utility's perspective later, but from the customers'
22 perspectives, that is a concern.

23 **Proceeding Time 11:10 a.m. T34**

24 We recognize that Alliance Pipelines is not
25 regulated by this Commission. However, it is a
26 regulated utility and the world of regulated utilities

1 in Canada is a very small one. When one Commission
2 decides something, I suggest to you -- but you'll know
3 better than I -- that that decision is usually known
4 to members of other Commissions and Boards across this
5 country reasonably quickly. And if it isn't known
6 quickly, if it is a relevant precedent, when it comes
7 up, that precedent is cited as the regulatory bar is
8 aware of what is going on across Canada. So that a
9 decision of this Commission may not directly impact
10 Alliance, but there is a very high possibility that it
11 could at some time indirectly affect Alliance, and
12 there have been, again, suggestions by Mr. Andrews of
13 a number of areas. One of particular concern that's
14 already an issue in this hearing, and we haven't even
15 got going, is the disclosure of information, the
16 confidentiality. And a precedent in this decision, in
17 this forum, could well be a precedent elsewhere.

18 We suggest to you that it is not
19 unreasonable, viewing these circumstances -- it's not
20 -- in viewing these circumstances, it would not be
21 unreasonable for the reasonable man to be concerned
22 that an active sitting executive of a utility on the
23 panel may have conscious or unconscious bias. For
24 example, is it reasonable to be concerned that an
25 active president of a utility may not be prepared to
26 make a difficult decision contrary to the wishes of an

1 executive utility, or that a precedent in the course
2 of these proceedings may be harmful to his utility?

3 And, as I say, particularly
4 confidentiality, how to proceed in the case of
5 confidentiality. If Alliance is going to face that
6 problem somewhere down the road, how would it happen?
7 How would it be dealt with, and would this be a
8 precedent? And there can be other matters.

9 THE CHAIRPERSON: Mr. Wallace, I welcome your comments
10 with respect to a public policy issue, if you will, if
11 I can characterize it as that, and maybe it's more
12 than that. But the government appoints temporary
13 Commissioners for public service and it's my
14 impression that it's in the interests of this
15 Commission that the people that are appointed come
16 from the industry, or have some familiarity through
17 other functions with the matters that are before us.
18 So that in some way, they have some experience in
19 energy matters when they're appointed. If that's
20 true, and the Commission uses temporary Commissioners,
21 is the conclusion of your argument that when temporary
22 Commissioners are appointed, they can no longer
23 function in the industry?

24 MR. WALLACE: I wouldn't go that far, but I think they
25 have to be very careful about it, yes. And when you
26 hit a position as prominent and as influential, and

1 with the same -- with the responsibilities that a
2 President of Alliance has, to protect Alliance, it
3 simply -- it isn't appropriate. I, you know, if it
4 were some minor thing, I'm not sure if it would make a
5 difference. But there is, I suggest to you, at the
6 level of president, divided loyalties. As president,
7 your responsibility is to the shareholder of that
8 corporation. And that's a very strong responsibility.
9 And, I mean, you're at the top of the pyramid. And
10 so, at the same time in this Commission, there is a
11 responsibility to make an unbiased and perceived to be
12 unbiased decision. And there may well be issues that
13 we don't know about, or whatever, that affect the
14 perception. And in my suggestion to you, the
15 perception of -- at that level is vital.

16 **Proceeding Time 11:15 a.m. T35**

17 And, you know, I did go to the retirement
18 issue, and people stepping back, and that has worked.

19 And I think we've had cases in the past
20 where Commissioners actually have disclosed a minor
21 interest in some way, and all people have said, "No,
22 that doesn't strike us as something that would cause a
23 problem." And the person has carried on.

24 I suggest to you that also there's a -- is
25 it unreasonable for the reasonable man to be concerned
26 that Mr. Birch might put himself mentally in the

1 position of Hydro's executives, which have spent \$100
2 million on this project or more, and where the
3 decision is should go ahead or not, and be reluctant
4 to make that decision. Again, I'm not saying he
5 would, but is there a reasonable -- is that a
6 reasonable concern in the mind of that hypothetical
7 reasonable person?

8 Another case. Is it reasonable to be
9 concerned, and Mr. Andrews touched on this, that the
10 president of a natural gas utility, a major natural
11 gas utility, might be reluctant to be part of a
12 decision that determined that, looking forward, gas
13 price risk is too high to warrant going through with
14 this project? Admittedly, it's going to be the nature
15 of this project that will make that decision, but is
16 it good for natural gas industry, for the president of
17 Alliance, to be quoted if it came up, the gas price
18 risk was too high for this project? In our
19 submission, the answer to these questions, if put to
20 the reasonable man, would be "Yes, those are fair
21 concerns."

22 One close example, I suggest to you, and
23 it's been quoted earlier, although not for its
24 closeness, is the *Bennett* case. And Commissioner
25 Boychuk, you were asking about the connection in this
26 case, and I think I've tried to give some examples of

1 the connection in the regulatory world between your
2 decision and between Alliance, but the connection in
3 the *Bennett* case was simply that one Commissioner
4 there, or one decision-maker, was a director of a
5 company in the same industry which he -- the evidence
6 at least that's found by the panel, I believe, was
7 that was not a competitor. And yet the courts turned
8 around and said, "There's a connection." It's, I
9 would suggest, even more remote than the connection in
10 this case, but at least one example of a connection
11 for you to look at.

12 In summary, it's our submission that the
13 law indicates that it's imperative that the Utilities
14 Commission be seen by all parties as being free of any
15 potential bias, or any potential perceived bias, and
16 it should not have, as its Commissioners, making
17 important decisions, individuals who at the same time
18 have -- or are actively advancing the interests of any
19 class of stakeholders, even if they're advancing that
20 class, that interest, in a different forum and it is
21 not precisely the same.

22 That concludes my submissions.

23 THE CHAIRPERSON: Mr. Wallace, you have not commented on
24 Mr. Andrews's second application.

25 MR. WALLACE: I didn't, Mr. Chairman, because I haven't
26 had the benefit of seeking instructions on that

1 matter. I can say that my clients were concerned that
2 what we perceive as a normal procedure, that where a
3 conflict might be -- might arise was not put to the
4 parties initially, but was apparently subject to a
5 decision by yourself without a request, which has been
6 the normal practice in the past. So it is in our
7 opinion, a clear departure from normal practice, of
8 concern, but I do not have instructions as to whether
9 that would actually be taken as a matter of bias or
10 not.

11 THE CHAIRPERSON: When can you get those instructions?

12 MR. WALLACE: Given Christmas and a lot of people away,
13 I'm not certain at this point. I may at least be able
14 to get some better opinion after the lunch break.

15 THE CHAIRPERSON: Thank you.

16 MR. WALLACE: Thank you.

17 MR. FULTON: Perhaps what I should do is, I should read
18 down the list, so that we have some order.

19 THE CHAIRPERSON: Your initial proposal was a good one,
20 Mr. Fulton. Those who support the application I think
21 we should hear from first, and those who object, we
22 should hear from second.

23 MR. FULTON: Right. And the reason why I stood up is,
24 Mr. Bois is here, and I assumed that he might have
25 something to say, but Mr. Gathercole was coming
26 forward to the mike, so --

1 **Proceeding Time 11:20 a.m. T36**

2 MR. BOIS: Mr. Chairman, Commissioners, I come into this
3 a little late and I feel like I've walked into a
4 minefield but I do want to offer some thoughts and I
5 have a couple of responses to questions that have been
6 asked by yourself, Mr. Chairman, and by you,
7 Commissioner Boychuk.

8 With regard to the submissions that have
9 already been made, I can echo a lot of the sentiments
10 raised by Mr. Wallace and Mr. Andrews with respect to
11 Mr. Birch's, or Commissioner Birch's position as the
12 president of Alliance. In regard to the connection
13 and relativity of that, as I recall, during the VIGP
14 hearing B.C. Hydro proffered Gordon Engbloom and Dr.
15 Pickle and I've forgotten his initial, but as experts
16 in both gas price forecasting and electricity price
17 forecasting. And I stand to be corrected by Mr.
18 Sanderson, but as I recall the gist of that evidence
19 was to suggest that particularly with the gas industry
20 it's a very highly integrated and very liquid
21 environment where changes in the northeast affect the
22 market in the Pacific Northwest and that demand is a
23 very fluid situation. It's a very complex, highly
24 integrated system. So if Commissioner Birch, as the
25 president of Alliance, was to make a decision here
26 that affected the gas prices in B.C., it certainly

1 could affect gas prices elsewhere in North America,
2 and conversely the same is true where, if Alliance is
3 making decisions with respect to how it flows gas or
4 negotiates rates or how it determines things based on
5 gas price forecasts, it could affect the outcome here.

6 And I'm mindful, and I stand to be
7 corrected on this, but as I understand it the
8 applicant's price forecasts for both gas and
9 electricity in this application are the subject of a
10 confidentiality request and in issue here. And I'm a
11 little bit concerned that we have a panel where
12 dealing with this matter in confidence, that was the
13 subject of heated debate in VIGP, that has now been
14 removed from dialogue and discussion by proponents and
15 stakeholders, and I don't relish the thought of
16 Commissioner Birch being put in that position, but it
17 seems to me that it is an awkward position nonetheless
18 and it does give an apprehension of bias that this
19 sort of confidential nature of the commercial terms of
20 this entire project have been dumped in his lap and I
21 fear it puts him in a precarious position and raises
22 that perception.

23 Commissioner Hobbs, you -- or Mr. Chairman,
24 you mentioned about the policy issue with your
25 questions to Mr. Wallace and I would direct your
26 attention to page 639 of the decision of the Supreme

1 Court of Canada in *Newfoundland Telephone v. Public*
2 *Utilities -- v. the Commissioners of the Public*
3 *Utilities*. I don't have a paragraph number. I'm just
4 dealing with the decision that was handed out this
5 morning. It's the first full paragraph on page 639.
6 Do you have it? I will read it and I don't want to --
7 I'll paraphrase it into the record.

8 Essentially:

9 "Janisch published a very apt and useful
10 Case Comment on *Newfoundland Light and Power*
11 *Company*. He observed that the public
12 utilities commissioners, unlike judges, do
13 not have to apply abstract legal principles
14 to resolve disputes..."

15 although given that we're faced with one right now I'm
16 not necessarily sure that that's a necessarily
17 applicable statement.

18 "As a result, no useful purpose would be
19 served by holding them to a standard of
20 judicial neutrality. In fact to do so might
21 undermine the legislature's goal of
22 regulating utilities since it would
23 encourage the appointment of those who had
24 never been actively involved in the field."

25 And I think this gets to your point, Mr. Chair.

26 "That would essentially mean that the party-

1 line faithful and blind civil servants would
2 be appointed but there appears to be great
3 merit in appointing to the boards
4 representatives of interested sectors of
5 society including those who are dedicated to
6 forwarding the interests of consumers."

7 And then in the next paragraph he goes on to say:

8 "Further a member of the board which
9 performs a policy formation function should
10 not be susceptible to a charge of bias
11 simply because of the expression of strong
12 opinions prior to the hearing."

13 And the point I want to emphasize here is:

14 "This does not, of course, mean that there
15 are no limitations to the conduct of board
16 members. It is simply a confirmation of the
17 principle that courts must take a flexible
18 approach to the problem."

19 And I'm going to stop there.

20 **Proceeding Time 11:25 a.m. T37**

21 My concern is that, and I echo Mr.
22 Wallace's comments, that we don't take exception to
23 Mr. Birch's experience and qualifications at all. In
24 fact they're quite commendable and they should -- if
25 he wasn't sitting as the interim president of Alliance
26 I wouldn't be standing here. But it's his position as

1 the interim president of Alliance that raises the
2 concern, and that is that it's not practical nor
3 appropriate for a sitting executive of a utility that
4 is regulated by any public utilities commission that
5 is interested in seeking the public good and the
6 public interest, to sit as a commissioner on a panel
7 that is charged with that purpose.

8 If he was not employed in that capacity I
9 wouldn't be standing here. If he was a consultant in
10 the industry, that would probably go to your question,
11 Mr. Chair, about how far involved that would take a
12 person out of the realm of being a commissioner versus
13 an employee in the industry. I think that's a
14 different situation. But as an executive decision-
15 making authority, I don't think that there's any
16 question that it's not appropriate for him to be a
17 panel member. There's just too much of a perception
18 of bias.

19 With regard to the other -- those are my
20 submissions with respect to Commissioner Birch.

21 With regard to the portion of the
22 application that deals with the comments that you've
23 made and whether or not you should be recused from
24 making a decision, it would be my position that the
25 panel itself, in dealing with this aside from the
26 comments, should be making the decision, not

1 Commissioner Birch.

2 But with respect to the comments that
3 you've made, I do have a concern that there may be a
4 reasonable apprehension of bias on your part with
5 respect to this decision, and I say that with the
6 greatest of respect. My concern goes to the
7 definition of bias in the *Wewaykum* decision that you
8 have in front of you and that's already been cited,
9 and that is that you may have inadvertently suggested
10 that you've already predisposed yourself to a line of
11 thinking with respect to Commissioner Birch's
12 involvement. And while I hope that's not the case,
13 because you've allowed us to make these submissions,
14 it nevertheless does raise a perception of concern.

15 THE CHAIRPERSON: But Mr. Bois, that goes to the issue as
16 to whether or not I should hear Mr. Andrews'
17 applications, and Mr. Andrews has said that I should
18 hear his applications.

19 MR. BOIS: I think you should hear his application, but I
20 think you should recuse yourself from the decision
21 itself.

22 THE CHAIRPERSON: I should recuse myself.

23 MR. BOIS: You should recuse yourself from the decision
24 yourself. My submission would be that it should be
25 Commissioner Birch and Commissioner Boychuk that makes
26 the decision with respect to Commissioner Birch.

1 THE CHAIRPERSON: Which is, I think, different than what
2 Mr. Andrews said. I think Mr. Andrews is requesting
3 that I recuse myself from the proceeding, from the
4 review of the EPA itself.

5 MR. BOIS: I didn't understand that to be his position.
6 I wasn't -- I'm not -- I don't think that -- I didn't
7 understand that to be his position.

8 THE CHAIRPERSON: Mr. Andrews?

9 MR. ANDREWS: Excuse me, no. My position is that you
10 should be disqualified, the Chair should be
11 disqualified from making the decision regarding
12 Commissioner Birch.

13 THE CHAIRPERSON: Oh, okay.

14 MR. FULTON: I think I had the same understanding that
15 you had, Mr. Chair, and that's why I sought the
16 clarification that I did when Mr. Andrews sat down,
17 so.

18 THE CHAIRPERSON: I thought it was clear too that Mr.
19 Andrews was making an application for me to be recused
20 from reviewing the EPA as opposed to me being on the
21 panel for consideration of Commissioner Birch --

22 MR. BOIS: Well, if that's the essence of his
23 application, I don't have instructions on that
24 particular issue. If the essence of his application
25 is that you recuse yourself from making the decision
26 with respect to Commissioner's Birch's bias or

1 impartiality, then I have some submissions. So I need
2 some direction from you in that regard, Mr. Chair.

3 THE CHAIRPERSON: Well, I hope the record is very clear
4 here, Mr. Andrews, with respect to whether or not this
5 panel, the three members of the panel, can hear your
6 current applications with respect to whether or not
7 there's a reasonable apprehension of bias with respect
8 to Commissioner Birch, and we need to hear further
9 from you because I'm surprised by your recent answer
10 with respect to my role.

11 MR. ANDREWS: May I have a moment?

12 **Proceeding Time 11:30 a.m. T38**

13 Mr. Chairman, I'm in the somewhat
14 embarrassing position of having to retract the
15 statement that I made just a moment ago in the course
16 of Mr. Bois' argument. My instructions are that the
17 motion is that the Chair be disqualified for the
18 reasons that I provided from continuing to -- from
19 sitting in this application. The confusion in my mind
20 had to do with the consequences for this application
21 if the Chair were to be disqualified, because it would
22 seem to follow that there would be no quorum to
23 continue. So if I created confusion by my previous
24 statement and I apologize, and you're original
25 understanding of my second motion is indeed correct.

26 MR. BOIS: That being said, Mr. Chair, I would prefer to

1 seek some instructions with respect to any further
2 submissions on that, given my misunderstanding of Mr.
3 Andrew's application. Those would be the end of my
4 submissions at this point, and then maybe if I get the
5 instructions I can be called back later on the list.

6 THE CHAIRPERSON: Thank you, Mr. Bois.

7 MR. BOIS: If there are no questions I will sit. Thank
8 you.

9 MR. WEAVER: Mr. Chairman, members of the panel, I can be
10 brief. I think the law has been fairly set out by Mr.
11 Wallace and Mr. Andrews with respect to the primary
12 application dealing with Mr. Birch, Commissioner
13 Birch. It is with some reluctance on behalf of my
14 clients, the Commercial Energy Consumers, that we
15 support the initial application with regard to Mr.
16 Birch, Commissioner Birch, not sitting on this panel.

17 It's been said in a variety of ways, but
18 just to be clear, it's clear to us that Mr. Birch has
19 a clear potential conflict with respect to his
20 fiduciary duties to Alliance Pipeline as President,
21 and those duties are both statutory and common-law.
22 And turning to the test that Mr. Andrews and Mr.
23 Wallace both relied upon from *The Committee for*
24 *Justice v. The National Energy Board*, at page 394 of
25 the copy handed out this morning, the reference to the
26 "reasonable man," would he think that it is more

1 likely than not that Mr. Crow would have consciously -
2 - or unconsciously would not decide fairly is a very,
3 very broad test, and on that basis, and on the
4 arguments put forward by Mr. Wallace and Mr. Andrews,
5 we think that there really is no alternative but for
6 Commissioner Birch not to sit on this panel.

7 With respect to the second application, and
8 the position of the Chair, we confess we had an
9 understanding that Mr. Andrews's application was
10 simply to deal with you sitting on consideration of
11 Commissioner Birch, and we can address that, and we
12 believe that you should not sit on the consideration
13 of Mr. Birch's position with respect to this panel.

14 THE CHAIRPERSON: What concerns me about that, Mr.
15 Weafer, and maybe this isn't an issue, but what
16 concerns me about that is that that application, the
17 consideration of that application has already begun.
18 You're proposing that at this stage I recuse myself
19 from that, and maybe that is within appropriate
20 procedure, but I had -- I heard Mr. Andrews say, and I
21 think the record is very clear with respect to this,
22 that he had no objections with respect to the panel of
23 three hearing his two applications.

24 MR. WEAFER: Mr. Chairman, I had not understood him to be
25 making the more fundamental application, and my
26 understanding was that his statement and the record

1 will confirm or refute, that you could sit on the
2 proceeding, but you could not participate in the
3 decision-making process with respect to Commissioner
4 Birch. That was my understanding of his submission.

5 But that said, the practical -- the belief
6 is so strong that it's clear that Commissioner Birch
7 cannot sit on the Panel, that out of an abundance of
8 caution, we think the Chair should not sit on the
9 decision-making of that, and Commissioner Boychuk and
10 I think Mr. Birch should make that decision, and you
11 should not participate in the actual decision process.

12 And that is stated from an abundance of
13 caution in the sense that we think the situation is
14 such that there's no question, Commissioner Birch
15 should not be sitting, and to avoid the risk of appeal
16 on a procedural basis would be appropriate.

17 **Proceeding Time 11:35 a.m. T39**

18 THE CHAIRPERSON: Effectively, Mr. Weafer, you're making
19 what I'll refer to as a third application, and my only
20 hesitation is that procedural fairness, for those who
21 have spoken before you, they didn't realize that in
22 fact there were three applications for them to comment
23 on, and I think it's going to be necessary for me to
24 circle through the intervenor list the second time
25 with respect to that issue, as to whether or not I
26 should be hearing this matter.

1 And what concerns me about that are
2 comments Mr. Sanderson made earlier, with respect to
3 making sure the record was clear with respect to who
4 should be hearing Mr. Andrews's two applications, as
5 he has now defined them. So there are some procedural
6 issues here, I think, that are now going to need to be
7 commented on. One, I either entertain your
8 application or not. And two, on what basis do I do
9 so?

10 MR. WEAVER: Mr. Chairman, it's not intended to be an
11 additional application, it was my understanding from
12 Mr. Andrews's original submission, which now seems
13 revised. So I have a concern, if you do sit on the
14 decision, and participate in the decision, with regard
15 to Commissioner Birch, as the -- I'll leave that as it
16 is.

17 THE CHAIRPERSON: But you're not making an application.

18 MR. WEAVER: No.

19 THE CHAIRPERSON: Yeah.

20 MR. WEAVER: My understanding was, that was the process
21 we were following, that you were sitting, but you were
22 not participating in the decision, and that you would
23 determine that at the end of hearing all submissions.

24 THE CHAIRPERSON: Yes. There's been some confusion with
25 respect to that. I think Mr. Andrews has made it
26 clear now, unless you're going to seek an application

1 for me not to hear Mr. Andrews's two applications with
2 respect to me being disqualified, and Commissioner
3 Birch being disqualified, then I don't think I need to
4 hear from you on that issue.

5 MR. WEAVER: That's fine. And with respect to the more
6 fundamental application which now seems to be the
7 application that you, the Chair, recuse from the
8 entire proceeding, we do not support that application.
9 We do not believe that basis has been set by Mr.
10 Andrews's submissions.

11 THE CHAIRPERSON: Thank you.

12 MR. WEAVER: Thank you, Mr. Chairman. Thank you, members
13 of the panel.

14 MR. GATHERCOLE: Mr. Chair, I, too, will be brief,
15 because I will not repeat what everybody else has
16 said. I too reluctantly support, on behalf of my
17 clients, the motion with respect to Commissioner
18 Birch. I do so reluctantly, because I think things
19 should only be -- matters should only be raised in
20 significant circumstances. The fact that I can't
21 recall -- I think I can recall one where an
22 application may have been brought a number of years
23 ago that I wasn't involved in -- I think indicates the
24 seriousness.

25 And I want to, you know, underline that our
26 concern is the fact -- with the fact that Commissioner

1 Birch holds the position of interim President and CEO
2 of Alliance Pipeline. His previous experience, and
3 indeed his experience in that position, should he
4 later leave it would, in my submission, be -- in the
5 absence of some clear indication of actual, you know,
6 conflict or bias, would again add to the Commission's
7 strengths.

8 I agree with Mr. Wallace's submissions, and
9 I won't repeat them, but I particularly -- you know, I
10 agree with the test, I think it's pretty clear, the
11 test to be applied, and I would also underline what
12 Mr. Wallace said with respect -- and what he quoted
13 with the *Wewaykum Indian Band* case, and particularly
14 -- and I won't again quote them -- but paragraphs 66
15 and 67. And I think in particular in considering this
16 application, this needs to be kept in mind, because
17 this is a regulator that regulates in the public
18 interest. And I quote:

19 "The reasonable person is asked to imagine
20 the decision-maker's state of mind under the
21 circumstances. In that sense, the oft-
22 stated idea that justice must be seen to be
23 done, which was invoked by counsel for the
24 Bands, cannot be severed from the standard
25 of reasonable apprehension of bias."

26 And I submit that that is -- you know, that is very

1 important. Because we are talking here, one has to
2 keep in mind, natural justice and as part of the
3 consideration, and the fact that, in my submission,
4 the Commission should consider what -- you know, not
5 only what the reasonable person would be thinking in
6 this, but I think it also has to do that within the
7 context of the Commission's general role in the public
8 interest.

9 With respect to Mr. Andrews's application
10 with respect to the Chair, I have some real
11 difficulties, quite frankly, because as I understand
12 Mr. Andrews' position, it's that he wants the full
13 panel to decide both of his applications. But in my
14 submission, the concerns that he raises, while they
15 are, in my submission, legitimate concerns with
16 respect to the Chair participating in the decision
17 with respect to Commissioner Birch, he's not asking
18 for that. And I really can't say any more than that,
19 so those would be my submissions, Mr. Chair.

20 **Proceeding Time 11:40 a.m. T40**

21 THE CHAIRPERSON: Thank you. I see we got your
22 attention, Mr. Hague.

23 MR. HAGUE: Thank you. I do support Mr. Andrews in his
24 two applications. However, it seems to me the
25 learning opportunity for the full panel to address
26 both applications should not be missed. This is not a

1 happy day for the process in one sense, but it is in
2 another. There is an opportunity here to learn
3 something very fundamental. I doubt that anybody in
4 this room today is happy with the turn of events. I'm
5 not happy, that's for certain.

6 I hold very close to my beliefs that the
7 public interest demands and requires the public trust.
8 There is nothing that should impinge upon that basic
9 tenet. We would all prefer, of course, I think, and I
10 think I can speak for everyone here, that we'd all
11 like a transparent, fair, just and reasonable process
12 that would enable an unambiguous contest between the
13 Energy Purchase Agreement and any and all qualified
14 alternatives, with a best net socially beneficial
15 project prevailing.

16 Now, now as it turns out, every decision
17 made so far by this panel may be made ambiguous in
18 this event, and if this proceeding continues, these
19 decisions that have already been made with regard to
20 scope, timing, process and confidentiality, will have
21 to be rescinded and reconsidered. I think that's
22 *q.e.d.* Given the loss of time, and time has been the
23 big bugaboo in this process and much time has been
24 wasted, squandered I might say, but given the loss of
25 time that this issue presents and especially if this
26 leads to an adjournment of this proceeding, and it

1 very well could, then it would be incumbent upon the
2 B.C. Utilities Commission, if an adjournment is
3 required, to forthwith order B.C. Hydro to cease and
4 desist this application, and to expedite the in-
5 service date of the 230 KVA replacement transmission
6 line to Vancouver Island and, as a belts and
7 suspenders measure, to also engage such bridging
8 resources to guarantee the continuation of service
9 without interruption. Thank you.

10 MR. FULTON: Mr. Steeves, did you have anything that you
11 wanted to say today? Is there anyone else who is
12 speaking in favour of the applications?

13 I should point out, Mr. Chairman, that
14 Exhibit C33-6, which was the e-mail from Shadybrook
15 Farm, does speak to this issue as well.

16 All right, I'll now call upon those opposed
17 to the applications.

18 MR. SANDERSON: Mr. Chairman, there are so many
19 applications spinning around at the moment that
20 characterizing anybody as being for or against all or
21 everything is a dangerous exercise.

22 I would like to take instructions and just
23 sort of try and make some sense of what I've heard
24 this morning, over the lunch break if I might. I
25 think that would assist me in making my submissions
26 more pointed and useful to the Commission.

1 **Proceeding Time 11:45 a.m. T41**

2 THE CHAIRMAN: We will take -- is an hour long enough,
3 Mr. Sanderson, or would you prefer an hour and a half?

4 MR. SANDERSON: Could I suggest one o'clock and then that
5 would bridge the difference?

6 THE CHAIRPERSON: That splits the difference. And I'll
7 look forward to hearing from Mr. Wallace and Mr. Bois
8 if they can get instructions during lunch as well.
9 Mr. Bois?

10 MR. BOIS: Mr. Chairman, given Mr. Sanderson's comments I
11 just want to echo some whispering that I've heard
12 around the room and that is I think it would be
13 helpful if we were to clarify the applications that
14 are before the Commission because my concern is that
15 we all don't know what we're for or against, and I
16 think it would be helpful if Mr. Andrews was to
17 certainly clarify in sort of simple, plain English
18 what it is that he's seeking with respect to
19 Commissioner Birch, which I understand to be him to be
20 declared recused from this hearing and secondly, with
21 respect to yourself and your involvement in this --
22 continued involvement in this hearing.

23 And I'm a little bit apprehensive because
24 of the comments that were raised when Mr. Weafer was
25 speaking and the possibility of the prospect of a
26 third application which is essentially what I was

1 about to speak to, and given my confusion or
2 misapprehension about Mr. Andrews' second application
3 if you will. So I'm wondering if just for the sake of
4 clarity we could confirm what it is we're going to be
5 thinking about over lunch.

6 THE CHAIRPERSON: Yes.

7 MR. BOIS: Thank you, Mr. Chair.

8 THE CHAIRPERSON: Thank you, Mr. Bois. And Mr. Andrews,
9 I'm going to do that and you can correct me if I'm
10 wrong because I believe I understand what your
11 applications are and if I don't then I want you to
12 tell me that I don't understand it. You're seeking an
13 application that Commissioner Birch be disqualified
14 from hearing the filing of the EPA, so from this
15 proceeding and you're also seeking an application that
16 I be disqualified from hearing the review of the EPA
17 as well. So in both cases from the full proceeding.

18 You are not seeking -- in fact you have
19 accepted that the three members of the panel would
20 hear those two applications and that is the extent of
21 your applications.

22 Now Mr. Weafer, although he spoke, as did
23 Mr. Bois, spoke to the issue of whether or not I
24 should sit on the panel for the purposes of those two
25 applications, Mr. Weafer did not make an application
26 in that regard so there are only two applications

1 before us at this time and they're the two
2 applications that I've spoken to.

3 MR. ANDREWS: That is an implicit question to me and the
4 answer is yes.

5 THE CHAIRPERSON: All right. Does anybody believe that
6 the record is different than that?

7 Thank you. We are adjourned until one
8 o'clock.

9 **(PROCEEDINGS ADJOURNED AT 11:49 A.M.)**

10 **(PROCEEDINGS RESUMED AT 1:00 P.M.)** **T42**

11 THE CHAIRPERSON: Please be seated.

12 Mr. Fulton?

13 MR. FULTON: Mr. Chairman, I understand that Mr. Wallace
14 and Mr. Bois now have the instructions that they had
15 said that they would seek.

16 THE CHAIRPERSON: Thank you.

17 MR. WALLACE: Thank you, Mr. Chairman. The JIESC does
18 not support Mr. Andrews's second motion, that is, the
19 motion with respect to yourself.

20 MR. BOIS: Yes, Mr. Chairman. Norske Canada does not
21 support the second motion as well.

22 THE CHAIRPERSON: Thank you.

23 MR. BOIS: Thank you.

24 MR. SANDERSON: Mr. Chairman, I'll speak to the motions
25 in turn.

26 And the first motion, as you framed it, and

1 as I take Mr. Andrews and other counsel to have
2 accepted it, is whether or not Commissioner Birch
3 should be disqualified in the context of the
4 continuing process with respect to the CFT process
5 report and filing, and the consideration of the EPA.
6 I want to start by saying that I do not agree, and in
7 fact I fundamentally disagree, with the bulk of the
8 submissions that you've heard from my friends this
9 morning. I don't disagree strongly on the law.
10 However, I don't think you've heard the flip side of
11 the law, and in that respect I want to quickly refer
12 you to the seminal case that a number of people have
13 talked about this morning, and that is -- or talked
14 about this morning, and that is, *Committee for Justice*
15 *and Liberty v. The National Energy Board*.

16 **Proceeding Time 1:02 p.m. T43**

17 MR. SANDERSON: Sorry, the *Committee for Justice and*
18 *Liberty v. the National Energy Board*. That decision,
19 I don't think I need take you there given where I'm
20 going with this, but I just want to read one paragraph
21 that people have skipped over because I think it
22 captures what we've heard today.

23 After what is generally accepted to be the
24 expression of the law taken from the dissent in that
25 case, and I think it's correct, as earlier counsel
26 have said, that is where the law is now found, Mr.

1 Justice de Grandpré continued as follows at page, in
2 my report, 394 and 395, and unfortunately we're
3 working off different copies. So if you've got the
4 Supreme Court Reports, it's at 394, 395. At the very
5 bottom of 394 the court said this:

6 "I can see no real difference between the
7 expressions found in the decided cases be
8 they reasonable apprehension of bias,
9 reasonable suspicion of bias or real
10 likelihood of bias."

11 And then the passage I emphasize:

12 "The grounds for this apprehension must,
13 however, be substantial, and I entirely
14 agree with the Federal Court of Appeal which
15 refused to accept the suggestion that the
16 test be related to the very sensitive or
17 scrupulous conscience."

18 And put at its best, Mr. Chairman, my submission is
19 that what you heard this morning was from the very
20 sensitive or scrupulous consciences of the various
21 parties who were making submissions. It's setting a
22 very unfortunate precedent indeed, I think, to make a
23 decision based on allegations or apprehensions of bias
24 as vague as the ones we've heard today and as high
25 level and generalized. There was really very little
26 specific connection made between the interests of

1 Alliance, with which Commissioner Birch is now
2 associated, and the outcome of this review, which I
3 remind the Commission is not about regulation of a
4 public utility, rather it's under Part 5 of the Act
5 and is a hearing looking into a specific contract and
6 deciding whether or not the Commission should employ
7 extraordinary powers it has, under Part 5, not under
8 Part 3, which is what deals with public utilities, to
9 interfere with a contract that is otherwise made in
10 the commercial world.

11 **Proceeding Time 1:04 p.m. T44**

12 Having said that, I also need to observe in
13 response to some questions, I think from Commissioner
14 Boychuk, and perhaps from the Chair -- I think it does
15 set an unfortunate precedent in the context of
16 temporary Commissioners. I think it's significant
17 that the Act provides and contemplates that
18 Commissioners of this particular Commission do have
19 other business lives, and if we are to have
20 Commissioners who are professionals in the field of
21 one sort or another, or have knowledge of the field,
22 it's got to have been assumed that those other lives
23 might very well be in related fields. And the most
24 that can be said, I think, of Mr. Birch's current
25 appointment is that it's employment in a related
26 field.

1 is that the panel erred, or you specifically erred, by
2 exercising the chief executive function of appointing
3 a panel, and in doing it, seeking each of your
4 panelists to tell you what other involvements they
5 had, and then deciding, based on what you heard, what
6 panel to appoint.

7 It's my respectful submission that that's
8 what you must do every time you appoint a panel. You
9 must inquire of your panelists whether or not there's
10 any reason or any facts you should be aware of before
11 you choose them to sit on a panel. And at that point
12 your obligation as chief executive of the Commission
13 is to make a decision as to what the panel should be.
14 Your further obligation is, if you've any concern
15 about other perspectives that may exist in the matter,
16 that either you or they disclose on the public record
17 what those facts are; that is, what other concerns or
18 interests individual commissioners might have so that
19 you can obtain the input from other parties.

20 That, as I read the transcript, is exactly
21 the procedure you followed. I completely disagree
22 with Mr. Wallace, and challenge him to give any basis
23 for his assertion that what you did deviates from the
24 standard practice of this Commission. I've never seen
25 the Commission behave any differently. I have seen
26 the Commission say often at the beginning of hearings,

1 "Here are some facts the parties should know. We're
2 comfortable with our panel," or whatever, "but we want
3 people to know, and if they have a concern, to raise
4 it now." And that's what I took you to do. That's
5 the procedure that I think should be followed both
6 here and should be followed in future hearings.

7 And so my first proposition is that the
8 procedure here is exactly the right one. You've done
9 nothing which would suggest that there isn't a -- that
10 you're not capable of now hearing in respect of
11 Commissioner Birch, the submissions of the parties as
12 you have been all day. And so you should feel
13 entirely free to participate in that decision, and you
14 shouldn't also feel any hesitation to participate in
15 the balance of this proceeding.

16 On that last point I make one last and
17 probably my last point, which is, even if my
18 submissions with respect to your decision with respect
19 to Commissioner Birch weren't accepted, that surely
20 can have nothing to do with the rest of this hearing.
21 It can surely have nothing to do with the substance of
22 the application. There is nothing in the process that
23 you adopted with respect to Commissioner Birch that in
24 any way touches on your suitability to hear the
25 substance of the application.

26 And so the most that even could be asked

1 for, if the procedure that you'd employed was
2 inappropriate, would be for you to be recused from the
3 decision with respect to Commissioner Birch. As has
4 been made clear in the morning, that's not being
5 sought. There is not one party here who is saying
6 that should happen. Everybody is accepting that they
7 want this panel to make that decision. There is no
8 merit, and no basis, made in anyone's submission for
9 you recusing yourself from anything else.

10 So those are my submissions.

11 **Proceeding Time 1:10 p.m. T46**

12 THE CHAIRPERSON: Thank you. Mr. Andrews? Oh. Mister
13 -- sorry. Mr. Keough.

14 MR. KEOUGH: Thank you, Mr. Chairman. I, too, will be
15 brief. It is also with considerable reluctance that
16 Duke Point Power associates itself with the position
17 and the conclusion that B.C. Hydro has reached on this
18 matter. We think when one looks to the substance,
19 there is at best a very tenuous basis for the motion
20 that has been brought before you. And I'm dealing
21 with the first motion. However, as my friend Mr.
22 Sanderson has said, we are in a predicament where we
23 really cannot take the chance and for that reason we
24 support Hydro's position.

25 On the second issue, Mr. Chairman, I think
26 my friend has overstepped the bounds. There is simply

1 no basis, no foundation at all that he has laid that
2 you should excuse yourself from this proceeding in
3 total. I'm not even sure he has identified any basis
4 at all for that. And I'm going to suggest to you that
5 that application be dismissed. Thank you.

6 THE CHAIRPERSON: I think procedurally now it is your
7 opportunity to reply, Mr. Andrews. Unless, Mr.
8 Fulton --

9 MR. FULTON: Yes, I don't have much further to say, Mr.
10 Chairman, because there is agreement on the law, and I
11 do want to return to the *Wewaykum Indian Band* case
12 again, though. And this is something that B.C. Hydro
13 has picked up in their reference to the *Committee for*
14 *Justice and Liberty*. And Mr. Wallace referred to
15 paragraph 77. My notes don't tell me whether he
16 referred to paragraph 76. If he did, I apologize for
17 repeating it, but I did want to refer the Commission
18 Panel to it, and that is that the standard refers to
19 an apprehension of bias that rests on serious grounds,
20 in light of the strong presumption of judicial
21 impartiality. And then there's a reference to Mr.
22 Justice de Grandpré's further statement from the
23 *Committee for Justice and Liberty*. So, that's all
24 that I wish to say further, Mr. Chairman.

25 MR. ANDREWS: Members of the panel, I'm going to limit my
26 reply to points that I think are properly limited to

1 reply. Commissioner Boychuk asked a question of Mr.
2 Fulton regarding the effect on temporary
3 Commissioners. The important point I submit in reply
4 is that Commissioner Birch was not appointed as a
5 temporary Commissioner at the time that he was the
6 interim President of Alliance Pipeline, and so no
7 conclusions can be drawn to the effect that, when he
8 was originally appointed, it was intended that he
9 represent Alliance Pipeline on the Commission.

10 MR. FULTON: Perhaps I'm a little confused with that
11 statement. It was my understanding that Commissioner
12 Birch has been, since the time of his original
13 appointment, a temporary Commissioner. And at the
14 time that he was appointed to this panel, he was a
15 temporary Commissioner. It wasn't him being appointed
16 a temporary Commissioner after he became the interim
17 President of Alliance Pipeline.

18 MR. ANDREWS: That's my point -- that there can be no
19 argument that the government knew that the
20 Commissioner was the President of Alliance Pipeline
21 when he was originally appointed a temporary
22 Commissioner. Because he was not the President of
23 Alliance Pipeline at the time that he was originally
24 appointed to be a temporary Commissioner, and that's
25 my comment in reply on that point.

26 And regarding Mr. Sanderson's comments on

1 the second motion -- the -- I'm not -- I disagree with
2 his characterization of the evidence. This was not a
3 case of the Chair coming to the parties and saying
4 there is an issue and we invite submissions. I won't
5 repeat what my position is as to what happened because
6 I've said that already. The record is clear on that.

7 **Proceeding Time 1:15 p.m. T47**

8 Secondly, the basis for the argument that
9 the Chair should be disqualified is that this was not
10 a mere ruling that one could say was correct or
11 incorrect. This was a decision that, we argue,
12 creates a reasonable apprehension of bias in terms of
13 dealing with an important issue in this proceeding and
14 as such reflects on the ability to handle the
15 application before the panel and not merely the
16 particular issue that was involved at the time. And I
17 won't go further than that. Those are my reply
18 submissions, subject to any questions.

19 THE CHAIRPERSON: I think with that -- thank you, Mr.
20 Andrews. I think with that we will adjourn for -- Mr.
21 Fulton?

22 MR. FULTON: Yes, I just wanted to make sure that the
23 panel adopted a certain process with these
24 applications because -- and my submission is that they
25 should be dealt with serially rather than both at the
26 same time and that Commissioner Birch -- the

1 application relating to Commissioner Birch should be
2 done first. Otherwise Commissioner Birch, if the
3 decision is that he should recuse himself would then
4 be taking a decision on the application that involves
5 you, Mr. Chairman. So the decision should be made
6 serially.

7 And perhaps what should happen, and I do
8 submit what should happen is that the decision should
9 be made on Commissioner Birch, the panel should come
10 back and advise us of that decision, and then it
11 should retire and consider the application as it
12 relates to the Chair, whether there be two or three
13 Commissioners at that point.

14 THE CHAIRPERSON: Thank you, Mr. Fulton. We're adjourned
15 for 20 minutes.

16 **(PROCEEDINGS ADJOURNED AT 1:17 P.M.)**

17 **(PROCEEDINGS RESUMED AT 1:32 P.M.)** T48

18 THE CHAIRPERSON: Please be seated.

19 COMMISSIONER BIRCH: I guess before we proceed to a
20 decision, I've come to the conclusion that I must
21 recuse myself, before a decision is taken. I thought
22 I had structured the affairs in a way that would be
23 entirely independent of the Commission, and obviously
24 others view that not to be the case. So, before we go
25 any further, I will simply recuse myself.

26 Thank you.

1 THE CHAIRPERSON: Mr. Fulton, you wanted to do this in
2 two steps.

3 MR. FULTON: Yes, I did, Mr. Chairman. So that now, in
4 my submission, it is appropriate for you and
5 Commissioner Boychuk to consider the second
6 application.

7 THE CHAIRPERSON: We will adjourn for ten minutes.

8 **(PROCEEDINGS ADJOURNED AT 1:34 P.M.)**

9 **(PROCEEDINGS RESUMED AT 1:37 P.M.) T1A**

10 THE CHAIRPERSON: Please be seated. Mr. Andrews's second
11 application is dismissed. I do not intend to provide
12 reasons unless I'm obligated to, and if I am, then I
13 will do so -- the panel will do so after today, in
14 writing in a letter. But given the nature of the
15 application, it's been dismissed.

16 MR. ANDREWS: Thank you for the decision. I would
17 request reasons when -- in due course.

18 THE CHAIRPERSON: Okay. Thank you.

19 We are now on to the third item on the
20 agenda. I want to identify first, Mr. Wallace, your
21 reconsideration application of the scope decision. I
22 think it, if you will, is a separate matter from the
23 two that you and BCOAPO have made, and I simply wish
24 to confirm -- I don't intend to deal with that issue,
25 that reconsideration application now, but I would like
26 to confirm with you whether or not you wish to proceed

1 with it.

2 **Proceeding Time 1:39 p.m. T2A**

3 MR. WALLACE: Mr. Chairman, at some point that is
4 appropriate, I do wish to proceed with that. It is --
5 we do not have additional arguments to those put
6 before you previously. However, as you may be aware
7 that one of the requirements generally for appealing
8 is that you have exhausted all of your remedies before
9 a panel, and accordingly I wish to raise that matter
10 at a time that is appropriate.

11 THE CHAIRPERSON: Which brings us to the issue as to
12 whether or not a ruling with respect to the scope of
13 the proceeding is the appropriate subject matter of a
14 reconsideration application. And I raise that issue
15 because I think it's a -- I see it as a significant
16 issue. From time to time during the proceeding I'm
17 going to need to make decisions with respect to
18 relevance, and I do not intend to provide reasons for
19 every ruling I make with respect to relevance, nor do
20 I think I'm required to provide reasons with respect
21 to rulings with respect to relevance. In a sense, I
22 see the scope ruling that we made on November 30th as
23 similar to relevancy ruling.

24 MR. WALLACE: Well, maybe it's the mother of all
25 relevancy rulings in the sense that on a very tight
26 hearing like this, it really does define what's going

1 forward, and we've listened to Mr. Sanderson argue
2 very eloquently to get rid of a very large number of
3 information requests that he said, as I understood it,
4 that in the normal process of a hearing might well be
5 appropriate and would be answered, but in a hearing
6 like this where we need to be expedited, and I think
7 his stress was on focus, they did not want to answer
8 them and in many cases they have succeeded in not
9 answering them.

10 Accordingly it is very much an issue for
11 us. I take your point that maybe it's an appeal point
12 at the end of the hearing rather than the beginning.
13 That is a matter we will have to consider.

14 **Proceeding Time 1:41 p.m. T3A**

15 THE CHAIRPERSON: Not to put too fine a point on it, but
16 the decision that we made with respect to B.C. Hydro's
17 application seeking relief from answering certain IRs
18 is, in some respects, arguably inconsistent with the
19 ruling that we made on November the 30th with respect
20 to scope. It seems to me that it's quite appropriate
21 for the panel to do that, if it so chooses. It may
22 lead to some procedural confusion, if you will, but
23 for that, it seems to me that it's quite appropriate
24 for us to have done that.

25 And so, you're seeking a reconsideration of
26 a scope -- if I can call it that, a scope ruling --

1 that is going to provide us with a foundation for this
2 proceeding, and a direction for this proceeding, but
3 it nevertheless is going to continue to be evolving as
4 I apply it to the evidence that we hear. And so
5 you're seeking a reconsideration of something that I
6 -- at least in some respects I see as yet to be fully
7 determined. And so, I struggle with why -- or the
8 appropriateness of a reconsideration application in
9 that context.

10 MR. WALLACE: Well, Mr. Chairman, I guess -- and
11 obviously we're going to be talking about timing --
12 but at the time this application was brought, the
13 filing of the evidence was -- on behalf of the
14 intervenors -- was eight days away. And we, at that
15 point, have -- if we at that point have to -- if we
16 commission experts, which is very tough in the time
17 frame we've had on this in any event -- we have to
18 make our decisions on what is perceived to be the
19 scope of the hearing as explained to us by the Chair.
20 And we have no alternative.

21 | Proceeding Time 1:44 p.m. T4A

22 I raise the issue because it is very
23 important to our participation, and those rulings are
24 made for a purpose, and I accept that maybe there are
25 changes, and obviously I'm going to have to take into
26 account your comments, and think about whether this is

1 the appropriate time to proceed further with an
2 appeal, or a review, or whatever. But that scope is
3 vital to us, and accordingly that is why we did bring
4 it back to you.

5 Thank you.

6 THE CHAIRPERSON: I would like to hear comments with
7 respect to whether or not the scope ruling made on
8 November the 30th is the appropriate subject matter of
9 a reconsideration application.

10 MR. WALLACE: I don't think I have anything further to
11 add to what I have said.

12 THE CHAIRPERSON: Yes. Thank you, Mr. Wallace.

13 MR. SANDERSON: Mr. Chairman, I would like to deal with
14 the specific rather than the general. That is, Mr.
15 Wallace has sought reconsideration of a specific
16 ruling from the panel, to do with scope -- says he's
17 content for the panel to consider that now -- and
18 acknowledges that he doesn't have any further basis
19 for making the application than he did previously.
20 The reason that he wishes to bring the reconsideration
21 application in those circumstances is because he wants
22 to pave the way for another forum.

23 I think you, with great respect, should
24 take him at his word. I think that if you apply the
25 Commission's guidelines with respect to
26 reconsideration, you have no option but to deny his

1 application. I think that's all you're called upon to
2 do now. And while I share your concerns about
3 appropriateness, I think those are concerns that can
4 be pursued, depending on what course Mr. Wallace
5 chooses to adopt, if any -- in another forum. In the
6 Court of Appeal. Because any of the concerns you've
7 got are equally concerns, I think, in the Court of
8 Appeal. And so my respectful suggestion is, you deal
9 with his motion on the terms that he's brought it, and
10 I say that will require you to dismiss it, and then
11 that's dealt with.

12 MR. GATHERCOLE: Mr. Chairman, we also have a
13 reconsideration application, but I think we take a
14 slightly different approach than --

15 THE CHAIRPERSON: I'm going to get to your
16 reconsideration application.

17 MR. GATHERCOLE: Okay.

18 THE CHAIRPERSON: I wanted to deal with this one first,
19 because I think it needed to be dealt with first. I
20 don't think I need to hear -- Mr. Andrews?

21 MR. ANDREWS: You are seeking input regarding whether the
22 statement on scope is suitable for reconsideration?
23 In my view, it is, and the reason is that it's
24 distinguished from a decision regarding relevance of
25 particular evidence because it is -- it was not a
26 decision about the relevance of particular evidence,

1 it is a crucial decision for the hearing as a whole.
2 And that's why I think it should be subject to
3 reconsideration.

4 THE CHAIRPERSON: Okay. I don't think I need to hear
5 from anyone else, but Mr. Fulton, if you wish --

6 MR. FULTON: I just wanted to refer you to Section 99 of
7 the *Act*, Mr. Chairman, and the wording in that Section
8 is broad, and it is a discretionary section.

9 THE CHAIRPERSON: Okay. We will then proceed with the
10 reconsideration application. Mr. Wallace, it was not
11 my intent to proceed with it this afternoon, though.
12 I really just wanted to establish how to deal with it,
13 and we'll proceed with it as you have stated it. I
14 think that requires that there -- others to have been
15 given an opportunity to comment on its merits, and we
16 do have a two-step process with respect to
17 reconsideration under our guidelines that we should
18 follow. And I think unless there are any objections
19 we'll follow that process in writing, and endeavour to
20 do that two-step process. This is going to mean very
21 quick turnaround time, but I assume that you would
22 like that earlier rather than later, and so I'm
23 thinking that we do it in writing between now and
24 December the 31st. Is that satisfactory?

25 MR. WALLACE: Yes, that is.

26 THE CHAIRPERSON: Okay. We will establish a schedule,

1 then, to deal with Mr. Wallace's reconsideration
2 application with respect to the scope ruling, and
3 we'll do that either this afternoon or in writing
4 following this pre-hearing conference.

5 **Proceeding Time 1:50 p.m. T5A**

6 That brings us to the two applications that
7 have been made with respect to reconsideration of the
8 decision that was made on November the 30th with
9 respect to confidentiality. The applications of
10 BCOAPO, which was joined by JIESC. As I mentioned in
11 my comments on Friday, it's my view that that
12 application, or those applications, are premature,
13 that there were assumptions made with respect to the
14 ruling on November the 30th in those reconsideration
15 applications that in fact were not reflective of, I
16 think, either what was said on November the 30th or
17 certainly the intent of what was said on November the
18 30th. And another procedural step that is, I think
19 supported, if I understood you correctly, Mr. Wallace,
20 is supported by you, and I understood is supported by
21 Mr. Quail, and that is the fourth item on the agenda
22 for today. However, before we get there, for the
23 record, I would like to, if it's your intent to do so,
24 to formally withdraw your reconsideration applications
25 as related to confidentiality, not to prejudice you
26 with respect to bringing forward another

1 reconsideration application following the decision
2 that we might make after dealing with agenda item
3 number four. But I think it's appropriate for you to
4 be withdrawing those applications before we get to
5 item number four on the agenda.

6 MR. WALLACE: Mr. Chairman, maybe if I can put those
7 applications in context. We did have the pre-hearing
8 conference on the 30th and the rulings that were
9 contained therein, and with respect, as I read them,
10 in any event, and unfortunately we don't have a clear
11 order, we have reading transcripts that are
12 discussions and are off the -- discussions made in the
13 course of the proceeding, but it was not clear to us
14 at the time that there had been a definitive ruling,
15 but it looked like there had and the information,
16 particularly the disclosure of the terms of the EPA
17 were not clear to us whether that was going to be
18 ordered, not ordered, definitively. We thought we
19 understood one thing. We wrote a letter to the
20 Commission and we never received a response to our
21 seeking of clarification there. So we did bring on
22 the application.

23 With respect to the application at the
24 moment I would have thought that it would be enough
25 that we deal with item four and then come back to item
26 three. We can, I guess, withdraw it without prejudice

1 to refilling it but I'm concerned, as everybody has
2 been in this process, that that simply adds to delay
3 without adding anything new to the record.

4 And our problem is we're on -- at least
5 until we go to item five, I guess it is, we're on a
6 very tight time frame and if it is withdrawn then it
7 has to be -- it sounds like something different might
8 be forthcoming after item four. It has to be sent out
9 to everybody. It has to be dealt. Then there has to
10 be time for responses, et cetera, whereas everybody
11 has that material before them right now and it may be
12 unnecessary delay if it were to be withdrawn if there
13 are no changes on item four.

14 And it's simply on the grounds of
15 expeditious proceeding and giving people notice that
16 my preference would be to leave it on the record. If
17 the situation changes and material is disclosed then I
18 think, yes, we would want to make further submissions
19 or withdraw it and submit a new one or none at all.

20 THE CHAIRPERSON: What concerns me, Mr. Wallace, is that
21 your reconsideration application is a reconsideration
22 of the decision on November the 30th. Following the
23 matters that I intended to deal with at item number
24 four there will be another decision from the
25 Commission Panel and so the question then is your
26 reconsideration application is of November the 30th

1 ruling, you will then get a subsequent decision with
2 respect to item number four on the agenda. I would
3 have thought that you would have preferred to commence
4 your reconsideration application of that item and
5 maybe including November the 30th.

6 **Proceeding Time 1:55 p.m. T6A**

7 MR. WALLACE: I absolutely would in normal circumstances.
8 There is no question. I would never have raised it at
9 this stage under normal circumstances. The problem is
10 that the timeframes are so tight that even with a
11 relaxation from filing on Friday, which I understand
12 will be there or has already been ordered by the
13 Commission but we don't have new dates, and without
14 new dates -- sure, I would like the process to be
15 clean, but if everybody knows what my objection on
16 confidentiality is, and it's filed, and the situation
17 hasn't changed, then I'd rather say to you, "Sir, I'd
18 like to amend my review and reconsideration hearing to
19 include this but not take the time that would normally
20 be go back to the office, rewrite it, send it out to
21 all parties, allow time for consideration, et cetera."
22 So it's solely a matter of expeditious treatment. But
23 if it's going to cause confusion, obviously we want to
24 deal with the most recent and the final decision. We
25 don't want to deal with what happened on the 30th if
26 something different happened on the 22nd. That's not

1 the intent. It's only in giving notice to people of
2 where we are in the tight timeframe we're working.

3 THE CHAIRPERSON: What also concerns me with respect to
4 confidentiality is I see a series of decisions with
5 respect to confidentiality. If the process is going
6 to be for you to be seeking a reconsideration of every
7 one of those decisions, then we're going to have a
8 proceeding that's procedurally encumbered more than
9 most, I suppose is the best way to say it.

10 MR. WALLACE: There is no question. This tight timeframe
11 and the procedural handicaps that are on all of us is
12 making this a more procedural hearing. That's the
13 world we're in. But it is fundamental to us that the
14 terms of the EPA be disclosed. That is absolutely
15 fundamental and will -- I've been in hearings where
16 there have been small amounts, usually not provided to
17 the Commission and Staff but not the intervenors,
18 where confidentiality has been discussed and ways have
19 been found to work around it. We're not talking about
20 that here. We're talking about the core terms of the
21 EPA, which go to our ability to provide input into the
22 decision-making process. And so that one to us is
23 fundamental. Other ones will probably work their way
24 out in the normal way, but that one is fundamental.
25 And so I'd be disingenuous if I was to suggest it was
26 anything less or more minor.

1 THE CHAIRPERSON: What also concerns me, Mr. Wallace, is
2 that I think one needs to look at confidentiality from
3 the perspective of the requirements for
4 confidentiality of B.C. Hydro and Duke Point Power and
5 the unsuccessful bidders as well, but also from the
6 perspective of the requirements of the intervenors in
7 this proceeding. And it seems -- and I'll welcome
8 your comments with respect to finding a means, but
9 maybe not until there's further consideration of more
10 evidence, but finding a means by which we might
11 accomplish what you're seeking, but at the same time
12 not do harm to ratepayers as a result of releasing
13 information that is in fact commercially sensitive.

14 And so as we move through the proceeding
15 and we see additional evidence, solutions to that
16 problem may become apparent that are, in effect,
17 satisfactory to the intervenors as well as B.C. Hydro
18 and Duke Point Power. But we may not know what those
19 solutions are until some time later in the proceeding.

20 **Proceeding Time 2:00 p.m. T7A**

21 MR. WALLACE: Well, again, Mr. Chairman, I come back to
22 the time constraints on this proceeding. We had a
23 schedule that had us filing on the 24th, we had a
24 hearing commencing on the 10th or 11th, and it was over
25 by about the 18th. That is not a schedule that allows
26 for the working it out as we go.

1 I agree with you. I think you're
2 completely right. And one of my submissions was going
3 to be, this Commission simply does not have processes
4 appropriate for dealing with confidential information
5 in the way that has been proposed here. This material
6 was going to be, as I understood it, and I may have it
7 wrong, and it may change, but as I understood it, the
8 Commission was going to -- and Commission staff were
9 going to receive confidential information from the
10 utility, including the terms of the EPA, including
11 responses to Information Requests, and potentially
12 even including *in camera* sittings.

13 This Commission has procedurally, as I've
14 understood some of your comments in other forums,
15 moved to the point where it does not associate with
16 the staff in maybe the same way it did in the past,
17 and that the Commission works with the evidence. So
18 what it left was issues for us like, if this
19 information comes in, and it goes to staff, what does
20 that mean if staff doesn't share it with us, and it
21 doesn't share it with you, their views of it, and if
22 they do share their views, do they cross-examine
23 witnesses, and are we excluded from the room when that
24 happens? And they don't present argument, and we do,
25 but we don't know the information. And simply, we do
26 not -- we have not dealt with this problem and then

1 when we hit it for the first time, we are dealing with
2 it in probably the most compressed hearing that I have
3 experienced in my professional career. And it just --
4 it boils over into motions for reviews and
5 reconsiderations, declarations that we see the
6 material, because we simply don't have a mechanism or
7 time to deal with things otherwise.

8 Some tribunals have dealt with this sort of
9 matter. I think the International Trade Tribunal has
10 procedures under which information is provided to
11 counsel and consultants, cross-examinations do happen
12 in confidence under non-disclosure agreements. But
13 even setting those procedures up, and getting them to
14 work, is not a quick process. It's something that's
15 evolved with them over many, many years, not over the
16 course of a hearing in a month. And so we did not
17 believe we could leave that to a chance development
18 during the course of these proceedings.

19 THE CHAIRPERSON: Thank you, Mr. Wallace.

20 MR. SANDERSON: Mr. Chairman, I rise because I think I
21 really -- we all have an interest in getting on with
22 things, as Mr. Wallace is saying, and I would like to
23 try, with some trepidation, to cut this short.

24 I think, with great respect, you're on the
25 right track when you say this is premature. I think
26 Mr. Wallace has made it clear -- or has made two

1 things clear:

2 One, his central concern, is with respect
3 to the fundamental issue of the confidentiality of the
4 EPA. Should the prices and the substantive terms of
5 that be confidential or not? I acknowledge that
6 that's an issue. It's an issue which I understood is
7 on the agenda for today. It needs debate. And that
8 issue may be prominent enough, once it's been decided
9 by the Commission, to warrant a party who disagrees
10 with the solution taking further steps, or the
11 decision of the Commission, disagrees with that,
12 taking further steps. It may be appropriate to do it
13 then. It may be appropriate to do it later. That's a
14 decision that whoever is aggrieved by your decision
15 will have to make. But that's for them to make. I
16 don't think you have to help now in coming to grips
17 with those issues. I think counsel for each of the
18 parties is going to have to come to grips with those
19 issues as you make your decisions.

20 At the moment, you've made none. That's
21 the one thing that's transparent. On the issue of
22 confidentiality, if we go back -- which I think we
23 haven't done, but we should -- to all that you did on
24 November the 30th, at page 314, it really is quite
25 instructive. This is at transcript 314 of the
26 afternoon version of -- sorry, volume 2 of the

1 transcript. And I think it's helpful to parse this
2 paragraph. The first sentence says:

3 "The Commission Panel accepts B.C. Hydro's
4 proposal regarding confidentiality at pages
5 116 to 17."

6 Without taking you to those, that proposal was one I
7 put on the record with respect to handling the QEM
8 model. That approach was accepted in practice by Mr.
9 Wallace and his client.

10 **Proceeding Time 2:05 p.m. T8A**

11 That is, what I was saying at 116 or 117 is
12 yes, we'll make the model available, there's
13 proprietary issues here, we need an accommodation with
14 counsel. That accommodation has been reached, at
15 least with Mr. Wallace and his client. They do have
16 the model. They did agree to the terms under which
17 they received it. There's no quarrel between us in
18 respect of that. So in my respectful submission that
19 sentence, certainly from the perspective of Mr.
20 Wallace's client, is a dead issue.

21 The second sentence is:

22 "The Commission Panel and Staff will review
23 the executed EPA, the CFT models, and the
24 input data."

25 That's a statement, not a decision, I think, and I
26 don't think anyone takes issue with the fact that you

1 will review them. And then the next sentence:

2 "Following completion of that review, the

3 Commission Panel may hold..."

4 my first observation is it's conjectural, it's not
5 determination, "You may hold",

6 "...*in camera* review with B.C. Hydro and Duke
7 Point to consider public disclosure of
8 confidential information."

9 I believe I've made clear on the record that B.C.
10 Hydro does not wish to participate in *in camera* review
11 with the Commission in respect of that, despite those
12 comments, and I think you've made clear by your
13 subsequent conduct that you aren't any longer
14 proposing to have those kinds of reviews, whatever
15 that may have meant.

16 So whatever you had in your mind then, I
17 think has been superseded by subsequent events. That
18 is, there has been, and nobody is now proposing that
19 there ought to be, any *in camera* review, with the sole
20 exception of the discussion between staff of the
21 Commission and the staff of Hydro with respect to BCUC
22 2.72 and 2.73, which all parties consented to. So
23 there's nothing left. There is absolutely nothing
24 left.

25 And so now I suggest you proceed and we all
26 proceed, get on with what we acknowledge is a big

1 issue, which is the basic confidentialities of the
2 EPA, which is issue number 4. And I agree with you
3 that there's -- whether you dismiss it or whether Mr.
4 Wallace withdraws it or whatever, there is nothing
5 left to the old reconsideration application.

6 Once you've made your decision, and this is
7 the second point I hear Mr. Wallace making, he's
8 making it clear that many of these decisions he may
9 wish to appeal. He says, "In order for me to do that,
10 I need you to reconsider, not on the basis I've got
11 anything new, not on the basis that I can meet your
12 requirements, but rather to clear the way for the
13 Court of Appeal." Well, if he needs to do that, then
14 what he should do at the end of each decision is say,
15 "Leave to reconsider hereby requested." People can
16 say, "The standards aren't met," and you can reject
17 it. And his procedural path is therefore clear and he
18 can do whatever he needs to do thereafter.

19 THE CHAIRPERSON: Thank you, Mr. Sanderson, that was
20 helpful. That suggests to me that the appropriate
21 next step is then to turn to item number 4 of the
22 agenda.

23 I want to, though, particularly following
24 up on the comments that Mr. Sanderson has just made,
25 reach a conclusion with respect to whether or not 4-B
26 is going to remain on the agenda. If JIESC is the

1 disclosure of, speak to those portions of the EPA
2 which they wish disclosure of. Then Mr. Sanderson,
3 and perhaps Duke Point Power, would have an
4 opportunity to comment and then the intervenors would
5 have a right of reply.

6 Are there any concerns raised by that
7 proposed process? Mr. Andrews.

8 MR. ANDREWS: Mr. Chairman, the status quo legally is
9 that the filed EPA is available to the public unless
10 the Commission decides that disclosure is not in the
11 public interest. I gather that it's B.C. Hydro's
12 submission to the panel that disclosure of the
13 redacted portions is not in the public interest and I
14 think it's very important for my client to know the
15 case to be met, that is to hear from B.C. Hydro what
16 it is that they argue is the basis for the conclusion
17 that they seek and that will give us something to
18 respond to. We've yet to hear what legal tests Hydro
19 suggests ought to be applied. We've yet to hear -- I
20 assume that Hydro will have evidence in support of its
21 claim that so far has been in the form of submissions
22 from counsel, but I'm presuming that Hydro will want
23 to bring evidence that will support its argument about
24 the consequences of disclosure of this information. I
25 think we need to hear that evidence so that we know
26 the case to be met and then, of course, we would

1 respond and Hydro would reply. Thank you.

2 MR. SANDERSON: Mr. Chairman, I find myself in the unique
3 position I think of agreeing on this one with Mr.
4 Andrews. It had been my expectation that it would be
5 up to the applicants, plural, to make a submission
6 with respect to the need for confidentiality and
7 response and reply to follow from that.

8 THE CHAIRPERSON: Let's proceed on that basis.

9 MR. FULTON: And if I might just interject for a moment
10 before Mr. Sanderson proceeds to that, Mr. Chairman, I
11 do want to refer the panel to the *Administrative*
12 *Tribunal's Act* because the issue of the rules has come
13 up a number of times in the transcript. It came up
14 again in the correspondence leading up to Friday and
15 the Commission does have the general power to make
16 rules but in subsection (11.3) of that Act:

17 "In an application the tribunal may waive or
18 modify one or more of its rules in
19 exceptional circumstances."

20 I just wanted --

21 THE CHAIRPERSON: Yes.

22 MR. FULTON: Thank you.

23 THE CHAIRPERSON: I see that as a very different issue,
24 Mr. Fulton. That issue arises from comments that Mr.
25 Andrews has made with respect to Section .1.9 of the
26 Energy Contract Supplier Rules and I see that as a

1 very different issue than the matter that we're going
2 to deal with now and that is a review of the redacted
3 EPA. If Mr. Andrews wants to pursue the issue with
4 respect to the initial filing that was made by B.C.
5 Hydro, I'm not going to entertain that as part of this
6 agenda.

7 MR. FULTON: Thank you, Mr. Chairman.

8 MR. SANDERSON: Mr. Chairman, just dealing with your last
9 point first. There has been an exchange of
10 correspondence dealing with that last issue and I
11 think I am going to deal quickly with it in a
12 preliminary way to my general remarks on the EPA.

13 **Proceeding Time 2:15 p.m. T10A**

14 And then I respect what you've just said in
15 terms of what you're actually going to dispose of or
16 deal with here, but I think given Mr. Andrews' notice
17 of this position anyway it may as well get it on the
18 record here and then you can decide, having heard
19 that, whether it is anything, and the parties can make
20 submissions on whether or not it should be taken
21 further. But I think it helps provide a context
22 probably for my later remarks, to just articulate what
23 we see the process here to be with respect to the EPA.
24 So it's by way of background to the debate on the EPA,
25 and the way in which -- I guess I wanted to cover the
26 way in which it had come before the Commission and

1 been filed.

2 THE CHAIRPERSON: The reason why I said what I did on
3 that item, Mr. Sanderson, is that issue first arose by
4 Mr. Andrews in the transcript at page 267, and then
5 you replied to that at page 302, and we followed with
6 the ruling on November the 30th, which did not
7 explicitly address this issue, but we did accept your
8 submissions on page 302. Otherwise we would have
9 directed you to file reasons to support your request
10 for confidentiality, and we didn't do that. And so
11 that matter was before us then, it was considered by
12 the Panel, and the Panel didn't give you direction to
13 do that and in fact accepted your submissions on page
14 302 of the transcript.

15 MR. SANDERSON: All right. Mr. Chairman, then I won't
16 belabour the point in light of that. I will say only
17 this, that it is my submission that the transcript of
18 the remarks I made that day, and the transcript of the
19 remarks I'm making now, are all written submissions
20 and are all part of, if they need to be, compliance
21 with Rule 1.9.

22 THE CHAIRPERSON: Thank you.

23 MR. SANDERSON: So I'll then move on, if I might, to deal
24 with the question that I think you've already posed,
25 which is -- or perhaps with Mr. Wallace in that back
26 and forth, which is what are the appropriate

1 standards? Or actually to be fair to him, it's Mr.
2 Andrews actually who posed this question saying he
3 wanted to hear from Hydro in terms of what is the
4 proper test to apply with respect to confidentiality.
5 I think that's a fair request.

6 And in my respectful submission, there are
7 two sources of law to which the Commission can
8 usefully have reference in order to answer that
9 question, and they both take you to the same place.

10 The first area -- I'll go from the general
11 to the specific, and starting with the general, there
12 is a decision of the Supreme Court of Canada which I
13 think is instructive, and I'm just -- Ms. Cane is just
14 getting extra copies. The case is *The Sierra Club of*
15 *Canada v. Canada (The Minister of Finance)*, a decision
16 of November 6th, 2002, and we'll just circulate those.
17 But while Ms. Cane is doing that, this was a case in
18 which the Sierra Club was seeking a determination
19 through the federal courts that a decision that had
20 been reached to provide financial assistance to Atomic
21 Energy of Canada Limited was one that should have been
22 preceded by an environmental assessment review under
23 federal -- under the *Canadian Environmental Assessment*
24 *Act*. And in the course of that proceeding, Atomic
25 Energy filed an affidavit which summarized
26 confidential documents containing thousands of pages

1 of technical information concerning the ongoing
2 environmental assessment of the construction site by
3 the Chinese authorities. And this was an investment
4 being made by Atomic Energy jointly with respect to
5 Candu reactors to be installed in China.

6 **Proceeding Time 2:20 p.m. T11A**

7 And in dealing with whether or not that
8 affidavit could be maintained in confidence, the court
9 grappled with what it saw to be two competing
10 imperatives. One was the *Charter*-based interest in an
11 open and transparent judicial process, and the second
12 was the commercial need for confidentiality associated
13 with the information that was subject matter of the
14 confidential affidavit.

15 If you refer to page -- sorry, paragraph 53
16 of that decision, you will see where I think the
17 Supreme Court of Canada has taken us, after analyzing
18 a number of decisions.

19 It's at page 15 of the copy I've given you,
20 I think. The court, at paragraph 53, says this:

21 "Applying the rights and interests engaged
22 in this case to the analytical framework of
23 *Dagenais* and subsequent cases discussed
24 above, the test of whether a confidentiality
25 order ought to be granted in a case such as
26 this one should be framed as follows..."

1 and then it sets out the test in these words:

2 "A confidentiality order under Rule 151
3 should only be granted when:

4 (a) such an interest is necessary in order
5 to prevent a serious risk to an important
6 interest, including a commercial interest,
7 in the context of litigation because
8 reasonably alternative measures will not
9 prevent the risk; and

10 (b), the salutary effects of the
11 confidentiality order, including the effects
12 on the rights of civil litigants to a fair
13 trial, outweigh its deleterious effects,
14 including the effects on the right to free
15 expression which in this context includes
16 the public interest in open and accessible
17 court proceedings."

18 So, in dealing with the issue generally,
19 what the Supreme Court of Canada has told us is that
20 the protection of a commercial interest, as was in
21 issue here, is a public interest which has to be
22 balanced and evaluated against whatever other public
23 interest is being compromised by confidentiality.

24 In the case of *Sierra Club*, what was being
25 compromised was the right to freedom of expression and
26 open courts. As I'll elaborate in a minute, I don't

1 think that is the issue here. I don't think that in
2 this tribunal, and in this specific context, it's
3 right to say that the deleterious effects of
4 confidentiality compromise the right to free
5 expression. And I don't think they compromise public
6 interest in open, accessible court proceedings. And
7 I'll elaborate on why I make that distinction in a
8 moment. But what I rely on this case to say is that
9 you need to determine what is the interest that's
10 compromised by making a confidentiality order, and
11 then evaluate that interest against the commercial
12 interest which is compromised by the making of the
13 order, or by not making the order, I'm sorry.

14 Now, that instructive passage in *Sierra*
15 *Club* has got to be considered in light of the Section
16 of the *Administrative Tribunals Act* which applies to
17 this Commission, and to which Mr. Fulton has already
18 drawn your attention, and that is Section 42.

19 Section 42 of the *Administrative Tribunals*
20 *Act* says this:

21 "The tribunal..."

22 and it's my submission that this Commission is such a
23 tribunal,

24 "...may direct that all or part of the
25 evidence of a witness or documentary
26 evidence be received by it in confidence to

1 Duke Point and its counsel to address that issue and I
2 think it's, frankly, for them to take you through the
3 EPA and tell you where that prejudice comes from with
4 respect to particular clauses, to the extent that they
5 feel they need to do that. So I'm not going to take
6 you to the EPA on a clause by clause basis. I'll
7 defer to my friend and his discretion in terms of how
8 far he goes with that. But that is a legitimate
9 commercial interest and I say a public interest on the
10 basis of the *Sierra Club* case for you to take into
11 account.

12 The second interest in which B.C. Hydro
13 does have a decided interest arises in two ways and
14 that is B.C. Hydro's concern to maintain the integrity
15 of the tendering process. First, it has a concern to
16 maintain the integrity of the process insofar as it
17 relates to the signing of the EPA which is before you,
18 that is the actual contract arrived at with Duke Point
19 Power. There are commitments made by B.C. Hydro to
20 maintain confidence subject, it's acknowledged, to
21 order of this Commission and this regulatory process,
22 but there is nevertheless commitments in that
23 agreement for B.C. Hydro to use its best efforts to
24 keep confidential the information which is being
25 provided in the EPA and the terms of the EPA and
26 that's what it here seeks to do. That is a legitimate

1 interest which it, I think, serves Hydro and through
2 Hydro it's ratepayers to have protected.

3 Second, B.C. Hydro has an interest in
4 protecting the broader integrity of the process both
5 for future winning bidders and even more profoundly
6 for future losing bidders, and here I distinguish
7 between disclosure of information as it is in the EPA
8 and relates to the winning bid and disclosure of
9 information that relates to non-winning bids, that is
10 the Tier 2 bids or even the analysis of, even if
11 they're not bids -- well, no, I'm restricting myself
12 to analysis of bids so all those things that were put
13 into the tender process were put in in the expectation
14 by the participants that win or lose their information
15 wouldn't be disclosed, and for the losers to now
16 discover that not only did they not succeed, but
17 commercially sensitive information is now available to
18 the competitors for the next round, is in my
19 respectful submission to add insult to injury. And it
20 doesn't require sophisticated evidence or indeed
21 really any evidence beyond the Commission's general
22 understanding of the value of the competitive process
23 to understand how that would compromise Hydro's
24 ability to get participation in future calls. And in
25 my respectful submission, really that is the public
26 interest in the commercial interests that are at stake

1 here.

2 The public interest that this commission
3 should be considering is the impact on Hydro's ability
4 to acquire least cost or cost effective power here and
5 elsewhere in the future. And the reason that that is
6 the public interest that you should be concerned with
7 is it goes to the heart of the ratemaking
8 jurisdiction. You are here to set rates and create an
9 environment which allows rates to be minimized
10 consistent with a just and reasonable return to the
11 utility providing the service and anything you can do
12 to lower the costs for the utility in this instance is
13 something you ought to do consistent with that
14 jurisdiction. It goes to the heart of why you're
15 here. And that is basically the case and the
16 commercial interest/public interest side of the scales
17 that you've got to evaluate on the plus side of
18 confidentiality.

19 **Proceeding Time 2:30 p.m. T13A**

20 Now, what's on the other side? On the
21 other side is not, I say, a *Charter* right to freedom
22 of expression. On the other side is not a generic
23 right to equal standing and to be heard. The
24 Commission isn't required, and indeed never has before
25 to my knowledge -- and we've done a fair bit of
26 investigating to see whether we could find a

1 circumstance -- and I'll go so far as to say I don't
2 believe has ever held a public hearing or disclosed
3 publicly information with respect to EPAs, either
4 provided by gas or electric utilities. It's not the
5 practice and I've yet to find an instance of it
6 occurring. If one comes to the Commission and asks to
7 see energy supply or electricity supply agreements,
8 one will be routinely told that those are confidential
9 and they're not available to the public.

10 So we're not dealing here with keeping from
11 the public something to which they're normally
12 entitled, nor are we dealing here with a situation
13 where a process which is normally public is suddenly
14 being taken *in camera*. Quite the reverse. We're
15 dealing with a private commercial matter which is
16 suddenly being taken public.

17 Now, I say that the only claim that the
18 ratepayers can make to the need for disclosure is if
19 they can make the suggestion that that will yield
20 lower rates ultimately. In other words, they have to
21 found, I say, their basis for disclosure on the same
22 basis that we make an argument for confidentiality.
23 "It will yield lower rates," they will say I expect,
24 and normally I accept that their participation in the
25 debate around the price and around the terms may
26 provide you with perspectives, information or

1 characterizations that you wouldn't otherwise have.
2 They may assist you in making your decision. I will
3 allow for the purposes of argument that that may be
4 so. But it's that benefit that's got to be held up
5 against the longer-term detriment that I've submitted
6 disclosure will produce. And it's my respectful
7 submission that when you come to balance those two,
8 the balance clearly favours maintaining the bulk of
9 the terms of the EPA in confidence, to the extent in
10 particular that, one -- sorry, let me start that
11 sentence again.

12 I think first and most fundamentally,
13 information with respect to anybody other than Duke
14 should be absolutely confidential -- that is, the
15 population of the models, et cetera -- because to add
16 insult to injury, as I put it before, for non-
17 successful bidders, would be devastating to future
18 process.

19 Second, with respect to Duke, I think you
20 should listen very carefully to Mr. Keough and Duke
21 Point Power, and I think wherever they can establish
22 commercial harm, then that should be given very
23 serious consideration, and in my respectful
24 submission, should trump whatever fairly minor
25 benefits, in my respectful submission, will accrue on
26 the other side of the scales from disclosure. The

1 On the page that follows Section 1.7, there
2 is also water supply information. I have been
3 endeavouring to get instructions unsuccessfully on
4 that. I don't know whether that's important to
5 anybody, but that information was provided by the
6 host, who is not represented here today, both the
7 water supply and effluent disposal information. The
8 host of the Duke Point Power site is Pope and Talbot,
9 which is a mill, and I have been unable to get
10 instructions, but the information there was provided
11 by them in confidence to Hydro, and so I think at this
12 stage I have to object again independently to
13 disclosure of those provisions.

14 But for the balance of the EPA, I leave it
15 to Mr. Keough.

16 COMMISSIONER BOYCHUK: Mr. Sanderson, then the reasons,
17 though, for objecting to 1.7, Transmission
18 Interconnection Facilities, and 1.8, Water Supply, are
19 what?

20 MR. SANDERSON: That information was provided -- well,
21 let me separate the two, because they are separate.
22 1.7 was provided by BCTC in its role as transmission
23 provider, as the application discloses. For each of
24 the bids B.C. Hydro went to BCTC and asked for an
25 estimate of the interconnection costs, et cetera,
26 associated with each specific one, and the analysis

1 they did. To the extent that the specific facilities
2 are disclosed there based on information provided by
3 BCTC, our submission is that that information, as it
4 affects Duke Point and describes what they need to do,
5 is confidential. BCTC doesn't disclose that to the
6 market or the world generally, and that ought not to
7 happen through this process. And so, the integrity,
8 if you want, of BCTC's investigations is best
9 maintained by keeping that information in confidence,
10 and we don't want our process to interfere with that
11 integrity.

12 COMMISSIONER BOYCHUK: And BCTC is here, so if they wish
13 to confirm that, they'll be in a position to do so.

14 MR. SANDERSON: Yes. No, I mean certainly they can speak
15 to that themselves. Again, it's their studies for
16 individual parties, I think, and so I won't speak for
17 them, but I suspect that the position of Hydro and
18 Duke Point is important to BCTC, in terms of
19 determining what they should do with it, and I've just
20 described our position.

21 With respect to the other two, as I say,
22 that was information which relates to costs that a
23 private enterprise, Pope and Talbot, is going to incur
24 in connection with this project, and they have asked
25 that any information on their costs be kept in
26 confidence. That was a blanket assurance given them.

1 Talbot thinks is irrelevant. If the Commission
2 concludes that it does matter what Pope and Talbot
3 thinks, then I'll undertake to continue the inquiry of
4 them and seek their waiver but abide by the Commission
5 decision if we fail to get it.

6 THE CHAIRPERSON: Yes, I think that's a good suggestion.

7 I think we'll now hear from Duke Point
8 Power.

9 MR. KEOUGH: Thank you, Mr. Chairman. I'm going to try
10 and cover off a number of things and I'd like to start
11 off by dealing with two procedural points that my
12 friends insist on making, and one of them does deal
13 with Mr. Andrews.

14 And he appears to be saying to you, and
15 he's said this several times either in writing or
16 orally, that the board has previously ruled in Order
17 G-106-04, paragraphs 6 and 7, that the complete EPA
18 was to be made available to the public. And we do not
19 think he is correct in that regard, Mr. Chairman. In
20 fact, we think he is way over-reading what we think is
21 just standard language in a commission's initial
22 letter notifying of a notice for a proceeding. We
23 think the paragraphs simply state the filing should be
24 available for the public, i.e. what was filed. There
25 wasn't some hidden or subliminal ruling on
26 confidentiality contained in these rather

1 straightforward, innocent paragraphs; and my friend is
2 trying to build it into something it's not.

3 And so I think that my suggestion is, Mr.
4 Chairman, that you find he's wrong there, and if he's
5 got something to argue on the substance, let's hear it
6 but let's not have any more of this nonsense about
7 trying to read into the wording something that simply
8 is not there.

9 THE CHAIRPERSON: Do you think it's necessary for me to
10 hear him on that point?

11 MR. KEOUGH: I think Mr. Chairman, it's pretty clear. If
12 he wants to make a submission on it, I'm sure -- he's
13 made it like four times. I'm not sure what else you
14 need to hear. I've heard it four times. So if the
15 Commission feels it needs to hear it again, Mr.
16 Chairman, by all means.

17 THE CHAIRPERSON: Well, I do not think that we need to
18 hear it again. I'm trying to figure out a way to put
19 an end to it.

20 MR. KEOUGH: I would endorse that, Mr. Chairman, given
21 that I think that it's worn out its welcome. The
22 horse is dead.

23 Mr. Chairman, next I want to turn to Mr.
24 Wallace, because in his December 16th letter at page 3,
25 he attempts to align the public interest solely with
26 his clients and certain of the other intervenors, and

1 he contrasts that with what he calls the private
2 interests of other parties. And I guess in that
3 basket we include Hydro and Duke Point Power.

4 Well, Mr. Chairman, quite frankly, I think
5 Mr. Wallace knows better. He's been around the block
6 long enough, way longer than I, and he knows --

7 THE CHAIRPERSON: Do you think --

8 MR. KEOUGH: Significantly longer. And Mr. Chairman, he
9 knows that in --

10 THE CHAIRPERSON: I hope you brought your toothbrush this
11 time.

12 MR. KEOUGH: Mr. Chairman, he knows that in the context
13 of public utilities and public utility regulation,
14 that when one talks about the public interest, it
15 means the balancing of all interests. His client, my
16 client, everybody else. It's not this debate that
17 he's trying to instigate. And I think he knows better
18 and really don't need to argue about that any further,
19 but I had to call him on it.

20 But I think if we turn to the substance of
21 the application, which is where I'd like some of this
22 to focus, then I think we are very much into talking
23 about the public interests, and what public interests
24 there are here, and what public interests need to be
25 balanced in the context of this debate. And at the
26 outset I'm going to suggest to you that one of the

Proceeding Time 2:45 p.m. T16A

So what does that policy approach embody?

You could ask yourself that. We would suggest to you

1 it's the essence of this approach, that the key
2 ingredient in it, if it's going to work, is that you
3 have to respect the process. If you don't respect the
4 process it all falls to pieces and you don't have the
5 market-based approach as envisaged. You certainly
6 don't get a market-based result.

7 And we submit to you that fundamental to
8 maintaining this approach is that you respect the
9 sanctity of the bidding process and furthermore you
10 respect the sanctity of the agreement that comes out
11 of the bidding process.

12 Now it's understood that bidders disclosed
13 confidential information in the process, winners and
14 losers as my friend has said. They put confidential
15 information on the table that is, if disclosed, going
16 to be extremely detrimental to their economic well-
17 being. They've put that information on the table on
18 the understanding that it is going to be kept
19 confidential. It is known, it is understood when you
20 go into these processes that those are the rules of
21 the game. And I can assure you bidders would behave
22 differently, if they participated at all, if they
23 thought that the sanctity of the contract they enter
24 into was not going to be respected.

25 I think that raises another public
26 interest. Is it in the public interest for this

1 Commission to require a party to not respect the
2 sanctity of a contract they've entered into? Is that
3 in the public interest? I certainly do not think it's
4 something this Commission should take lightly. If
5 parties have entered into a contract and agreed to
6 confidentiality, as they have done here, then I think
7 this Commission should be very leery about overruling
8 those contracts.

9 If you take a look at page 40, Section --
10 or Article 22.8 of the agreement. It deals with
11 confidentiality. Take a look at (c). My friend, Mr.
12 Andrews, wants evidence. Well, we've got documentary
13 evidence here. Look at (c).

14 "The parties acknowledge that confidential
15 information constitutes commercial and
16 financial information of the seller and the
17 buyer which has been supplied in confidence
18 and the disclosure of which could reasonably
19 be expected to harm significantly the
20 competitive position and/or interfere
21 significantly with the negotiating position
22 of the seller and further could reasonably
23 be expected to harm the financial or
24 economic interests of the buyer."

25 Here's some evidence for you:

26 "The parties knew and understood that

1 disclosure of this information would have
2 significant negative impacts."
3 They would detrimentally impact the competitive
4 position not only of the parties involved, but they
5 would significantly, and we would submit to you
6 adversely, impact your process in the future to the
7 point you would not get the best bids, you would not
8 get the best agreements and you would not get the best
9 deal for customers.

10 I should also point out that I don't think
11 this commission is the first one to be faced with this
12 type of issue. As Mr. Sanderson has said, the norm is
13 you do not disclose this type of information and I
14 think that's a consistent norm among other tribunals
15 as well, particularly in markets where people have
16 gone for the competitive market-based approach.

17 **Proceeding Time 2:50 p.m. T17A**

18 I think it is inconsistent with the public
19 interest to take steps that would be detrimental to
20 that approach, that's been embodied in government
21 policy. There's another public interest. Is it in
22 the public interest to take actions that will
23 detrimentally harm a process that has been endorsed by
24 government policy? I would submit to you it is not.
25 I would also submit to you that nothing will kill the
26 competitive market-based approach quicker than

1 undermining the whole bidding process.

2 We submit to you that to direct disclosure,
3 as my friends would have it, will undermine not only
4 the bidding process, it will undermine the government
5 policy. You are not going to be able to have a
6 competitive marketplace if the potential bidders know
7 their business is going to be detrimentally harmed in
8 a very significant way for the future. That's why
9 this Commission typically keeps this type of
10 information confidential, that's why other Commissions
11 do the same thing, or other tribunals and boards.

12 The Commission should be very reluctant or
13 hesitant before you take action that will
14 detrimentally harm the whole market-based approach.

15 Now, we understand that parties want
16 disclosure of everything. It's easy to say "I want
17 disclosure because if you don't give it to me, I don't
18 know what's going on." But I have to tell you, we do
19 not think that even if you ordered disclosure, in the
20 circumstances of this case, it would advance what my
21 friends purport to say they want to do, which is to
22 determine that Duke Point Power is the least-cost
23 alternative or the least-cost option.

24 Unless you direct that all of the bidders
25 have to disclose all of the information, and we're not
26 suggesting you do that, as my friend said, I think

1 that would be a pretty onerous thing to do, but unless
2 you do that, my friends aren't going to be able to
3 make any comparisons of options. So I don't think
4 they get what they want, even if you ordered
5 disclosure of simply the information held by Duke
6 Point Power.

7 The parties know that Duke Point Power was
8 the winning bidder. They know it was the result of a
9 Call for Tenders process that was endorsed by the
10 Board, they know the process was followed through and
11 used. In those circumstances, I think it would be
12 entirely inappropriate and, we would submit, contrary
13 to all of the public interests I've identified, to
14 order further disclosure.

15 Now, I think it's also important to
16 understand that it is not a situation where the
17 parties have attempted, or not attempted, to be
18 helpful. You've got a 118-page document, and 99.9
19 percent of it has been disclosed. And I have to tell
20 you, Mr. Chairman, it's with some reluctance that my
21 client even agreed to that. Terms and conditions are
22 an important component of an agreement as much as
23 numbers. The disclosure of the information that has
24 been provided to date has the potential to
25 detrimentally harm Duke Point Power. But it did try
26 to go through the agreement and say, "Okay, we will

1 try to be as helpful as possible, we will disclose as
2 much as possible."

3 Having said that, we did, yet again, take
4 another look at the agreement, in light of this
5 forthcoming motion. And there are certain -- a
6 limited number of other provisions that I think we are
7 prepared to consent to be made available. And if you
8 looked at the agreement, the first one is page 46, the
9 definition number 33. I think we're prepared to have
10 that filed with the number inserted.

11 **Proceeding Time 2:55 p.m. T18A**

12 If you look at page 52, definition number
13 87, I think we're prepared to fill that in. Pages 73
14 and 74, there's a table that is now completely blacked
15 out. I think we are prepared to complete that table
16 with the exception of one column -- sorry, one line,
17 not a column. And on pages 75 and 76, my friend has
18 talked about the problems that he has with disclosing
19 clauses 1.7, 1.8, 1.9. Again, we don't think we're in
20 a position to be able to disclose those because we're
21 under agreements not to. So that's not something we
22 could disclose even if we wanted to.

23 As well, following page 77, there's a blank
24 page which is a map or site map. I think we're
25 prepared to provide that.

26 But Mr. Chairman, save for those things, I

1 think that's about as far as I think we can go.

2 There's a couple of other points I can make
3 that may be of assistance to my friends, and we've
4 struggled with this but there's just two other
5 comments I can put on the record that they may find
6 helpful. One is that there has been a number in the
7 public domain with regard to the overall capital cost,
8 and it's out there, and that's a \$280 million number.
9 And I think Duke Point Power is prepared to say that
10 number is a good number. It includes \$50 million for
11 the purchase of Hydro's assets but excludes IDC. And
12 I think people can use that number and we will not
13 object to that. I don't know what they're going to
14 use it for but they can use it.

15 I think the other comment I can make is
16 that there's information in the public domain on the
17 heat rate issue. And the first source of the
18 information is in the VIGP decision at page 28, and I
19 think it's important when you're talking about heat
20 rate to make sure we're talking about the same units
21 and the same value, and I think the numbers used are
22 HHV or higher heating value. And I think the number
23 there 7308 kilojoules per kilowatt hour. And I think
24 that's a number that's in the -- as I say, in the
25 public domain.

26 I think we've also come to grips with the

1 fact that there's publicly available information such
2 as on the General Electric website or something, where
3 people can go and get heat rates for this type of
4 machine, and they will be in the same range. The one
5 that we found was 7132 kilojoules per kilowatt hour.
6 And that type of information, that range is out there.
7 And I think what we're prepared to say, Mr. Chairman,
8 while we can't and do not think it's appropriate to
9 disclose the details of the agreement, we can say, to
10 the extent that any of my friends are going to make
11 use of these numbers, if they use those type of
12 numbers that are in the public domain, they will not
13 hear us solely because they made use of those numbers,
14 complain that what they did with them is inappropriate
15 or inaccurate.

16 So we're trying to be helpful here and say,
17 "Okay, if you want to do some calculations or do some
18 modelling or something and you use that type of
19 number," we're not going to come back and say, "You're
20 wrong because you use that number."

21 **Proceeding Time 3:00 p.m. T19A**

22 THE CHAIRPERSON: Mr. Keough, if we turn to Appendix H of
23 the filing, page 8.

24 MR. KEOUGH: Okay, I'm going to have to use Mr.
25 Sanderson's, I don't have it with me right here.

26 Yes, Mr. Chairman, I'm looking at it.

1 THE CHAIRPERSON: We do have heat rates provided there as
2 well. And the number is a little bit different than
3 the number that you've just mentioned, it's 7,240.

4 MR. KEOUGH: Yes, Mr. Chairman, and that's what I didn't
5 look up when we were putting our position together
6 here. But I think they're all in the same range. I
7 guess what I'm saying is, to the extent that people
8 make use of this data that's in the public domain,
9 they will not hear us complain on that basis.

10 THE CHAIRPERSON: There's also information here with
11 respect to the variable and fixed O&M costs. Can you
12 make a similar comment about those numbers?

13 MR. KEOUGH: Mr. Chairman, we did not discuss the
14 disclosure of any of that information in the contract,
15 but obviously if people have it in the -- this
16 information is already in the public domain, and they
17 make use of it, it is what it is, it's in the model.

18 THE CHAIRPERSON: As it related to the heat rate, did I
19 hear you suggest that if participants were to use
20 numbers like the numbers that are in the public domain
21 that they in fact would be similar to the heat rates
22 on your point -- did you go that far in your comments,
23 or did you simply say, "Hey, these are out there,
24 we're not going to object to you using them."

25 MR. KEOUGH: I think I've gone as far as to say that we
26 acknowledge these are representative heat rates, and

1 we will not object to a calculation or use of those
2 solely on that basis. So we will not come back and
3 say, "You're wrong because you made use of this heat
4 rate."

5 THE CHAIRPERSON: Can you tell me what you mean by
6 "representative heat rates"?

7 MR. KEOUGH: Well, I think, Mr. Chairman, what we're
8 saying is if you take a look at what's in the public
9 domain, GE's numbers, for example, those are heat
10 rates that we think are in the range of -- in a
11 reasonable range for this type of machine.

12 I'm not trying to be elusive here, Mr.
13 Chairman, I think, you know, we're saying that we're
14 not going to disclose the exact terms of the contract,
15 but if people want to make use of the number, there's
16 numbers they can use, and they will not hear us say
17 "You've got the wrong numbers." I think they're
18 reasonable numbers. I think that's our view.

19 And what we're trying to do, Mr. Chairman,
20 is to be as helpful as we can, and allow people to, I
21 guess, do what they can to the maximum extent possible
22 with information that's in the public domain, or is
23 already out there, without disclosing the specific
24 detailed provisions of the agreement. Because we do
25 maintain that if we go further -- and we do think
26 we've gone quite a distance here, Mr. Chairman -- but

1 I think if you go further, and order additional
2 disclosure, you will cause irreparable harm to Duke
3 Point Power, and that's not in the public interest.
4 You will cause significant damage to the overall
5 market-based competitive tendering process, which is
6 not in the public interest. You will be acting in a
7 manner, in our view, inconsistent with the government
8 policy, which is not in the public interest. And you
9 will be detrimentally impacting the sanctity of
10 contract, which again we don't think is in the public
11 interest. So those are all public interest factors
12 which I think coming around full circle is really what
13 you have to decide here.

14 **Proceeding Time 3:05 p.m. T20A**

15 And I think the Commission, to some extent,
16 recognized that when you have significant harm, little
17 benefit, then I think your decision should be that the
18 balance favours that the information be maintained in
19 confidence. And we're going to ask you to rule in
20 that fashion, with the exception of what I've
21 indicated we're prepared to disclose, and I have the
22 pages refilled.

23 We're going to ask, Mr. Chairman, that the
24 balance of the EPA, which is very few clauses, by the
25 way, be maintained in confidence and that B.C. Hydro
26 and Duke Point Power not be required to disclose

1 anything further.

2 THE CHAIRPERSON: I'd like to return to page 73 of the
3 EPA. You said you were willing to disclose Section
4 1.4 but for one line.

5 MR. KEOUGH: Yes, Mr. Chairman. Where it's all blanked
6 out it wouldn't have been very helpful to identify
7 which line it is, but --

8 THE CHAIRPERSON: Can you tell me?

9 MR. KEOUGH: Mr. Chairman, I'm told it's the fourth --
10 yes, it's the fourth one on page 74. And it's the
11 heat recovery steam generator is the first column for
12 the type of equipment, and the only thing that we want
13 to keep confidential is the manufacturer name, which
14 is the third column. And that's because there hasn't
15 been one chosen.

16 THE CHAIRPERSON: Okay.

17 COMMISSIONER BOYCHUK: Pardon me, Mr. Keough, that is
18 because?

19 MR. KEOUGH: I understand there has not been one
20 selected.

21 THE CHAIRPERSON: Can you tell me whether or not that's
22 going to disclose the technology, the class of turbine
23 that's going to be used?

24 MR. KEOUGH: Unfortunately it will.

25 THE CHAIRPERSON: Right. Which in part brings us back to
26 your representative heat rates.

1 MR. KEOUGH: Yes, Mr. Chairman, I think if the class of
2 turbine being used is identified, then people will be
3 able to fish around in the public and get
4 representative heat rates. We understand that.

5 THE CHAIRPERSON: In fact we don't have to fish very far.

6 MR. KEOUGH: I think the fish are in the barrel.

7 THE CHAIRPERSON: Right.

8 MR. KEOUGH: So, Mr. Chairman, that's where we are. We
9 have struggled with this, and there probably is not
10 uniform agreement that we should have gone as far as
11 we have. But we are trying to be helpful without
12 going that extra step and doing something that I think
13 would be detrimental to all the public interest
14 identified, and we think we're there. We really can't
15 go further. So that's unfortunately as far as we can
16 go, and I think if our friends wanted us to go further
17 then we have some real problems.

18 Thank you, Mr. Chairman.

19 THE CHAIRPERSON: Thank you.

20 MR. CARPENTER: Mr. Chair, it's Carpenter, initial S. I
21 appear for the British Columbia Transmission
22 Corporation.

23 There's been reference to one of the
24 sections. Mr. Sanderson raised it and then Mr. Keough
25 alluded to it in passing. I understand it's on either
26 page 75 or page 76. I don't have a copy of the EPA

1 with me. But it's Section 1.7 dealing with
2 transmission interconnection facilities.

3 **Proceeding Time 3:10 p.m. T21A**

4 Just so that it is clear, that information
5 is provided in confidence. The reason it is provided
6 in confidence is because it makes reference to
7 customer specific facilities. Those interconnected
8 facilities are dependent upon a particular generation
9 facility as I think Mr. Sanderson alluded to. Having
10 said that the protection there is for the purpose of
11 the generation customer and to protect that
12 information. It is not there from BCTC's perspective
13 to protect BCTC in any way. So from BCTC's
14 perspective it doesn't have any independent argument
15 with respect to the provision of that information.

16 MS. BOYCHUK: Mr. Carpenter, I'm just pausing because I'm
17 wondering whether we should find out whether parties
18 want that information disclosed, the same sort of
19 option we had with B.C. Hydro and then see whether you
20 need to take any further steps.

21 MR. CARPENTER: I understand. I just thought that given
22 it seemed like me may well be shifting from B.C. Hydro
23 and the proponent over to the other submissions and
24 the issue had been raised, I thought that we should
25 make our position clear on that issue.

26 MS. BOYCHUK: And your position, just to make sure I

1 understand it, then is that because it discloses
2 customer specific facilities, you're not, BCTC itself
3 is not objecting on the basis that -- other than a
4 third party would want this to be confidential.

5 MR. CARPENTER: No, that is Mr. Keough's objection to
6 make if he chooses to do so, but BCTC does not have
7 any independent reason to maintain the confidentiality
8 of that information.

9 MS. BOYCHUK: Thank you.

10 MR. CARPENTER: Thank you.

11 THE CHAIRPERSON: That was on your list. It seems like
12 there's a meeting of minds.

13 MR. KEOUGH: Sorry, Mr. Chairman.

14 THE CHAIRPERSON: I'd understood that Section 1.7 was on
15 your list of things that you would consider releasing.

16 MR. KEOUGH: No, Mr. Chairman. I think what I said was
17 that we had a commitment to not disclose that and I
18 understand now BCTC is putting it back in our court,
19 but I think those are specific facilities to Duke
20 Point Power customer specific facilities and we really
21 don't think it's appropriate to disclose that.

22 I'm not sure if anyone's even looking for
23 this but those are customer specific facilities.
24 Normally those aren't disclosed as Mr. Carpenter has
25 said and I do think that Duke Point Power would not
26 want to disclose the nature of the customer specific

1 facilities.

2 MS. BOYCHUK: Mr. Keough, I guess it will come down to
3 whether other parties want that information but
4 whether -- you may have to do something a little bit
5 more than say that it wouldn't be appropriate because
6 you were talking about the test being detrimental harm
7 to Duke Point Power so if you're not prepared to make
8 further submissions in terms of what the harm might
9 be, then we should perhaps wait to hear what the other
10 -- whether other parties even want that information or
11 not. Perhaps they'll be happy to leave it
12 confidential on the record.

13 MR. CARPENTER: Well, Ms. Boychuk, just so we're clear, I
14 think my comments that I made earlier with regard to
15 harm would apply to these provisions as well. These
16 are customer specific facilities and I didn't think I
17 repeat the same arguments but I think, you know, the
18 disclosure of those has the same impact. You're
19 telling people about the specific facilities Duke
20 Point Power would use, it's customer specific
21 information that usually is not disclosed so I think
22 the same arguments apply. But I think that's where we
23 sit on those.

24 MS. BOYCHUK: Thank you.

25 THE CHAIRPERSON: In effect it might be helpful, Mr.
26 Carpenter, if you were to confirm what Mr. Keough just

1 said, that it is your usual practice not to disclose
2 the facilities of your customers.

3 MR. CARPENTER: That is correct that transmission
4 interconnection facility studies are prepared on a
5 confidential basis and provided to customers. If
6 those customers wish to disclose those however BCTC
7 does not stand in the way of those. I'm simply
8 repeating my earlier submission. There is no
9 independent reason from BCTC's perspective to maintain
10 the confidentiality of that. It's up to the customer
11 themselves.

12 THE CHAIRPERSON: I think we should take a 15 minute
13 break and we'll return and hear from the intervenors.

14 **(PROCEEDINGS ADJOURNED AT 3:15 P.M.)**

15 **(PROCEEDINGS RESUMED AT 3:32 P.M.)** **T22A**

16 THE CHAIRPERSON: Please be seated.

17 MR. SANDERSON: Mr. Chairman, just before my friends rise
18 to speak on the confidentiality question, I thought
19 that it might be useful to interrupt for a second to
20 file a clean copy of Exhibit B-14, and that's the
21 letter I referred to this morning, dated December 21st,
22 which re-states the Commission IR BCUC 2.272 and BCUC
23 1.14.3. It actually re-states 1.14.3 and lays out a
24 procedure for 2.272.

25 Because there's an element of
26 confidentiality there, I thought that it would be

1 useful for parties to see that before they addressed
2 that issue, and so they all now have it.

3 THE CHAIRPERSON: Have you made it available to the --

4 MR. SANDERSON: I'm sorry, I can give you copies too. I
5 thought that --

6 THE CHAIRPERSON: It may have been, but it -- thank you.

7 Mr. Fulton, we'll go through your list of
8 appearances.

9 MR. FULTON: Terasen. Joint Industry Electricity
10 Steering Committee.

11 MR. WALLACE: Thank you, Mr. Chairman. I'm going to try
12 and do this more in the form of bullets. I'm mindful
13 of the time, and that we're all fairly familiar with
14 the issues.

15 One thing, though, I do want to start with
16 is that I suggest to you that disclosure should be the
17 assumed response unless good reason is given for
18 holding confidential. And my friends seem to approach
19 it in the reverse way.

20 **Proceeding Time 3:34 p.m. T23A**

21 And I say that because Section 71(5)
22 provides that an energy supply contract or other
23 information filed with the Commission under this
24 section must be made available to the public unless
25 the Commission considers that disclosure is not in the
26 public interest. So that is the viewpoint, the spot

1 we start from for sure.

2 You've asked about what areas we want
3 disclosed, and at least in general terms I'd like to
4 start out by saying what we want disclosed is Appendix
5 3, the tariff. There may be some other items, but
6 they really provide most of the costs that get the
7 demand charge, the energy charge, startups and matters
8 like that. With that information, to put it in a
9 positive light, it means that we will know or the
10 customers will know what this project is going to cost
11 them. We can make projections on what we see the
12 market as, as how often it is likely to run, because
13 there is a real issue here of covering the variable
14 costs, and if you don't cover the variable costs as we
15 understand it -- but of course again we don't have the
16 quantification, you have a high level of fixed costs.
17 And of course if you're not running at a high load
18 factor with high fixed costs, you end up with a very
19 high per megawatt cost of energy.

20 **Proceeding Time 3:36 p.m. T24A**

21 If we have that information, we can then
22 also run various scenarios to have some idea, both of
23 when -- of what may develop down the road, and how
24 things could be seen, and bring that to this
25 Commission. Without that, it is very difficult to do,
26 if not impossible. And I tend toward the

1 impossibility side.

2 There's been a -- raised by, I guess, both
3 -- or those that have preceded me, a concern with
4 rates. And I want to advise you, I think without any
5 difficulty at all, that my clients are as concerned
6 with the impact of your decision on rates as anyone.
7 They pay a very substantial amount to B.C. Hydro, they
8 will pay these costs, if costs go higher, so they are
9 not taking the issue of confidentiality lightly. If
10 they really believed that this would cause negative
11 impacts on their rates, I can assure you they would
12 not be making -- I would not be making the submissions
13 I am making.

14 With respect to disclosure, and I'm just
15 then moving on, not only is there the statutory
16 presumption in favour of disclosure but I would
17 suggest to you that the VIGP decision itself also had
18 a presumption of disclosure. There was talk of
19 simpler models, of the CFT demonstrating the least-
20 cost alternative, all of which, I think -- and the
21 expedited process, all of which contemplates that
22 parties are going to become aware of the outcome,
23 which is going to be transparent, and we may have had
24 a -- or Hydro may argue it's had a transparent bidding
25 process, but there's nothing transparent about the
26 current process. And I suggest to you the VIGP

1 decision contemplated that this process would be
2 transparent.

3 Mr. Sanderson said that the only claim
4 ratepayers can make with respect to the public
5 interest is that disclosure will lead to lower rates.
6 That's, of course, very hard to know, when you don't
7 see the figures, but potentially if we saw the figures
8 we might say "Rejecting this is going to lead to lower
9 rates." That's our assumption, quite frankly. But if
10 we don't see the figures, it's harder to make that
11 argument.

12 **Proceeding Time 3:39 p.m. T25A**

13 B.C. Hydro, I suggest to you, is holding
14 back the tools to do what it is suggesting we should
15 be doing. I also point out to you that they came in
16 and sought approval for VIGP as something that they
17 thought was a good project to do. They're back a year
18 later saying it's \$50 million cheaper, and I would
19 suggest to you that that doesn't mean you can't look
20 at it but rather means that you should look at it.
21 There may be bigger savings yet. It's virtually the
22 same project.

23 With respect, the transmission
24 interconnection facilities were raised. We're not
25 sure why it's confidential but on the other hand it
26 really isn't the information that is necessary to us.

1 And similarly to the other facilities, and I'll come
2 to it, that Mr. Keough was prepared to disclose, and I
3 think it was page 72 and 73. The plant layout. We
4 don't really care about the map of the plant or
5 exactly what the facilities are if we have the tariff
6 and the prices.

7 Mr. Keough, besides poking at my age, made
8 a point about private and public interests and that I
9 should know better. Well, in spite of his explanation
10 I don't. The public interest here, I suggest is the
11 ratepayers and -- excuse me -- I'd like to address
12 just briefly. The ratepayers are, I suggest, in the
13 long run, the ones that count in the public interest.
14 Obviously we do not want to do any damage to Duke
15 Point Power in any malicious way but on the other hand
16 they participated in this process and I point out page
17 40, Section 22.8, section (a) which is preceding the
18 section that Mr. Keough took you to and it states:

19 "The buyer may disclose confidential
20 information:

21 (a) to representatives of the government..."

22 Which I don't think is applicable here.

23 "...and (b) as may be necessary for the buyer
24 to adequately pursue or defend any legal or
25 regulatory proceeding relating to the CFT or
26 this EPA or any EPA awarded under the CFT

1 process."

2 In other words, it's clearly contemplated that it may
3 be disclosed in the course of these proceedings.

4 **Proceeding Time 3:42 p.m. T26A**

5 In addition, I think all the bidders in
6 this process knew this was not a standard gas purchase
7 one-year agreement that we have in a very competitive
8 market. They knew that this process had been very
9 controversial at the time of the VIGP application;
10 they knew, I suggest to you, that there would -- and
11 they knew of the transparency issues with respect to
12 VIGP, the CFT demonstrating least cost. And I don't
13 think they probably thought that was simply the
14 process of the CFT demonstrating least cost, but the
15 outcome of it demonstrating least cost. So I suggest
16 to you that the winner, I think, could have reasonably
17 foreseen that this would occur.

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

24 Mr. Keough urged you to respect the
25 process, and he's done that on many occasions, and
26 when I heard him chastising Mr. Andrews for

1 repetitiveness, I wondered about his "respect the
2 process" argument. There are many processes you have
3 to respect and one is the public process, and the
4 ability for the public to be able to provide you with
5 input. And I would suggest that that is primary.

6 Mr. Keough suggested -- I think I'm on Mr.
7 Keough's notes -- that winning bids are -- and I guess
8 it was common with Mr. Sanderson too, that winning
9 bids are not normally public. I suggest to you that,
10 on the contrary, they may not be in your gas process,
11 and those usually deal with routine gas purchases,
12 relatively short-term contracts, and a very
13 competitive market. On B.C. Hydro's EPA -- or recent
14 calls for tender, there were maximums. Nobody was
15 pushing to see it. And I suggest to you that one of
16 reasons they may be confidential is because nobody has
17 been too concerned.

18 On the other hand, if you turn to major
19 public projects, and this can't be anything less, over
20 the 25-year minimum term between the gas costs and the
21 payments to Duke Point, there will be hundreds of
22 millions of dollars in public expenditures associated
23 with this contract. And contracts of that sort, I
24 would suggest to you, are public, and I refer you to a
25 couple of other controversial projects -- the fast
26 ferry, for which the budget was complete to the toilet

1 paper, and the RAV project, which the budget has been
2 -- and the bid prices have been very public over a
3 considerable period of time. The total dollars of
4 this project is in the magnitude of those, and should
5 be treated similarly. And there should be allowance
6 for public input.

7 Mr. Keough said that unless you direct all
8 bidders to disclose their prices, you can't make
9 comparisons of options. That may be true that's
10 detrimental, but you will know what this project costs
11 and that is important.

12 He also said that the parties know that
13 Duke Point Power was part of a process endorsed by
14 this Board or Commission. And to an extent, that is
15 correct, but it can easily be overplayed. The
16 Commission did endorse a call for tenders. However,
17 it did not get into the specifics of the call for
18 tenders, either initially or when invited to do so in
19 January. It made some comments, but it very much left
20 it out there for Hydro to run the call for tenders, in
21 spite of invitations from both Hydro and others to get
22 involved. So the specifics haven't been endorsed, and
23 the Commission should not feel bound by a process
24 adopted and controlled by others.

25 **Proceeding Time 3:47 p.m. T27A**

26 MR. WALLACE: Mr. Keough said this not a case, as I got

1 my note, where the parties have not tried to be
2 helpful. Disclosure covers 90 percent of the
3 agreement. And I don't want to appear ungrateful, but
4 the fact is that 90 percent of the agreement was the
5 standard terms that all of the other bidders would
6 have been aware of at least. And the amount that he
7 is withholding is still very significant. We'd gladly
8 trade that 5 percent for another 5 percent of the
9 agreement, no question.

10 The items that he agreed to consent to
11 being disclosed I don't think added much. They were
12 plant description, the definition under Section 33, I
13 think, which was a standard, I think, per megawatt
14 penalty anyway.

15 He then concluded by sort of being
16 tantalizing with a bit of information that's on the
17 public record, for example the \$280 million in his
18 client's press release I believe it was, is a good
19 number. Well, again that doesn't help much. It's
20 something there.

21 The heat rate, we got into some discussions
22 in response to questions by you, Mr. Chairman. He
23 seemed to go to the point that, well, if people can go
24 out and fish it out of semi-public records, then they
25 won't challenge it. Well, I don't think "go fish" is
26 an answer here. I think it doesn't help the process.

1 He urged you not to order disclosure which
2 would cause irreparable harm to Duke Point. My
3 submission to you on that is there is simply no
4 evidence of irreparable harm. This is a one-off
5 contract, very specific circumstances, very unlikely
6 to be repeated in British Columbia, and if it is it
7 will be in a different time, different place and
8 different circumstances. There simply is no evidence
9 at all. There are submissions of Mr. Keough, and to
10 some extent submissions of Mr. Sanderson.

11 In summary, Mr. Chairman, we need the
12 information that will allow us to understand what the
13 cost of this application and contract is, and to
14 understand how it might vary with circumstances.
15 Thank you.

16 THE CHAIRPERSON: Mr. Wallace, can you confirm for me
17 that the Commission practices have been to respect the
18 confidentiality of customer information?

19 MR. WALLACE: I think that's probably fair but I don't
20 know that anybody's ever particularly sought it. It
21 hasn't been an issue in a proceeding. And as I say, I
22 think there are a number of reasons for that. One, of
23 course, is that at least on these EPAs, the parties
24 have known what the maximum bid price is.

25 THE CHAIRPERSON: Now, I was thinking of customer
26 consumption information, for example. It's my

1 understanding, please correct me if you think
2 otherwise, but it's been my understanding that your
3 clients have been particularly sensitive to that and
4 did not want disclose of that information and wanted
5 the Commission to respect that confidentiality.

6 MR. WALLACE: I think that's varied. Some customers
7 have, some haven't. I think there have been, as my
8 memory -- and this is going back a ways, but BC Gas as
9 I recall it, we used to see them, the gigajoules
10 consumption set up in a rolling table. So there's no
11 question that on occasion that has been an issue, and
12 I would still respect it.

13 I think there's a difference where an
14 applicant is seeking to have a contract approved under
15 which they are going to benefit for 25 years from a
16 customer who, as a part of a proceeding, may be having
17 some information disclosed.

18 THE CHAIRPERSON: But as related customer information
19 -- I would have thought that it would be very
20 important to your clients that they make a decision
21 with respect to whether or not that information should
22 be disclosed, and that they would want the Commission
23 to respect that.

24 MR. WALLACE: I think it probably is to some of them, and
25 yes, that they would like that.

26 THE CHAIRPERSON: And is that true for -- in a connection

1 facilities as well?

2 MR. WALLACE: I don't know. I don't know that we've run
3 into that issue, whether that would be considered a
4 neutral matter or not. Consumption can sometimes
5 indicate production levels and matters like that that
6 may be considered more confidential.

7 **Proceeding Time 3:52 p.m. T28A**

8 We are not, by the way, seeking the
9 description of the interconnection facilities here.

10 THE CHAIRPERSON: Okay.

11 MR. WALLACE: We really are seeking the pricing
12 information, the inputs that are required to run the
13 model and to be able to tell what the cost per
14 megawatt of power will be under varying circumstances.

15 THE CHAIRPERSON: You have also said that the information
16 of the unsuccessful bidders isn't something that you
17 should -- that at least you're seeking disclosure of
18 and I'd like to know why if --

19 MR. WALLACE: Why we're not seeking disclosure?

20 THE CHAIRPERSON: Mm-hmm.

21 MR. WALLACE: I think we would like it because I think it
22 would give us a complete picture, but we are not going
23 to pay the prices that the unsuccessful bidders bid.
24 What we are concerned about is the prices for the
25 power that we are going to pay.

26 Yes, we would like to see the others and if

1 a way can be designed -- and we were talking about
2 this earlier -- can be designed, that that information
3 can be disclosed and can be tested to see if different
4 scenarios or combinations would work better than what
5 Hydro's proposed out of the material, but when it
6 really comes down to it you have six bidders and most
7 of those are Duke Point in any event, it is not as
8 critical and in this boiled down, short-fused
9 proceeding the information that is most critical to us
10 is the price.

11 THE CHAIRPERSON: You haven't spoken to Mr. Sanderson's
12 concerns with respect to future bidding processes and
13 I was wondering if in fact the reason why you didn't
14 seek disclosure of the unsuccessful bidders is because
15 of concerns that you might have about future bidding
16 processes.

17 MR. WALLACE: I didn't speak to it because I guess I
18 slipped over it in a sense, not deliberately but there
19 may be an element of that. You may be correct. I
20 think it's one thing for a -- I'm thinking of some of
21 these other EPAs that are coming up, that the
22 unsuccessful bidder who has failed and may want to try
23 again in those types of processes could be prejudiced.
24 In this case where we are going after the successful
25 bidder on Duke Point, which by every description is
26 unique, it does not seem to me to be a concern that

1 disclosing of the winning bid in this circumstance
2 would cause any problem.

3 THE CHAIRPERSON: If it wasn't for the fact that you're
4 considering Duke Point as being unique, would your
5 view with respect to disclosure of the unsuccessful
6 bids include the successful bid?

7 MR. WALLACE: I don't know if we -- if it were different
8 -- if this was an all-in call for energy throughout
9 the province with a cap of \$65 a megawatt hour and
10 Hydro picked up whatever amount, we probably wouldn't
11 be asking for disclosure of anything. It is the
12 unique circumstances here where this is a specific
13 one-off type of resource, short time frame, 25-year
14 solution to a one- or two-year problem that we are
15 very concerned about and need to know those costs so
16 that we can compare them to the risks that are faced.

17 THE CHAIRPERSON: Is it your position that there's no
18 harm to Duke, or is it your position that in balancing
19 disclosure against that harm that the public interest
20 in disclosure is more important?

21 MR. WALLACE: I'm in no more position to give evidence
22 that there is no harm to Duke than other lawyers who
23 testified ahead of me are able to give evidence that
24 there is harm to Duke. My submission is, as you put
25 it, that on the balance the potential harm to the
26 public process is more than the harm to Duke and

1 It may be unique to B.C., but is it unique to other
2 processes that Duke might be participating in?

3 MR. WALLACE: Again, I -- you know, as much as others,
4 there is no evidence, of course, in this proceeding.
5 But speculating, I would suggest to you that a
6 contract under which the utility takes the entire gas
7 risk that has been built to meet a capacity problem
8 within one to two -- or two years out, and the other
9 bidding circumstances of who was involved, what fuels,
10 and all of the structures that hit this situation, in
11 this short time frame, is probably very unique.

12 COMMISSIONER BOYCHUK: Mr. Wallace, just one area that
13 the Chair hasn't asked about. I was wondering whether
14 you had any comments on Duke Point Power's comments
15 that disclosure of the information in this
16 circumstance would be contrary to prevailing public
17 policy, in particular, the Energy Plan.

18 MR. WALLACE: Yeah, and I guess that comment's similar to
19 the one that -- my response to the Chairman, that I
20 don't think disclosing the winning bidder would
21 detrimentally affect parties being willing to bid.

22 If they knew they were going to have to
23 disclose if they won, but not otherwise, I think most
24 people would say, "I take a chance on that." And I
25 point you again to Section 22.8, which allows
26 disclosure for the goal of getting approval of the

1 project.

2 I don't dispute that it is public policy
3 that future acquisitions will be done by IPPs, and I
4 think we're probably supportive of that. I do think
5 it's pretty clear from what Hydro's said that in the
6 future its call for tenders are going to be very
7 different, that they are going to be entered system-
8 wide, they are going to include resources that might
9 have been included under PowerSmart in the past, in
10 part response to Commission direction. So, no, I
11 don't accept that argument.

12 COMMISSIONER BOYCHUK: Thank you.

13 MR. WALLACE: Thank you.

14 THE CHAIRPERSON: Thank you, Mr. Wallace.

15 MR. BOIS: Mr. Chairman, Commissioner Boychuk. I just
16 wanted to address a couple of points to supplement
17 some positions taken by Mr. Wallace.

18 The first being that in his submissions Mr.
19 Sanderson made the comment, at least if my notes are
20 correct, that this is the first time that the
21 Commission has ever held a hearing on an EPA before.
22 That, to me, suggests that the Commission is seeking
23 not only evidence that the EPA is appropriate from the
24 applicant, but also from stakeholders and intervenors.
25 And in order to evaluate that, the intervenors and
26 stakeholders need the information in order to make

2 In particular, with respect to Norske, the
3 implications of this EPA agreement have been indicated
4 to be something like a rate increase of 2.7 percent.
5 I'm going to fall into the trap of giving evidence
6 here, as my colleagues have. My understanding is that
7 the implication of that to Norske is that that's an
8 operating hit of about 4.5 to 5 million dollars a year
9 in annual operating costs. There's a reason for them
10 to be able to see these costs to understand whether or
11 not it's a significant -- whether it's the best
12 alternative, given particularly since they've also got
13 a demand-side management proposal before the --
14 actually before the Commission, filed in the BCTC
15 hearings, and also before B.C. Hydro.

17 And I would draw the Commission's attention
18 and the Chair's attention to the decision of the
19 Commission in the application by BCTC for approval of
20 a transmission capital plan, Order No. G-103-4, at
21 page 33. The Commission comments with respect to
22 Norske's proposal:

Allwest Reporting Ltd., Vancouver, B.C.

1 analysis of CBT, the JIESC, and Norske
2 Canada that B.C. Hydro should explore load
3 management with its customers to reduce the
4 peaks or negate the need for new
5 facilities."

6 Well, that's what the purpose of this hearing is. One
7 of the things is to determine whether this EPA should
8 even be entered into and whether it's appropriate. It
9 seems to me that in order to evaluate that question,
10 we need disclosure of the financial information.

11 I would also entertain, or I would also
12 suggest to you that the comment that disclosure of all
13 bidders' information is at risk here, is a bit of red
14 herring in the sense that we're only looking at the
15 Duke Point Power Plant project as being the one that
16 ratepayers are going to have to pay for. I don't
17 think it's necessarily helpful to disclose previous
18 bidders' information, but if that's what the
19 Commission decides to do, I think there is some value
20 to it in the sense that I think it would enhance the
21 integrity of the bidding process actually, because
22 people would know why their bids were not successful.
23 They might actually be able to sharpen their pencils,
24 refine their bids in the next call for tenders whether
25 it's a system-wide call or another, quote, unique
26 situation. People would understand what's expected,

1 as opposed to this sort of semi-transparent and then
2 all of a sudden non-transparent process that we've
3 evolved since VIGP.

4 At page 34 of the same decision with
5 respect to the BCTC capital plan, the Commission
6 viewed the -- directed the BCTC in conjunction with
7 B.C. Hydro, if necessary, to fully evaluate the
8 proposal, the Norske proposal, and to submit a report
9 to the Commission within 30 days of the release of
10 that decision.

11 Well, that hasn't been done yet. Now, we
12 understand that Hydro is planning to file that report
13 on Friday, but to date there hasn't really been any
14 significant dialogue between BCTC, B.C. Hydro, and
15 Norske with respect to Norske's proposal. So it's
16 interesting to me that we're here today talking about
17 these alternatives, but there's no dialogue.

18 And the Commission goes on to state:

19 "If BCTC finds the Norske proposal
20 unacceptable, the report must specify the
21 rationale for its rejection and state which
22 planning criteria would be violated by the
23 proposal's implementation."

24 Well, hopefully we'll have that information on Friday,
25 but we don't have it right now, and so it's
26 particularly critical to have information available to

1 us to be able to evaluate what we're being asked to
2 consider in this hearing right now.

3 The second thing that I wanted to raise was
4 a comment that Mr. Keough made, and that was it's in
5 the public interest to require a party not to
6 disrespect the sanctity of a contract.

7 Well, I don't think that asking the
8 Commission to order the disclosure of the terms,
9 financial terms of the EPA is violating the sanctity
10 of the terms of this particular agreement.

11 My friend has already pointed to Section
12 22-8 of the EPA, which is the confidentiality
13 provisions. But I also found it quite interesting to
14 note that there's section 3 of the EPA agreement,
15 which provides for regulatory review. And if -- now I
16 do this with some trepidation and concern, but I
17 wanted to point out that it seems to me that the
18 parties have considered the full ramifications of
19 disclosure in this agreement, because if -- the
20 confidentiality provisions already contemplate
21 disclosure, but when we go into the regulatory review
22 it says that either party may terminate the EPA if
23 within 90 days after the effective date -- I'm
24 paraphrasing -- the BCUC determines to convene a
25 hearing under Section 71.2 of the *UCA*, and either has
26 not completed the hearing, or having completed the

1 hearing has not made an order under Section 71(3) of
2 the Act, or the BCUC has completed a hearing and made
3 an order under Section 71(3) of the Act, and that
4 order contains a term or terms that could be
5 reasonably expected to have an adverse effect on the
6 party exercising the right of termination.

7 **Proceeding Time 4:07 p.m. T31A**

8 Well, I would like to suggest there's been
9 no evidence presented by either party, either
10 applicant, of any adverse inference to be drawn from
11 the release of the information. Neither party has
12 adduced evidence, and in his submissions Mr. Sanderson
13 referred to the Court's decision in *Sierra Club of*
14 *Canada v. The Minister of Finance*. And in that
15 decision, he referred this panel to -- I believe it
16 was paragraph 53, on page 15 of 23, and he talked
17 about the test that was being considered by the court
18 in that case. However, he didn't refer to paragraph
19 46, I believe it is, which says:

20 "In the *Dagenais* case..."
21 which is the case that Mr. Sanderson was referring to,
22 the case that set the test out -- paragraph 46, the
23 court goes on to say:

24 "The court emphasized that under the first
25 branch of the test, three important elements
26 were subsumed under the necessity branch.

1 First, the risk in question must be a
2 serious risk, well-grounded in the
3 evidence."

4 Well, we don't have any evidence that there's a risk.
5 We have lawyers like myself speculating on the pros
6 and cons, but we don't have any evidence that there's
7 any adverse implications to it. And if there was,
8 Duke Point has a remedy available to it under the EPA
9 agreement, which they could exercise if that was
10 really truly an adverse inference, or an adverse
11 implication.

12 And then again at paragraph 55, the court
13 goes on to say:

14 "In addition, the phrase 'important
15 commercial interest'..."

16 now, this is the part of the test that Mr. Sanderson
17 was relying on when he said that it was an important
18 commercial interest that should generate
19 confidentiality provisions,

20 "...is the need for some clarification. In
21 order to qualify as an important commercial
22 interest, the interest in question cannot
23 merely be specific to the party requesting
24 the order, the interest must be one which
25 can be expressed in terms of public interest
26 in confidentiality."

1 And then just a little ways on, it says:

2 "For example, a private company could not
3 simply argue that the existence of a
4 particular contract should not be made
5 public because to do so would cause the
6 company to lose business."

7 Well, the disclosure of the EPA agreement in this case
8 is not going to cause Duke Power -- Duke Point to lose
9 business. The EPA is already signed. It's
10 essentially a deal, we're here talking about whether
11 or not it's the appropriate deal. So I'm not sure
12 that there's any real commercial penalty to Duke Point
13 by releasing the confidentiality provisions -- or, the
14 provisions, the financial provisions.

15 I would also add that with respect to the
16 submissions of the applicant with respect to the
17 integrity of the bidding process, I'm not going to
18 refer to RAV, because I don't know enough about it,
19 and I'm not going to refer to the fast ferries,
20 because they -- I do know something about that, and
21 I'm actually quite scared about what happened in that,
22 but I am going to ask that the Commission take some
23 judicial notice of the fact that public tenders are
24 held by government officials in government agencies
25 all the time. Those public tenders are open to the
26 public for a reason, it's a broad wide-open call.

1 Invitees that can sit there at the bid opening and
2 receive information with respect to every one of the
3 tenders being submitted. Quite often, particularly in
4 infrastructure projects, the owner -- in this case the
5 government agency -- produces a schedule of the bids,
6 and releases that to the public. I don't know how
7 much more commercial you can get than that, when you
8 have a list of all the tenderers submitting the
9 information, and the government releases and discloses
10 that information.

11 And if it's a unit priced contract, the
12 unit prices are submitted. So if anything, I think it
13 serves a purpose to -- again, the disclosure causes
14 people to re-evaluate what they're suspecting -- what
15 they expect they will get in the terms of the
16 commercial terms. Now, the losing bidders might
17 think, "Well, I should have sharpened my pencil a
18 little better, and I might have got this deal."

19 It also discloses whether or not there's
20 any kind of criteria that's been used to evaluate the
21 bids that was not disclosed in the call for tenders.

22 **Proceeding Time 4:12 p.m. T32A**

23 Now I'm not suggesting that there is but in
24 terms of a hidden criteria, but one of the issues that
25 take people to court on tendering processes all the
26 time is hidden criteria in evaluating a bid. We don't

1 know how this -- we have the QEM model but we don't
2 know the assumptions that went into this. We don't
3 know the assumptions that went into the net present
4 value calculations to determine which of the bidders
5 should be the successful bidder so it's at least
6 incumbent upon the commission to have the disclosure
7 of the successful bidder, the financial terms,
8 revealed in that sense.

9 Now there was some -- Mr. Chairman, you
10 asked some questions with respect to disclosure of
11 customer information and I just wanted to suggest to
12 you that in the case of my client I've been advised
13 that if they were requested to disclose this kind of
14 information, they would disclose this information with
15 respect to customer information consumption date and
16 things like that. They would prefer to have the
17 opportunity to consider the request rather than just
18 have it a blanket available information.

19 And in terms of confidential commercial
20 terms and information, my client has already disclosed
21 the terms and conditions, financial terms and
22 conditions of its demand-side management proposal in
23 the BCTC hearing in the capital plan and it intends to
24 file it in this application. So it is already a
25 matter of public record and in terms of evaluating
26 whether this is -- where this EPA agreement is

1 appropriate or not, it seems to me that financial
2 information must be disclosed in order to make that
3 evaluation.

4 And if there's no questions, those are my
5 submissions.

6 MS. BOYCHUK: Mr. Bois, I just have one question for you.
7 When you talked about the government public tendering
8 process you stated fairly generically that they are
9 open to parties to come and sit and hear the results
10 of the bids. My understanding is that there may be a
11 variety of ways of handling government bidding
12 processes and I'm just wondering if, in your
13 knowledge, you're familiar of any situation where the
14 government, in a bidding process, does not disclose
15 the results of the successful bid.

16 MR. BOIS: I know of no situation where they would
17 disclose the results of the successful bid. I do know
18 of situations where the government imposes I guess
19 what you would call degrees of confidentiality in
20 terms of confidentiality around the process to develop
21 the RFP or the call for tenders particularly in a P3
22 project. But once that's out in the public domain
23 that's basically it. The whole process is subject to
24 public scrutiny in terms of somebody -- if somebody
25 wants to look at it they can look at it.

26 And in terms of the contract, it's a public

1 contract. It's a public private contract. The only
2 one that I can think of that may not be disclosed in
3 recent memory was the CN purchase of B.C. Rail. For
4 reasons that are unknown to me the government moved
5 away from its position that it was going to disclose
6 that information and decided not to disclose that
7 information. So I guess that would be an example of a
8 non-disclosure situation.

9 MS. BOYCHUK: Thank you.

10 THE CHAIRPERSON: Thank you.

11 MR. WEISBERG: Good afternoon, panel. Let me begin, Mr.
12 Chair, by saying that we -- Green Island Energy agrees
13 with Mr. Wallace's proposition that there should be a
14 presumption of disclosure unless established
15 otherwise. We would also agree with his submissions
16 regarding the scope of the requested disclosure, that
17 being Appendix 3.

18 The rest of what I have to say is in the
19 nature of comments to those that spoke before me. Mr.
20 Sanderson addressed the *Sierra Club* case and
21 specifically the point about serious risk to an
22 important commercial interest.

23 In urging you to support maintaining
24 confidentiality of the EPA he made, Mr. Sanderson made
25 two points. The first one related to the specific
26 commercial interest of Duke Point Power and while we

1 acknowledge that that is a legitimate interest, I
2 think the key point is that it needs to be balanced
3 against competing interests under the test in *Sierra*
4 *Club*.

5 Mr. Bois before me has already addressed
6 that point in further detail and we would support his
7 submissions in that regard.

8 **Proceeding Time 4:17 p.m. T33A**

9 Mr. Sanderson's second point though, in
10 urging you to rule in favour of maintaining
11 confidentiality, was, if I can paraphrase this as
12 maintaining the integrity of the tendering process
13 overall. And I think the focus of Mr. Sanderson's
14 remarks in that context had to be taken to be what the
15 future effect may be.

16 As far as the integrity of this tendering
17 process, we would submit that the appearance of
18 resource option bias, which we believe the evidence in
19 this hearing will establish exists, has already
20 damaged the integrity of this tendering process. And
21 we expect that evidence and argument in this
22 proceeding will demonstrate other flaws in the process
23 that also undermine the integrity of this particular
24 process.

25 B.C. Hydro and Duke Point Power have
26 asserted throughout the proceeding that this case is

1 in many ways exceptional. And I think you've heard
2 remarks upon those lines from other intervenors, and I
3 believe remarks along those lines have come from the
4 panel itself. I don't think that anyone in this
5 proceeding today has suggested that the speed or the
6 scope or the nature of this proceeding is what anyone
7 considers to be the normal process. Everyone appears
8 to share that perception that this is in no way
9 typical.

10 And where I'm going with that is that we
11 submit you should not be unduly concerned that what
12 happens in these very unique circumstances of this
13 proceeding may apply or may colour bidders' behaviour
14 in future calls for tender. We submit that it's
15 unlikely that bidders in future calls will view what
16 has taken place and may take place in this process as
17 the template for what to expect in very different
18 circumstances.

19 Finally on Mr. Sanderson's point regarding
20 the need to maintain the integrity of the tendering
21 process generally, I'd suggest that in the latter part
22 of those comments he went perhaps beyond what's been
23 requested here by intervenors. I believe he made
24 mention of a broader interest of protecting interests
25 in the future of both winning and losing bidders. And
26 unless I've misunderstood, there hasn't been a call

1 yet in this proceeding for disclosure of bids or bid
2 details of losing bids.

3 THE CHAIRPERSON: Is it your client's preference to
4 maintain confidentiality with respect to your client's
5 bid?

6 MR. WEISBERG: I'm about to get to that point in just a
7 minute, Mr. Chair. If you'll bear with me I have one
8 other point in terms of the balance, just in favour of
9 disclosure. Mr. Wallace has articulated very well, I
10 think, that the benefits to be had of disclosure, and
11 Green Island would support those submissions.

12 Now turning to your point, I'll begin this
13 way. Mr. Keough before me noted that even if the Duke
14 Point EPA is disclosed, that comparisons won't be
15 possible in the absence of other bids being disclosed.
16 As the panel is well aware, Green Island has already
17 filed its term sheet, which contains fairly extensive
18 detail. But beyond that, in the course of this
19 proceeding, it's Green Island's intent to disclose the
20 details of its bid expressed in net present value
21 terms. And Green Island would encourage proponents of
22 other projects to do so as well. I believe -- I use
23 the word "projects". I think I should say more
24 broadly "solutions", and I believe Mr. Bois before me
25 has already addressed that point for his client,
26 Norske.

1 Green Island's intent in that regard is to
2 enable the panel and hopefully intervenors to make
3 relevant comparisons, to identify what is the best
4 solution for Vancouver Island.

5 **Proceeding Time 4:22 p.m. T34A**

6 THE CHAIRPERSON: You would like more than that from Duke
7 Point Power.

8 MR. WEISBERG: I'm sorry, Mr. Chairman?

9 THE CHAIRPERSON: You would like more than just the NPV
10 of the project from Duke Point Power. You're prepared
11 to provide, if you will, a summary amount, the NPV
12 amount.

13 MR. WEISBERG: My instructions today, Mr. Chairman, are
14 that our current intention is to provide it in NPV
15 terms. If the Duke Point EPA was disclosed to the
16 extent that Mr. Wallace and others, including
17 ourselves, are suggesting it should be, then I expect
18 that we would -- that my client, Green Island, would
19 consider further disclosure, and I don't think I'm
20 overstating things to say that it would -- we would
21 see that as being in our interest, because we would
22 want the Commission Panel to be in the best position
23 to make the comparisons that we hope it will.

24 THE CHAIRPERSON: If we make an order with respect to
25 disclosure of Duke Point Power's agreement, would you
26 object to the same order being made of Green Island

1 Energy, assuming we have the jurisdiction to do that?

2 MR. WEISBERG: I don't have those instructions, my -- and

3 I'm not sure if I should express what my inclination

4 in that regard is.

5 THE CHAIRPERSON: I would like you to seek instructions,

6 if you can.

7 MR. WEISBERG: I certainly will. I don't expect that

8 Green Island would oppose that. I can't go further

9 than that at this point.

10 Just in closing here, I have two other

11 points to make. One has to do, I guess, with what I

12 think are competing objectives pursued by B.C. Hydro

13 and Duke Point Power. One of those objectives is to

14 proceed with this case with as much haste as possible.

15 The other is to provide significant confidentiality

16 protection. And in our view, those objectives are

17 incompatible.

18 I'd submit that the need for speed, if I

19 can call it that, doesn't allow the panel adequate

20 time for confidentiality rulings to unfold in due

21 course, and I think there's been a preference

22 expressed for that to happen on the panel's part. We

23 submit that because that's the case, intervenors would

24 be prejudiced in preparing their case, because

25 (1) they don't know precisely the case to meet, and

26 (2) they don't have the information to build their

1 case.

2 On the other hand, the need for
3 confidentiality perhaps calls for a process that may
4 take longer than the anticipated schedule permits.
5 And what I mean by that is that there was reference
6 made earlier in the day to the possible use of a non-
7 disclosure agreement for counsel and consultants.
8 Some mechanism like that that would protect the
9 commercial interests on one hand, but on the other
10 hand provide for a basis for an examination of Duke
11 Point's bid in the context of other alternatives.

12 So we would suggest that perhaps B.C. Hydro
13 and Duke Point Power may have to forego pursuit of one
14 objective, speed or confidentiality, in the pursuit of
15 the other.

16 Finally, and this is more in the nature of
17 a footnote, I suppose, coming into this proceeding,
18 B.C. Hydro and Duke Point Power certainly from the
19 outset were clear about their objectives of we need to
20 get on with this proceeding and get to a decision as
21 soon as we can. We need to protect the
22 confidentiality of certain terms within the EPA. But
23 unfortunately they didn't develop a manageable process
24 to deal with that confidential information.

25 **Proceeding Time 4:27 p.m. T35A**

26 In light of all else that Hydro had to do

1 that may seem a tall order to expect that they would
2 do that as well. But I think we have to go back to
3 the first principle stated by Mr. Wallace if there is
4 a presumption of disclosure and that it was incumbent
5 upon Hydro and Duke Point wishing to maintain that --
6 I shouldn't say to maintain but to have
7 confidentiality established or extended by the
8 Commission to provide some reasonable basis to achieve
9 that.

10 So given the desire for speedy process and
11 confidentiality I speculate if an NDA type of process
12 might still be proposed. I'm not sure, I think there
13 was a suggestion or a reference made earlier today to
14 those models in other forms in other jurisdictions but
15 I think the comment had the caveat that it takes a
16 long time to develop such a model. So that may be
17 something that the panel wishes to explore but I can't
18 provide any further elaboration on that unfortunately.

19 Subject to any questions you have, panel,
20 those are my remarks.

21 MS. BOYCHUK: Just one question for you, Mr. Weisberg,
22 with -- B.C. Hydro sort of touched on the notion that
23 there's perhaps two standards with respect to winning
24 bidders and the unsuccessful bidders. That may be
25 more generous than what Mr. Sanderson has suggested.
26 But I'm just wondering whether you have any views

1 about the standards that we might be applying in terms
2 of the winning bidder versus the unsuccessful bidders.

3 MR. WEISBERG: The standards for protecting the
4 confidentiality of those bids?

5 MS. BOYCHUK: Yes.

6 MR. WEISBERG: I think that the test that you apply needs
7 to be the same but I think the difference is that
8 there is not perhaps the same prospective benefit for
9 the losing bidders and so in the whole balancing
10 equation I think there tends to be a greater risk in
11 forcing disclosure of a bid from an unsuccessful party
12 given that that's not on the table at least from B.C.
13 Hydro's perspective as the preferred solution.

14 MS. BOYCHUK: And that could be because those
15 unsuccessful bidders may be involved in further
16 tendering processes?

17 MR. WEISBERG: Absolutely.

18 MS. BOYCHUK: Is it possible that Duke Point Power could
19 be involved in further tendering processes as well.

20 MR. WEISBERG: I would think that's entirely possible.

21 MS. BOYCHUK: Okay, thank you.

22 MR. WEISBERG: Thank you.

23 Mr. Chairman, with regard to your question
24 to me, I will seek those instructions as soon as I can
25 and if possible I will return to the microphone today
26 to advise you of the outcome.

1 THE CHAIRPERSON: Thank you.

2 MR. WEISBERG: Thank you.

3 MR. WEAVER: Mr. Chairman, Commissioner Boychuk, I can be
4 brief. I wish to associate the commercial energy
5 consumers with those who have spoken in favour of
6 disclosure of the information sought. Mr. Wallace
7 described at Appendix 3 the tariffs.

8 Most counsel before me have spoken of who
9 has the onus on this application and clearly it should
10 be B.C. Hydro and Duke Point Power. The reality is
11 the competition is over on this tender and the winning
12 bidder has been selected and on our side of the table
13 we see no prejudice to disclosure of the information
14 which is being sought. No evidence has been led as
15 has been stated by other counsel.

16 Mr. Keough, on behalf of Duke Point Power,
17 spoke of irreparable harm to Duke Point Power by
18 disclosure. Mr. Bois has pointed out that the
19 contract has language which deals with that and if in
20 fact Duke Point Power sees irreparable harm by
21 disclosure they've got a choice, it would appear on
22 the language of the contract. They can walk on the
23 contract. That's not what Mr. Keough said they will
24 do. And of course they won't, because this is a very
25 significant win for them.

26 **Proceeding Time 4:32 p.m. T36A**

1 Our interest, as customers, is the impact
2 on rates, as a result of the selection of Duke Point
3 Power. And in participating in this proceeding to
4 determine that impact, having disclosure of financial
5 information which is being sought is a reasonable
6 request and indeed is required for effective
7 participation, and is required to make this process
8 effective, given that submissions and participation of
9 customer groups and stakeholders has been sought.

10 To repeat that which has been said before,
11 this is a unique process. It is a unique contract.
12 There were unique terms and conditions to the tender,
13 and it is highly improbable that a similar tender with
14 similar terms and conditions will be sought in the
15 short term. And I say that because we, you know, have
16 asked other counsel of their position on other
17 bidders. We do not see a prejudice to the disclosure
18 of other bidders' materials, but will be pleased if
19 those were provided on a no-names basis, that you are
20 in a position with respect to those other bids to
21 delete the bidders' names. But it may provide
22 valuable information to participants to determine what
23 the alternatives were in this process.

24 Those are my submissions, Mr. Chairman.

25 COMMISSIONER BOYCHUK: Mr. Weafer, I probably should have
26 asked this question of Mr. Bois as well, but I need a

1 little bit more clarification as to how Section 3,
2 Regulatory Review, which you've referred to in the
3 EPA, helps. If Duke Point Power believed this
4 information is confidential for reasons that it'll
5 suffer irreparable harm, if it walks on the contract,
6 how is that helpful in this case if it were, let's
7 say, ultimately to be the most cost-effective means of
8 dealing with the problem that we are here to address?
9 How does that help us?

10 MR. WEAVER: Well, the problem, Commissioner Boychuk, is,
11 in our submission, you can't assess whether it is the
12 best choice without the financial information. And
13 the parties had a choice when they contracted to
14 contain a provision which said, "We will walk on the
15 contract if disclosure is required for this
16 information." They didn't say that. They simply want
17 the option to do that. So clearly they would prefer
18 to get the contract, at least at this point in time,
19 because they have not stated they would walk on it if
20 they had to disclose these terms. They've got an
21 option that says they can. Their counsel didn't stand
22 up today and say, "We will act on that term, we will
23 walk if this information is disclosed."

24 The irreparable harm to Duke Point Power is
25 you not approving this contract. The inability of
26 participants to effectively comment on it, I suggest,

1 puts them at risk of that not being approved. By
2 providing the confidential information, or that which
3 they allege is confidential, we can effectively
4 participate in a process and have a robust review, and
5 approve a -- potentially -- a long-term contract with
6 the parties knowing the terms that were entered into
7 by the parties.

8 COMMISSIONER BOYCHUK: And in your view, then, Mr.
9 Weafer, the situation of the Commission Panel and
10 staff having access to that information and dealing
11 with it isn't sufficient to meet the needs in this
12 case, because we've engaged or embarked upon a public
13 process.

14 MR. WEAFFER: Correct.

15 COMMISSIONER BOYCHUK: Okay, thank you.

16 MR. WEAFFER: Thank you.

17 THE CHAIRPERSON: Mr. Weafer, if we order disclosure, and
18 Duke Point Power elects instead of disclosure to walk
19 from the deal, is the information still not fully
20 disclosed?

21 MR. WEAFFER: I'm sorry, Mr. Chairman, the information
22 would be -- if you asked for disclosure?

23 THE CHAIRPERSON: Yes. If we ask for disclosure, does it
24 matter what Duke Point Power's response is to our
25 order? Isn't the information in both cases -- if Duke
26 Point Power continues -- they have an opportunity to

1 walk. But whether they elect to walk or not, is the
2 information still not disclosed is my question to you.

3 MR. WEAVER: I would expect that they would -- if that
4 was the position they were going to take, today was
5 the day to take that position. They did not. If the
6 Commission is going to determine that they may make
7 that order, Duke Point Power missed their opportunity
8 to make their comment.

9 **Proceeding Time 4:37 p.m. T37A**

10 THE CHAIRPERSON: Thank you.

11 MR. WEAVER: Thank you.

12 MR. GATHERCOLE: Mr. Chairman, Commissioner Boychuk, I
13 too will be brief. I would like to associate myself
14 with the comments of those before me with respect to
15 the interpretation of Section 75(5) of the Act, and
16 that is that it presumes disclosure, and to associate
17 myself with the remarks of those who have indicated
18 with respect to the lack of evidence in support of
19 confidentiality. If the Commission accepts that
20 interpretation of 75(5), in my submission there is a
21 clear onus on those claiming confidentiality to
22 provide the Commission with sufficient evidence --
23 71(5). I obviously couldn't read my own writing,
24 which is not unusual.

25 With respect to our position, I would refer
26 you simply to Exhibit 3-4, which is Mr. Quail's letter

1 of December 15, 2004, on pages 4 and 5, and I won't
2 bother repeating that because I think it clearly sets
3 it out.

4 I do want to stress, however, what we are
5 asking for. Essentially what we are asking for is set
6 out in our Information Request 22.1, which is Exhibit
7 C3-3. We're not asking for anything more. The
8 information to be disclosed would be included in
9 Appendix 3 for our request. We're not asking for
10 anything else. We're not asking for any details of
11 losing bids or anything else within the EPA.

12 Having said that, I want to respond because
13 it -- to support this. Mr. Sanderson said, and I am
14 sure he will correct me if I'm misstating his
15 position, but I understood him to say that the only
16 way that those opposing confidentiality could justify
17 disclosure in the public interest was to establish a
18 connection in an impact on rates, that lower rates
19 would result.

20 With respect, I disagree. Clearly my
21 clients are interested in the lowest possible rates,
22 and it is our submission that at least the disclosure
23 of what the price to be paid by B.C. Hydro for this
24 energy may in fact lead us to see that lower rates
25 would result from not approving the EPA.

26 But of equal importance to my clients in

1 this particular situation is the integrity of the
2 regulatory process and having the fullest public
3 process possible on a matter of significant public
4 concern. There will be an impact on the ratepayer
5 regardless of what decision the Commission makes with
6 respect to the various alternatives, and particularly
7 with respect to approval of the CPA. In our
8 submission, the public interest requires those who
9 ultimately are going to have to pay, the opportunity
10 to have meaningful participation and input,
11 particularly with respect to a project like this,
12 which is a major project with significant potential of
13 major impacts on ratepayers.

14 I agree with what Mr. Wallace said with
15 respect to the confidentiality of EPAs in the natural
16 gas area, you know, not only are they short-term
17 contracts, not only is it a competitive market, but in
18 the final analysis we have the opportunity to look at
19 the overall portfolio and the costs of the overall
20 portfolio of the individual utility, and to compare it
21 to other utilities and to competitors where
22 competition exists. And with respect to other B.C.
23 Hydro calls for tender or RFPs, again where a maximum
24 price is established, we have a pretty good idea that
25 whether that's a reasonable, you know, price or not.
26 And so generally my clients are satisfied to allow

1 that process to carry forward in the normal course,
2 but I agree with Mr. Wallace that this is very much a
3 unique situation, particularly given the size and the
4 long-term impacts, and it is absolute essential, in my
5 submission, for there to be a meaningful process that
6 there be disclosure of the price and that clearly is
7 in the public interest.

8 And subject to any questions, those are my
9 submissions.

10 **Proceeding Time 4:42 p.m. T38A**

11 THE CHAIRPERSON: Thank you, Mr. Gathercole.

12 MR. ANDREWS: Thank you, Mr. Chair, member of the Panel.
13 William J. Andrews appearing for GSX CCC and the B.C.
14 Sustainable Energy Association. Much of the ground
15 that I was going to cover has been addressed already
16 and so I will refrain from repeating points that have
17 been made.

18 One starting threshold point here is that a
19 number of the comments made by Mr. Sanderson and Mr.
20 Keough related to disclosure or requests for
21 disclosure of the substance or information from the
22 non-winning bids. My understanding is that that is
23 simply not on the agenda for the panel, that is what
24 we're talking about here is the redacted EPA and
25 unless there's something odd in the blacked out
26 portions, there would not be any information from the

1 non-winning bidders in the redacted EPA. And so
2 partly in response to Commissioner Boychuk's question
3 about what if any differences there are in the
4 procedures and principles that ought to apply to the
5 winning bid and the non-winning bid, there is a
6 fundamental difference between the two in that Section
7 71(5) of the *Utilities Commission Act* requires public
8 availability of the filed EPA unless the Commission
9 decides otherwise. That provision does not apply to
10 the non-winning bids.

11 Mr. Sanderson said that freedom of
12 expression is not engaged in this balancing act that
13 is before the Commission. I take the opposite
14 position, and as authority for that I would refer you
15 to the *Sierra Club of Canada* decision which Mr.
16 Sanderson has cited to you.

17 In my submission it is abundantly clear
18 that the entire *Sierra Club of Canada* decision is
19 predicated on the assumption and previous findings
20 that the freedom of expression under the *Charter* is
21 engaged in these debates regarding requests for
22 confidentiality of material in public hearings. And I
23 would refer you to paragraph 37 in which the court
24 begins the discussion in the *Sierra Club* case with
25 reference to the *Dagenais* case which set the
26 background and it discusses the fact that *Dagenais*

1 *Charter*, jurisprudence which establishes core values
2 under -- within the concept of freedom of expression.

3 There are three, and they're set out in
4 paragraph 75. The first is seeking the truth, and the
5 common good. The second is promoting self-fulfillment
6 of individuals by allowing them to develop thoughts
7 and ideas as they see fit. That one would not be
8 engaged in this situation. The third is ensuring that
9 participation in the political process is open to all
10 persons. That one, the political process there means
11 the social process, which would include court
12 proceedings as well as this regulatory tribunal, I
13 submit.

14 The court continues:

15 "The *Charter* jurisprudence has established
16 that the closer the speech in question lies
17 to these core values, the harder it will be
18 to justify a Section 2(b) infringement of
19 that speech under Section 1 of the *Charter*."

20 And it says:

21 "Since the main goal in this case is to
22 exercise judicial discretion in a way which
23 conforms to *Charter* principles, a discussion
24 of the deleterious effects of the
25 confidentiality order on freedom of
26 expression should include an assessment of

1 the effects such an order would have on the
2 three core values."

3 I commend to you that approach to making
4 your decision. The court continues, fairly obviously:

5 "The more detrimental the order would be to
6 these values..."

7 freedom of expression,

8 "...the more difficult it will be to justify
9 the confidentiality order."

10 And then the reciprocal also would be the case.

11 In my submission, what we -- I would go the
12 next step here to say that the information requested
13 that is subject to the confidentiality order goes to
14 the epitome of the decision that the panel has to
15 make. The panel has said that the principal issue is
16 whether Tier 2, Tier 1 or no award is the most cost-
17 effective means of meeting the perceived capacity need
18 on Vancouver Island. What could be more fundamental
19 to determining which of three portfolios is the most
20 cost-effective than to know what the cost is of
21 Hydro's proposed -- proposal of being one of the
22 three?

23 So in my submission, in terms of the
24 analysis of the *Charter*, and impacts of the proposed
25 confidentiality on core values under the *Charter*, to
26 deny the participants in the process the access to

1 information which is at the very centre of Hydro's
2 proposal, which is before the Commission for approval,
3 would -- requires the most stringent examination in
4 terms of the *Charter* balance.

5 Fundamentally, my submission is that there
6 is not sufficient evidence, if any, before the panel
7 to establish a serious risk of harm to either B.C.
8 Hydro or Duke Point Power that would follow from
9 disclosure of the redacted portions of the EPA. The
10 EPA itself, I submit, is not evidence of harm that
11 would be suffered by either of those two parties. It
12 is evidence that both parties wanted to avoid
13 disclosure of certain terms of the contract. But it
14 does not in any way state what the harm would be if
15 those figures were disclosed to the public.

16 **Proceeding Time 4:52 p.m. T40A**

17 Mr. Sanderson said that you don't require
18 evidence to understand how that which was referenced
19 to declining to keep the redacted information
20 confidential, how that would compromise B.C. Hydro's
21 ability to acquire least-cost power in the future; and
22 I'm paraphrasing there. My submission is that you do
23 need to have evidence, and you don't have evidence or
24 even cogent argument, as to why it would be that
25 releasing the price of the winning bid would hamper
26 Hydro's efforts to get bids on future calls for

1 tender. Those, the merits of the terms and conditions
2 of future calls for tender, whether it would be
3 desirable for those calls for tender to have a
4 condition that participation is in confidence and that
5 only the winning bid, for example, will be disclosed,
6 those are issues for future debate. The only thing
7 before the panel right now is this already signed,
8 executed Duke Point Power EPA.

9 Subject to any questions, those are my
10 submissions.

11 THE CHAIRPERSON: Thank you, Mr. Andrews.

12 COMMISSIONER BOYCHUK: Mr. Fulton, maybe just before you
13 proceed, I would like to -- I've maybe taken this down
14 wrong, but Mr. Gathercole, in terms of what it is that
15 you're seeking I think you referred to Exhibit C3-3
16 number 3. Did you want to just have a look at that
17 and make sure that that's --

18 MR. GATHERCOLE: C3-3, which I understand are information
19 requests, and it's Information Request No. 22.1.

20 COMMISSIONER BOYCHUK: Oh, 22.1. Thank you, that helps.

21 MR. FULTON: Is there anyone else who wishes to speak to
22 this matter before I turn the mike back to Mr.
23 Sanderson?

24 And yes, Mr. Bois is coming forward.

25 MR. BOIS: Mr. Chair, I just want to clarify something.
26 I misspoke when I made my earlier submissions. It's

1 BCTC that's filing the report on Friday, not B.C.
2 Hydro. I just want to make that clarification.

3 MR. HILL: Mr. Chairman, I'd like to speak somewhat
4 generally to the disclosure of information to the
5 public pertaining to the contents of the Energy
6 Purchase Agreement.

7 It seems to me that the *Utilities Act* under
8 which the energy sector operates is fairly clear on
9 this area. It appears to require that the public be
10 informed of the details of the purchase agreements
11 arrangements, so that I assume the public can assure
12 itself that its instructions have been followed in the
13 execution of the EPA -- and the CFT in this case --
14 and that it is getting the best bang for its buck or
15 other value requirements that it deemed important.

16 It appears that B.C. Hydro and the bidders
17 for the call for tenders have also understood that
18 there is a requirement here. As it is quite clearly
19 pointed out in the call for tenders, regulatory
20 matters and the confidentiality section, the early
21 part of it, that there is a requirement under both the
22 *Utilities Act* and the *Freedom of Information Act* that
23 binds both B.C. Hydro and the bidders to make public
24 the information from the winning bid, and the process
25 by which it was won. It also points out that all
26 should examine the VIGP decision to reject the

1 proposed plant there and the advice it contains on how
2 to do something different. It also points out the
3 BCUC's authority to render the EPA unenforceable.

4 Now it seems to me from a somewhat
5 simplistic perspective that if I'm standing on the
6 side of the street with a child in my hand, and I wish
7 to cross the street to see a show, that I am required
8 to use the crosswalk at the end of the block and wait
9 for direction as to when to cross. I have especially
10 shown that to be true when I bend down and explain the
11 circumstances to the child, as occurred in the CFT
12 process. The fact that I'm late for the show changes
13 nothing. If I step into the street outside of that
14 crosswalk, then either of two things have occurred. I
15 will have found a policeman, and I have convinced him
16 that I have an exceptional circumstance, and at his
17 discretion I may be relieved of some of the
18 requirements in crossing that street, or I have
19 contravened the law. The intent, spirit and, with any
20 kind of luck, the literature of this law is designed
21 to keep everyone safe.

22 **Proceeding Time 4:57 p.m. T41A**

23 It appears to me that the intent and spirit
24 of the law is embodied in the *Utilities Act*, are
25 attempting to keep the public safe both socially,
26 economically and environmentally.

1 In the last VIGP hearing, B.C. Hydro went
2 to the end of the street and waited for the light.
3 And it was determined by the Commission that the show
4 it intended to see was not really the best. And it
5 instructed Hydro to have a better look at the
6 selection of shows.

7 To this end, B.C. Hydro was given many
8 suggestions where to look. It seems to me that Hydro,
9 in its persistence to see the show it has chosen, has
10 waited until there isn't time to get to the end of the
11 block and go through the process, where they would be
12 required to show the same evidence as was presented
13 and rejected, and is standing on the side of the
14 street waiting for a policeman in the form of
15 political intervention, or are attempting through the
16 legal process of confidentiality and scope restriction
17 to circumvent the process, splitting the intent of the
18 *Utilities Act* from its literature. And in so doing,
19 in my view, break at least the spirit of this law.

20 B.C. Hydro uses the word "transparent".
21 The use of the word "transparent" is a bit curious.
22 It seems that transparency is purchased for a quarter
23 of a million dollars that is required to submit a bid,
24 and a bid that Hydro feels has merit. The assessment
25 model which I note from the last hearing was referred
26 to as the "black box", and the transparency of which

1 the Commission had a considerable amount to say, seems
2 to have, from the public's perspective, simply
3 received a further, darker coat of paint.

4 The load forecasting the Commission went
5 through in the last hearing, and reduced to 116
6 megawatts peak gap from Hydro's figure of 250
7 megawatts, seems to have returned, according to Mr.
8 Sanderson, 434 line 9 of the 17th meeting, to the 250
9 megawatt level. But this time the assumptions by
10 which that peak is arrived at have gone from opaque to
11 invisible.

12 B.C. Hydro and Duke Point Power say
13 the public cannot know what the power is going to
14 cost. This can only be for two reasons I can think
15 of. Either they don't know, and signing an EPA with
16 no bottom line looks pretty silly, or they won't say,
17 because the agreement will lead to large and
18 unpredictable increases in the cost of power, probably
19 to world pricing levels due to GATT's agreements,
20 driven there uncontrollably by the world price of gas.
21 I submit neither of which is in line with the public
22 interest.

23 The levels of time pressure, secrecy and
24 legal dancing demonstrated by the proponents and the
25 purchaser, my government-owned agency, are doing
26 nothing to ease my fears. With the utmost respect, I

1 would like to suggest to the panel that risk must be
2 taken with careful reflection, and preparation, and
3 the assistance of fully-informed intervenors, as was
4 done so well in the last VIGP hearing.

5 If there is insufficient time for this,
6 then in my view, ill-considered decisions taken will
7 be unnecessarily risky, financially, economically, and
8 politically. Let's not become the servants of
9 secrecy.

10 Thank you.

11 THE CHAIRPERSON: Thank you, Mr. Hill.

12 MR. FULTON: Is there anyone else present who wishes to
13 speak to these matters?

14 Before I turn the mike back to Mr.
15 Sanderson, Mr. Chairman, I will just reference the
16 letters that were received this morning, the letter
17 C5-4 from the village of Gold River, C33-6 from Shady
18 Brook Farm, and C36-4 from Mairi McLennan all
19 reference the issue of confidentiality.

20 **Proceeding Time 5:02 p.m. T42A**

21 MR. SANDERSON: Mr. Chairman, I note that it's five past
22 5:00. I'm not sure when we went back on the record
23 but it might have been a long haul for the reporters.
24 I don't know whether you want to take break. I'm not
25 going to be long in reply but I do have a half a dozen
26 points to make probably.

1 THE CHAIRPERSON: I understand that the hearing reporters
2 are --

3 THE HEARING OFFICER: They've volunteered to go to 6:00.

4 THE CHAIRPERSON: Okay. We can proceed.

5 MR. SANDERSON: Let me deal then with some comments sort
6 of in the order they arose and then I've got a couple
7 maybe to end on that are I think generic.

8 First, dealing with Mr. Wallace's comments,
9 and I think another speaker also dealt with this, I
10 just wanted to remind the commission that the
11 references to Section 71.5, I don't think particularly
12 advance the situation. We accept that matters are
13 public until made confidential. There is an
14 application before you to make them confidential and
15 on that application you have the right to perform the
16 balancing act that I've described. And so I don't
17 think Section 71.5 particularly advances either side's
18 position.

19 Second, there were references made by Mr.
20 Wallace in comparison to VIGP, and with great respect
21 I think that that ignores the fundamental difference
22 between the VIGP proceeding and this one. In VIGP
23 B.C. Hydro was seeking a CPCN. Here B.C. Hydro is
24 seeking nothing. There is no application before this
25 Commission. There is not required by the Act to be
26 any application before the Commission. As I've said

1 on a number of occasions, and I won't belabour it
2 again, the Commission has an extraordinary right to
3 intervene in commercial arrangements between two
4 parties granted by Section 71 and it is trying to
5 decide whether to exercise that right. That is a
6 fundamentally different inquiry than the one that was
7 undertaken in VIGP where B.C. Hydro is applying for a
8 certificate.

9 Much was made about the evidence or lack
10 thereof with respect to prejudice and what would
11 follow, if you will, from a decision that the
12 requirements of the EPA are now to be disclosed -- or
13 the provisions are to be disclosed publicly. In my
14 respectful submission the prejudice that I think Mr.
15 Keough spoke to and that we support is identifiable
16 with the application only of common sense, that is
17 deviating from the expectation of the parties in a
18 significant way is likely to cause damage to the
19 integrity of the process in the future and whether
20 that's individual bids -- well, whether that's general
21 call, whatever kind of call it is, the fact that B.C.
22 Hydro is rendered unable to give any comfort with
23 respect to issues of confidentiality in future bids is
24 something that concerns it and something that I think
25 it's simply common sense to accept, has its potential
26 to cause damage to that process in the future.

13 Proceeding Time 5:07 p.m. T43A

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1 And the struggle we're having is marrying
2 the two because the two have some fundamentally
3 inconsistent features to them. And because we've got
4 sort of a hybrid process going here, we're all
5 struggling with how do you marry the two. That has
6 nothing to do with government tenders.

7 There was some suggestion from Mr.
8 Weisberg, and I think it might have been echoed by a
9 couple of others, that somehow or other we don't have
10 time for confidentiality; that if it might even
11 otherwise be appropriate, it can't be accommodated
12 here because we've also asked for expedition. Well,
13 with great respect, I've never seen in any regulatory
14 proceeding, evidence from the proceeding that the
15 disclosure of more information speeds things up. I'm
16 not putting forward the need for speed as a reason for
17 confidentiality, but I certainly resist the notion
18 that if we didn't have confidentiality we'd have a
19 faster process. Experience does not support that.

20 It was said that B.C. Hydro -- with
21 sympathy, I may add, but nevertheless it was still
22 said by Mr. Weisberg that Hydro and Duke Point Power
23 failed to discharge some sort of onus on them to come
24 to grips with marrying what I've referred to as
25 essential planning process with a competitive process
26 and come forward with an advanced scheme, if you want,

1 for dealing with confidentiality.

2 Well, I'm not sure I accepted that onus,
3 but whether or not we accept the onus, I think B.C.
4 Hydro did come forward with that proposal as to Duke
5 Point Power. An enormous amount of information is
6 filed. That information includes all of the
7 provisions of the EPA so that the structure of the
8 deal is fully transparent and known. Mr. Wallace
9 says, "Well, yeah, but you've left out the critical
10 one-tenth of one percent," and if you accept that the
11 calculation of the amount -- and I'm going to come to
12 that in a minute -- is critical, then I take his
13 point.

14 But what B.C. Hydro has clearly done is put
15 forward a way to get as much information to people as
16 it possibly could, consistent with its belief that
17 that specific piece of information, that is, the
18 actual value of the payment to Duke Point Power,
19 should be retained in confidence. Our position hinges
20 on that proposition, but given that position, it's my
21 respectful submission that we have gone to every
22 effort to file as much information and make as much
23 transparent and public as we possibly could.

24 That does take me to -- well, let me make
25 one other specific point in response to Mr. Andrews'
26 first, and I'll close with my overall point. And that

1 is, Mr. Andrews took issue with my reliance on *Sierra*
2 *Club*, and I think was arguing that *Sierra Club* does
3 stand for the proposition that there is a general
4 *Charter* interest in the right to be heard in this
5 forum.

6 That argument was made very aggressively
7 and very fully recently in a review of the Accenture
8 transactions by the OPEIU, and the propositions -- as
9 I understood them at least, and it's late in the day
10 -- being advanced by Mr. Andrews were ruled on
11 adversely and clearly in the decision of *B.C. Hydro v.*
12 *OPEIU*. That can be found -- I don't have it here, but
13 that can be found at (2004) B.C. Supreme Courts 422.
14 Sorry, B.C. Supreme Court 422, that's the universal
15 cite. And -- well, I'll probably leave it there. Mr.
16 Fulton and the parties can have access from that cite,
17 I think.

18 **Proceeding Time 5:12 p.m. T44A**

19 My last remark, then, is an overall
20 response, and I'm just trying to characterize what's
21 going on here. I think I acknowledge the curiosity
22 that intervenors have with respect to the actual price
23 that has been entered into the EPA. But in my
24 respectful submission, that curiosity alone is not
25 enough. What the intervenors need to establish in
26 order here to warrant disclosure in the face of what

1 Mr. Keough has said, is that somehow or other their
2 case in fact is advanced, in the context of the issue
3 as the Commission has defined it. The Commission has
4 said the issue is to compare the cost-effectiveness of
5 Tier 1, Tier 2 and no award.

6 The relative values of those are identified
7 in Appendix J, with the different net present values.
8 So in terms of cost-effectiveness, the cost-
9 effectiveness filing in Appendix J lays out the effect
10 of changing assumptions on the relative values from
11 the perspective of that study of the different
12 projects. The Commission is armed with the full
13 information, and the unredacted version of everything,
14 so that were Hydro or -- well, I guess in this case
15 were Hydro to be alleged to have manipulated that data
16 in some way, or to not be *bona fide* developing those
17 net present values, the Commission has the complete
18 ability to verify that that is accurately calculated,
19 and that serves as sort of an overall check on the
20 process, and the parties are able, and have asked for
21 information relating to what happens if different
22 numbers change or different assumptions change.

23 Similarly with respect to rate impacts, in
24 terms of parties wanting to know what the different
25 rate impacts are, the rate impact of this particular
26 proposal is filed, the rate impact of the no award and

1 Tier 2 proposal is the subject matter of one of
2 BCOAPO's IRs. We've said we'll answer that. It is a
3 burdensome one and it'll take a while, but we have
4 said we'll answer that. We're not invoking
5 confidentiality with respect to that. So in terms of
6 the comparison that the panel has said is the key to
7 this hearing, it's my respectful submission that the
8 intervenors will have the numbers and the information
9 that they need in order to make their points about why
10 they say the solution here is or is not cost-
11 effective.

12 So those are my submissions in reply.

13 THE CHAIRPERSON: Appendix J provides the difference in
14 NPV numbers, but it doesn't provide the absolute
15 numbers. And you're going to make the rate impacts
16 available. The NPV numbers can be approximated, if
17 you will, from those rate impact numbers, but on a
18 total amount or actually by year, with cash flows.

19 Why is -- I suppose the answer to this is
20 this, and I'll propose the answer to my own question,
21 Mr. Sanderson. Is it true that you would prefer not
22 to provide the NPV numbers for the scenarios in
23 Appendix J because that would disclose the NPV number
24 of Tier 1, and you would prefer not to do that? So
25 Mr. Weisberg's offer to do that for Green Island is
26 nice, but it's not one that -- but it's one that you'd

1 object to as it relates to Duke.

2 **Proceeding Time 5:17 p.m. T45A**

3 MR. SANDERSON: Yes, I put it only slightly differently
4 which is this, that the information which is germane
5 to the varying points of view that will be in this
6 hearing it seems to me is fully provided by the
7 differences. That's what people are focused on or
8 need to be focused on because remembering that no
9 award is one of the things that's being looked at. So
10 all of the options, given that something between Tier
11 1 and no award is what has to happen, then it's the
12 differences really that disclose the information that
13 it seems to me the intervenors need hear from the
14 point of view of Duke Point in particular, I suppose,
15 and Hydro in terms of the process. The more specific
16 information there is then the more risk there is, the
17 more ability there are for competitors to calculate
18 and try and figure out what the bid prices must have
19 been. And so it was thought the differences give less
20 harmful information while giving the same amount of
21 useful information for this process as full disclosure
22 of the NPV's would have done.

23 THE CHAIRPERSON: One of the areas of harm that I
24 anticipated that you would include in your list of two
25 wasn't mentioned and I -- and that is if the
26 information that's set out in Appendix 3 of Exhibit B-

1 6 is made public, will that have harmful implications
2 with respect to the operation of the economics of the
3 unit on a go-forward basis?

4 MR. SANDERSON: There is, and I had expected to be honest
5 a little more disclosure -- a little more detail to
6 have got into around the specifics of the EPA and
7 that's why I didn't get to this one. The piece of
8 information that fits the description you've just made
9 is the start-up information, that is the dispatch
10 information, the cold start, the warm start and the
11 hot start. And I confess that I was anticipating that
12 would come up during the course of Mr. Keough's
13 remarks. My understanding is -- and I'm going to ask
14 not to be interrogated too heavily on this because my
15 understanding of this part is fairly cursory. Having
16 said that, in determining dispatch the profile of the
17 obligations on buyer and seller with respect to cold,
18 warm and hot starts is significant and can affect
19 dispatch order and so that information, knowing what
20 the number of cold starts are going to be, et cetera,
21 may assist other generating units within the region in
22 their efforts to predict how often this particular
23 plant might be dispatched.

24 THE CHAIRPERSON: You say you're surprised that it didn't
25 come up in the comments from Mr. Keough but I would
26 have thought that the impact of that was to the

1 ratepayers and that it would have come up in your
2 comments.

3 MR. SANDERSON: Yes. No. I agree and if that sounded
4 like criticism of Mr. Keough, it wasn't. I mean that,
5 I think what I did was leave all of the specifics of
6 the EPA to Mr. Keough. You're absolutely right, that
7 issue to the extent it is one, is more an ongoing
8 Hydro issue than it is a Duke Point issue and that no
9 doubt is why Mr. Keough was silent on it. So it's my
10 oversight, not his. But I was just really explaining
11 the reason for my own oversight.

12 THE CHAIRPERSON: Before we close, I want to confirm
13 whether or not those two elements are in Appendix 3 or
14 not. Yes, they are.

15 It would -- I mean as you say, I don't want
16 to push you beyond your level of comfort with this,
17 Mr. Sanderson, but if I look to page 63, your
18 references to the cold and the hot starts, and there's
19 a warm start here too, it's that information that's
20 set out in HH, II and JJ that would be what you'd be
21 speaking to.

22 MR. SANDERSON: I think that's right and that's the
23 definitional section and then there's an operational
24 section somewhere else, that I think I'm right in
25 saying that is also implicated.

26 THE CHAIRPERSON: Are there any other areas like that

1 MR. WALLACE: Well, we don't believe it will. We believe
2 that the -- as Mr. Sanderson put it, how Hydro will
3 behave in the market, which I think this was leading
4 to, is going to be primarily directed by the spark
5 spread, and that will be determinate.

6 THE CHAIRPERSON: So you don't accept Mr. Sanderson's
7 submission that in fact that's going to be prejudicial
8 to the dispatch of this plant on a go-forward basis.

9 MR. WALLACE: I think that's correct. I think that we
10 feel that if there is a prejudice there, it's less
11 than the prejudice to the ratepayers of not having
12 full understanding of this agreement.

13 MR. BOIS: Mr. Chair, we would prefer to have this
14 information disclosed as well, because it's directly
15 relevant to some of the issues on the demand-side
16 management proposal put forward by Norske on a
17 comparative basis. Without it, it makes it a little
18 bit difficult to actually compare that. And I would
19 just add to Mr. Wallace's comments that disclosure of
20 this information, I think, when Mr. Sanderson talked
21 about it, said that it would be prejudicial because it
22 would give information to other generators in the
23 region. Well, I'm not really sure what other
24 generators there are in the region of Vancouver Island
25 other than ICP, which B.C. Hydro already readily
26 dispatches on an economic basis, so I'm not sure how

1 that information's going to change that. So I don't
2 see the prejudice there at all, to the future
3 operation either.

4 MS. COCHRANE: Mr. Chair, our -- Chris Weafer had to
5 leave. On behalf of the commercial customers, I think
6 this information is important and it also will speak
7 to the cost-effectiveness of the plant, and it
8 possibly will be prejudicial to the ratepayers, and we
9 would like to know that now. There will be not only
10 the difference, the spark spread as Mr. Wallace
11 mentioned, but there's also going to be the issue of
12 what the commitment will be for B.C. Hydro when in
13 fact it has to run the plant, and there may be cheaper
14 power available.

15 MR. GATHERCOLE: Mr. Chair, I indicated earlier the
16 specific information that we were requesting, and made
17 the reference to the particular IR.

18 Proceeding Time 5:27 p.m. T47A

19 MR. ANDREWS: The information under discussion is the
20 information that the GSX CCC and BCCEA, I believe,
21 should be disclosed. It's an essential component of
22 the price hence cost of the proposed project.

23 COMMISSIONER BOYCHUK: Mr. Sanderson, I have a couple of
24 questions for you. You've discussed in detail about
25 how we're in a proceeding under Section 71(5) of the
26 *Utilities Commission Act*, which is different from a

1 CPCN application. And I note, though, in your
2 application at page 24, lines 26 to 27, you make the
3 statement that for that reason -- and it's talking
4 about the comparisons between VIEC and the Duke Point
5 project, B.C. Hydro considers a CFT process to be a
6 continuation of the VIGP CPCN process. And I'd just
7 ask you to comment on that.

8 I appreciate that we're in Section 71 of
9 the *Utilities Commission Act*, but just given the
10 history of this process -- and I wasn't involved in
11 the VIGP proceeding; I've certainly read the decision
12 and am familiar with that -- but I'm just wondering,
13 was it not realistic or reasonable of B.C. Hydro and
14 the parties who were involved in the process to
15 anticipate that there might be something more, that
16 this Section 71 review might be a little different
17 than what you might contemplate in ordinary
18 circumstances?

19 MR. SANDERSON: Well, I think I addressed that at some
20 length, Commissioner Boychuk, in my original
21 submission, but not today. I mean --

22 COMMISSIONER BOYCHUK: Yes, I appreciate that.

23 MR. SANDERSON: -- when we talked about scope right at
24 the beginning. It was B.C. Hydro's expectation that
25 this would be about process. And I stand by that, and
26 indeed make the point -- you know, it's an

1 opportunity, I suppose, for me to make an observation
2 around submissions that have been made both today and
3 on previous days about Hydro can hardly be heard to
4 complain that it isn't ready to go or doesn't have
5 this information or that information. After all, you
6 know, why aren't you here ready to go?

7 Well, with great respect, B.C. Hydro did
8 not know what project substantively it would be
9 dealing with till the end of October. The premise
10 that everybody has proceeded on is "Well, you've known
11 all along you were going to come back with VIGP."
12 Well, nonsense. We didn't know that. We were in a
13 competitive process the outcome of which wasn't known
14 until October.

15 What we expected, what we knew was that
16 sure, the process we had gone through over the course
17 of the last year would be subject to a great deal more
18 scrutiny than maybe the typical EPA. If we hadn't
19 been able in a few weeks to put together this
20 document, which is 1000 pages dealing with the
21 process, I think we would have been subject to
22 legitimate criticism. But we were able to do that
23 because we did anticipate that that process would be
24 focusing, process-wise, on the CFT. The remark on
25 this page is saying, "Fine, in the context of doing
26 that, let's not have to recreate the context. Let's

1 take the context as it was. We had a long hearing,
2 we've got a whole bunch of evidence. Let's not have
3 to re-lead all that so everybody can understand what's
4 going on with respect to this process. Let's just
5 adopt it."

6 The panel did not accept that. The
7 submission that was made there was repeated by me
8 initially and was not accepted by the panel. The
9 decision said, as I read it: This is a separate
10 process. That's without prejudice to your right to
11 incorporate pieces of the former process in on
12 application, and anyone has that right, but we step
13 back from importing the whole whole of VIGP into here.

14 So I'm really making two responses in
15 response to you. One is, that remark was really
16 addressed at the record and the extent to which we
17 should be using that here. And then second, the Panel
18 has decided that the two processes are distinct and
19 we're not going to incorporate the whole thing in here
20 and we're going to do it on a case-by-case basis,
21 which is fine.

22 But anyway, I guess -- I hope that helps.

23 COMMISSIONER BOYCHUK: Thank you. And just another
24 question. Mr. Bois brought to your attention or
25 raised on the record today the provisions of the EPA
26 dealing with confidentiality, and to make the point

1 references have been to the EPA, but I'm inclined to
2 agree with the inference I can take from your
3 question, which is, in terms of integrity of the
4 process, it was the Call for Tender document which was
5 put before all of the different bidders. So I accept
6 that point.

7 The sentence to which you've referred at
8 page 21, 18.15, I think you have to read the clause
9 you just read in the context of the first clause in
10 that same sentence. And to read the whole thing, it
11 says:

12 "Bidders are also advised that B.C. Hydro is
13 subject to the *Freedom of Information and*
14 *Protection of Privacy Act* and, accordingly,
15 Hydro cannot guarantee the confidentiality
16 of those documents."

17 That's giving notice, as I think Hydro was obliged to
18 do to tenderers, that (1) the *Act* applies to it, and
19 (2), that in consequence they'd better look and see
20 whether, given the *Freedom of Information and Privacy*
21 *Act*, they're content with the level of confidence that
22 will be associated with their material.

23 As I'm sure you're aware, Commissioner
24 Boychuk, that *Act* contains an exception for
25 commercially sensitive information. And so my
26 submission on that is, a bidder reading that would

1 think, "Okay, well, I'm going to need to have
2 established it's commercially sensitive, but if it is,
3 it isn't going to get disclosed."

4 To anticipate your next question, though,
5 if I might, the next sentence does go on to recognize
6 that -- oh, I'm sorry, I'm juxtaposing the two. I'm
7 sorry. I'm looking up above where you read from.

8 COMMISSIONER BOYCHUK: Yes.

9 MR. SANDERSON: And there is a reference to the *Utilities*
10 *Commission Act* there, and the fact it will be required
11 thereunder. And I don't dispute that any bidder going
12 into this process is aware that the risks, that are
13 now becoming apparent, exist. They did know that.

14 On the other hand, if I were one of those
15 bidders, I would have a history of 37 EPAs filed quite
16 recently, none of which have been made public. I'd
17 have a history of all of the other gas contracts
18 filed, none of which have been made public, and I
19 would know that if I went to the Commission and tried
20 to get any of those, I couldn't.

21 Now, this process is a different one, I
22 accept that. But nevertheless, the history of this
23 Commission in respect of energy purchase agreements
24 and energy supply contracts has been not to make
25 sensitive information confidential. As the Chairman
26 has pointed out, that history extends also into

1 commercially-sensitive information for customers.
2 There has been a respect within this Commission for
3 commercially-sensitive material. And if I were a
4 bidder, frankly, looking at those risks, I would have
5 gotten into this process aware of the existence of the
6 risk, but also feeling fairly comfortable with taking
7 the risk.

8 COMMISSIONER BOYCHUK: Thank you. And then in terms of
9 the future bidding processes, we have in this
10 proceeding Green Island, Norske, and the JIESC, that
11 have all suggested that the disclosure of the
12 information wouldn't affect future bidding processes.
13 Do you want to comment on that? Three parties that
14 could potentially be involved who are all saying,
15 "This isn't an issue for us."

16 MR. SANDERSON: Well, I'm not sure, with great respect,
17 that I heard quite that from them. What I heard --

18 COMMISSIONER BOYCHUK: It's an opportunity to clarify,
19 thank you.

20 MR. SANDERSON: What I heard Green Island say was that
21 they were prepared to make net present value
22 information available, which I've submitted is very
23 much level to and similar to what's disclosed anyway
24 in Appendix J. I mean, it's a little more, but it's
25 not a lot more. And we haven't heard yet back from
26 Mr. Weisberg with respect to whether the specific

1 terms and conditions in every element of their bid,
2 they do want disclosed. So I make that point.

3 Second, with respect to Norske, Norske has
4 adopted a strategy throughout of making public their
5 offer, and did make it public. And they have taken
6 that step, the offer that was used by B.C. Hydro in
7 evaluating the no award option, and in looking at the
8 various contingencies, the 140 megawatts of
9 curtailment is based on evidence that Norske has
10 already put in the public domain. I can only surmise
11 as to their thinking behind that, but my guess is that
12 because this -- they're not in the business of bidding
13 energy into a competitive market, there is no future
14 threat for them. I mean this is a one only deal.
15 They've got a bunch of facilities they think they can
16 do things with and so they want to get it out there
17 and there is no prejudice for them in the context of
18 future bids. This is the only game in town for them
19 and that's fine. I respect that. But I don't think
20 it tells us much about the reaction of other potential
21 bidders into future calls who may have the option of
22 building a plant here or building it in other
23 jurisdictions or whatever and it's those sorts of
24 people that Hydro is concerned to make sure are
25 interested in bidding here.

26 **Proceeding Time 5:37 p.m. T01B**

1 MS. BOYCHUK: Thank you, that's helpful. And then just
2 finally one question. I apologize, I note the
3 lateness of the day, but you made a comment that the
4 Commission -- as you are aware the Commission panel
5 and staff are receiving information on a confidential
6 basis and I think your comment was something to the
7 effect that the Commission will have sort of an
8 overall check on the numbers here. In your view is it
9 important that the Commission have that overall check?

10 MR. SANDERSON: Well, I think to the extent that the
11 parties are skeptical about the calculations that are
12 performed in Appendix J or elsewhere then, yes, it is
13 important. It is important that the commission is
14 there to verify that the numbers as presented by Hydro
15 in fact are consistent with the numbers that are
16 before it and before the rest of the panel, in other
17 words, they're not, frankly, made up.

18 I mean I think that the parties are going
19 to be reluctant to just take Hydro's word for it and
20 they're going to be reluctant -- in the absence of
21 having some comfort, the Commission is armed with
22 information that allows it to be persuaded that the
23 calculations are accurate, I think the parties would
24 be concerned but they ought not to have that concern
25 to the same extent if the Commission has access to all
26 the data that allows them to confirm the accuracy.

1 MS. BOYCHUK: Okay, thank you.

2 THE CHAIRPERSON: Mr. Keough.

3 MR. KEOUGH: Mr. Chairman, not wanting to prolong this
4 but I had wondered if I was going to get an
5 opportunity to get my two cents worth in given I had
6 to go at the start of the line as well.

7 THE CHAIRPERSON: You may proceed.

8 MR. KEOUGH: Thank you, Mr. Chairman. I won't be long.
9 I'll deal with some comments in order as well. But I
10 do want the record to show, Mr. Chairman, that when
11 Mr. Wallace attempted to redefine the public interest
12 as per his December 16th letter he choked on his words.
13 I think it's also noteworthy that he, until prompted
14 by the panel, did not respond to the various public
15 interests identified and then his best retort was that
16 he disagreed with what I said without any foundation
17 for that.

18 Also, when he was casting his evidentiary
19 net as wide as he could to come up with projects that
20 were in the public domain and things were disclosed he
21 -- it's noteworthy he did not mention the ICP project
22 and the degree of disclosure associated with it.

23 Mr. Chairman, I heard some comments from
24 Norske and also from Green Island that I'm not sure if
25 they're troubling or not. They alluded to evidence
26 that they might be filing and I guess we may not be

1 done with our procedural wrangles yet, but it appears
2 that they are going to restart the CFT process in a
3 forum before the Commission. We'll have to wait and
4 see with bated breath if they in fact do that.

5 There was some discussion in questions from
6 the panel about the impact on Duke Point Power in
7 other jurisdictions and certainly that is a concern.
8 The concern is not restricted to the impact on this
9 jurisdiction although obviously Duke Point Power is an
10 active player in this market but certainly the
11 principles and the affiliated companies are active in
12 other jurisdictions and when you're talking about harm
13 it's not restricted to harm associated with this bid.
14 Some people think that because the bid is complete
15 there is no possibility of harm and I think that's
16 just absolutely not correct.

17 **Proceeding Time 5:42 p.m. T2B**

18 Mr. Weisberg made a comment referring to
19 the Green Island two-page document that was floated
20 during the first procedural conference. And Mr.
21 Chairman, I'm not sure what he wanted you to take from
22 that, but it's very clear that was a general document
23 with some general statements in it, certainly not
24 anything that would have qualified even remotely under
25 the CFT or met the requirements of that process. So
26 I'm not sure what he wants you to take from that other

1 than maybe they're willing to disclose, so why isn't
2 Duke Point Power? But I suggest to you there are very
3 different types of data that they want.

4 There's also some discussion about the
5 disclosure of the other bids, the losing bids if you
6 will. And I think it was interesting that a couple of
7 people did take you back to what the Commission itself
8 characterized as the most -- or the principal issue in
9 the proceedings, and it was to determine the most
10 cost-effective option.

11 Well, how can you determine the most cost-
12 effective option if you don't know the cost of the
13 other options? So I think even Mr. Wallace conceded
14 "We'd like to have it, but you know, if we can't have
15 it we'll get as much as we can." And I go back to my
16 suggestion that getting the Duke Point Power will not
17 permit them to achieve what they purportedly want to
18 achieve.

19 I think, Mr. Chairman, those are my
20 comments, other than to say a lot of people are
21 talking about evidence, including me, and what is in
22 evidence. I think that, you know, we probably should
23 wait till we get the evidence before you start making
24 decisions based on what we're all saying might be in
25 the evidence.

26 Thank you, Mr. Chairman. Those are my

1 comments.

2 COMMISSIONER BOYCHUK: Mr. Keough, I'm sorry, I
3 apologize, but --

4 MR. KEOUGH: I'm still on my feet.

5 COMMISSIONER BOYCHUK: Again apologies. You mentioned
6 that you were replying, responding to some of the
7 comments of parties where there was a suggestion that
8 because the bid is complete, there's no possibility of
9 harm and your statement is that's incorrect. Can you
10 just elaborate for me in the circumstances on what the
11 harm is to you, to your client in this case for this
12 information to be -- just put it into, if you can,
13 more succinct terms in terms of what the harm will be
14 that you're facing.

15 MR. KEOUGH: Ms. Boychuk, I think when you are an
16 independent company that's bidding into these power
17 projects in a competitive world, the other bidders are
18 all looking at -- like it's a mug's game. We're
19 trying to figure out what other people are going to
20 bid because you want to bid as little as possible
21 under them to win. And that's the nature of the
22 competition. You are trying to get the best deal you
23 can but get a winning bid.

24 So if I know everything about my
25 competitor, and my competitor doesn't know anything
26 about me, well then I have a significant commercial

1 advantage over that other party. It's as simple as
2 that. If I know everything that they are doing, and
3 they don't know anything I'm doing, I think I've got a
4 significant leg up in the competitive bidding process.
5 And if parties have to go into this process knowing
6 that their commercial sensitive information is going
7 to be disclosed, they're going to be, one, very
8 reluctant to put in a bid; two, they're probably going
9 to put in a premium to compensate for the risk that
10 it's going to be disclosed; and three, it's going to
11 hurt them in any other jurisdiction where they're
12 putting in similar information, similar bids.

13 So I think the harm is in the knowledge
14 that you're equipping competitors with. I'm sure all
15 of the competitors, all the other potential bidders,
16 would love to know all the details of Duke Point Power
17 if they don't have to give out any themselves. It's a
18 competitive world and you're handicapping one player.

19 COMMISSIONER BOYCHUK: Thank you. I had thought as well
20 that you might have wanted to comment on the comments
21 of some of the parties, that in this bid, this process
22 or your bid, the CPA, it's unique. I think the term
23 used is it's a one-off type situation.

24 MR. KEOUGH: I'm not sure that from an independent power
25 developer perspective it is unique. I mean, from my
26 clients' perspective, they have a call for tenders and

1 the phone. The other gentleman is to meet me
2 downstairs. We have a logistics problem, because as I
3 was speaking to him I discovered that I was locked out
4 of getting back onto the floor, and if I go outside,
5 I'm locked out of the building. And I didn't want to
6 incur Mr. Fulton's wrath by having my cell phone on.
7 But I did advise my client that at the next break, I
8 would call him. I have him on stand-by somewhere
9 nearby, and I will seek those instructions, and after
10 a break I expect to have those.

11 THE CHAIRPERSON: Is fifteen minutes long enough?

12 MR. WEISBERG: I expect so.

13 THE CHAIRPERSON: We're adjourned for fifteen minutes.

14 MR. WEISBERG: Thank you.

15 **(PROCEEDINGS ADJOURNED AT 5:49 P.M.)**

16 **(PROCEEDINGS RESUMED AT 6:03 P.M.)** **T4B**

17 THE CHAIRPERSON: Please be seated. Mr. Weisberg?

18 MR. WEISBERG: Mr. Chairman, thank you for providing me
19 the opportunity to seek the instructions that I
20 required. Just a basic statement of principle, that
21 Green Island supports an open and transparent process.
22 Going from that, I understood you to be enquiring as
23 to Green Island's view on a possible order from the
24 panel that would require disclosure of bids from
25 parties other than Duke Point Power.

26 THE CHAIRPERSON: No. More specifically, Duke Point

1 Power and Green Island.

2 MR. WEISBERG: Responding to that, our preference would
3 certainly be for an order that required disclosure of
4 all the bidders that remained in the process as of
5 August 13th, when the bids were submitted.

6 If the Commission felt it necessary to do
7 so, perhaps that could include just a single VIGP
8 project, Duke Point Power, and the other bidders. We
9 would, provided that there was an order as broadly as
10 I first characterized it, that being for the bid
11 details of all bidders that remained in the process as
12 of August 13th, Green Island would support such an
13 order.

14 Green Island would oppose an order,
15 however, that applied only to Duke Point Power and
16 Green Island, on the basis that the consideration of
17 Green Island's project, as we understand it, will be
18 in the context of a portfolio larger than Green
19 Island, the Tier 2 portfolio specifically being 122
20 megawatts. And for purposes of a comparison, we would
21 suggest that Green Island's bid information alone
22 would not be sufficient for that purpose.

23 **Proceeding Time 6:05 p.m. T5B**

24 THE CHAIRPERSON: Thank you.

25 MR. WEISBERG: Thank you.

26 THE CHAIRPERSON: That takes us to the regulatory

1 timetable. I think for the purposes of the regulatory
2 timetable, you can assume that whatever decision the
3 panel reaches with respect to confidentiality will not
4 provide additional time to the intervenors for
5 consideration of that confidential information, nor
6 will it provide an opportunity for a round of
7 information requests with respect to that confidential
8 information.

9 On that basis, I would like to speak to the
10 regulatory timetable, and I think probably, Mr.
11 Sanderson, we should begin with any suggestions that
12 you have.

13 MR. SANDERSON: Thank you, Mr. Chairman. You have taken
14 the wind out of my sails so I will collect my thoughts
15 for a moment.

16 On the assumption as you've laid it out
17 that there will not be countenanced further
18 applications for further processes in light of
19 whatever ruling you ultimately make on
20 confidentiality, then I think the only relevant issue
21 is what delay in the schedule as it was originally
22 laid out in Appendix A to Order G-106-04, should be
23 occasioned by virtue of B.C. Hydro's failure to file
24 all responses on December 17th.

25 As I was at pains to explain this morning,
26 B.C. Hydro's failure to file is confined to one

1 working day with respect to the BCUC requests, i.e.
2 they were all filed by the end of Monday, and with
3 very few exceptions and generally speaking exceptions
4 which involved intervenors that I think I can relax
5 the rules that might apply to others, two working
6 days. That is, they were filed late yesterday.

7 Having said that, I appreciate it's
8 Christmas and, you know, we're all pretending it's
9 not, but the fact is it is. I'm told it's not in my
10 household, but -- and there's increasing skepticism
11 that there ever will be in my household, but having
12 said that, I think one has to get real here. And so I
13 suggest my getting up and saying, "Well, just add two
14 days to the intervenors' time so they can file on
15 December -- I don't know, 29th, instead of December
16 24th" is probably not a realistic option. I said
17 December 31st earlier.

18 **Proceeding Time 6:08 p.m. T6B**

19 I think, in fact, what we should do is
20 establish a date for intervenor evidence and any
21 further material from any source of January the 5th,
22 which gives a day after the New Year's break. And I
23 appreciate that that's getting very close to the
24 January 11th.

25 What it means is that effectively B.C.
26 Hydro will lose an opportunity to ask Information

1 Requests of intervenors. The way I can rationalize
2 that, I think, is by suggesting that we're prepared to
3 adopt a process of trying to get those sorts of
4 questions which ought to be asked by Information
5 Requests to intervenors by the end of that week, and
6 have them take the form of notice that these questions
7 are going to be expected to be answered in cross-
8 examination, so that intervenors aren't required to
9 have responses to them filed in writing, they are
10 required and expected to come to the hearing prepared
11 to answer them. And while that's a less-than-ideal
12 solution from Hydro's perspective, I think in light of
13 maintaining the schedule it's probably the only
14 practical one.

15 It does depend on filing the balance of
16 what's outstanding, including the out-of-scope
17 materials, as much as possible this week, and as I
18 said, I've indicated that I expect that will happen.

19 I don't believe that the exceptions that I
20 listed this morning are sufficiently important by
21 themselves -- I'm not suggesting they're not important
22 evidence, but I am suggesting that early receipt of
23 those by intervenors is not a prerequisite to their
24 preparing their evidence. They ought to be able to
25 prepare their evidence without those things.

26 If the additional information filed by

1 Hydro requires update to evidence, or anything like
2 that, then obviously we'll have to make provision for
3 that. Either people orally will have to -- we may end
4 up in a position where we need a little bit of oral
5 direct from some of the parties, because there's
6 information been filed since they filed their written
7 evidence, and I think in appropriate circumstances
8 that may be an adequate answer. There may be
9 circumstances where they want to file something
10 supplemental in writing, to respond to something
11 additional that's gone in, and I think the Commission
12 will need to be flexible to deal with those things,
13 but it can do that on a case-by-case basis, because
14 the number of IRs we're talking about is not very
15 great.

16 So I think, to summarize, January 5th for --
17 should replace what is now December 24th. And
18 effectively, the Information Requests on written
19 intervenor evidence should be required by the end of
20 that week, which I think is the 8th. I'm sorry, I'm
21 told it's the 7th, I can't -- yes, yes, of course, it's
22 the 7th. And then that would still facilitate
23 proceeding on the 11th.

24 **Proceeding Time 6:12 p.m. T7B**

25 MR. SANDERSON: I do have one question on scheduling and
26 that is this. The Commission has adopted an issues

1 list approach in its most recent several proceedings,
2 and there isn't provision in this agenda for that. I
3 appreciate this is confined and more challenging. I'm
4 wondering if there isn't a way to do that, because I
5 think in many ways it's more important in this
6 proceeding than most, without taking up an awful lot
7 of time and wondering whether it would be constructive
8 for Hydro to file a proposed list of issues based on
9 the evidence that has been filed on the Monday, the
10 10th, and then address it at the commencement of the
11 hearing on the 11th. And I'm floating that. I don't
12 know whether that's a practical suggestion, but I do
13 think that the Commission's recent practice of
14 developing an issue list has been a very beneficial
15 one, and if there's a way to preserve it in the
16 context of the schedule, I think it would be a good
17 thing.

18 THE CHAIRPERSON: Mr. Fulton, this is going to be putting
19 you on the spot late in the day, but what's your
20 current estimate of the number of hearing days that
21 are going to be required for this proceeding?

22 MR. FULTON: That is putting me on the spot, Mr.
23 Chairman, and without seeing what the evidence is,
24 that's almost -- well, it's a very very challenging
25 question to answer, and I don't know that I could give
26 any meaningful answer other than I'm looking at the

1 schedule before me for January for both the CFT and
2 OATTs, and we are going to run up very close to the
3 date for the preliminary -- on the OATT hearing
4 there's a draft hearing issues list that staff needs
5 to get out on the 17th, and the opening comments date
6 is the 19th. We will be, on the present schedule,
7 sitting in Nanaimo for the Town Hall on the 15th, so we
8 don't have a lot of wriggle room. And as I said,
9 without seeing the evidence it is a bit of a mug's
10 game to say how long we'll be. We have had a fair
11 number of procedural matters to deal with up until
12 now, and one doesn't know at this point whether they
13 will continue.

14 THE CHAIRPERSON: You haven't been very helpful, Mr.
15 Fulton.

16 MR. FULTON: I didn't think I would be, Mr. Chairman.
17 I'm sorry but --

18 THE CHAIRPERSON: You did your best. Thank you.

19 MR. FULTON: Not to be unhelpful, I hope.

20 THE CHAIRPERSON: Mr. Carpenter?

21 MR. CARPENTER: Mr. Chair, I don't think I'm going to add
22 anything to what Mr. Feldberg has already indicated to
23 the Commission. The OATT hearing is scheduled to
24 start, as of right now, on the 25th. There are various
25 pre-hearing dates before that, including the
26 Wednesday, January 19th date that Mr. Fulton was just

1 referring to.

2 As I understand it, what Mr. Feldberg has
3 said is that while BCTC would prefer obviously that
4 that hearing go as soon as possible, it can
5 countenance some delay in that, the sooner the better.

6 What I can say to add to the previous
7 comments is given the uncertainty with respect to the
8 length of the hearing, given the comments that Mr.
9 Sanderson has just made with respect to effectively
10 having to deal with information as it's coming in
11 during the course of the hearing and B.C. Hydro being
12 prepared to deal with stuff in that forum, but at the
13 same time I can't think but that does anything other
14 than potentially extend this hearing process.

15 **Proceeding Time 6:17 p.m. T08B**

16 So if there is a risk that the CFT process
17 will carry on over the two week period for whatever
18 reason, then certainly BCTC would prefer to know
19 sooner as opposed to later and it would be preferred
20 that there be some delay in the start of CFT process
21 and some delay in the OATT process to a time certain
22 as opposed to sitting and waiting for two weeks
23 effectively not knowing whether it's going to be in a
24 hearing room on the 25th or not.

25 THE CHAIRPERSON: Thank you. I indicated on November the
26 30th that I intended to move us to a decision by

1 February the 17th. I still intend to do that. With
2 that comment are there any comments that the
3 intervenors would like to make with respect to the
4 schedule?

5 MR. WALLACE: Mr. Sanderson's comments with respect to
6 January 5th are helpful, particularly if we get your
7 decision with respect to confidentiality quickly so
8 that if more material is forthcoming it's forthcoming
9 earlier rather than later.

10 If that happens, then I would suggest that
11 while I'd like to see some delay in this proceeding,
12 it doesn't have to be a major delay. But there is a
13 lot of information. It is incoming. There is
14 Christmas and we have all been spending a lot of time
15 on procedural matters whether we like it or not.

16 I'm more concerned, or as concerned, about
17 the OATT proceeding because I think this proceeding is
18 going to take more time. To think that this could
19 start on the 11th or 12th and finish on time and also
20 allow the staff to do what they have to do for the
21 17th, 18th, 19th, in terms of issue this and opening
22 statements in the OATT, I do not think is realistic
23 and I would recommend that the OATT be delayed two
24 weeks to give us all time to complete this one and
25 refocus afterwards.

26 THE CHAIRPERSON: Mr. Wallace, there is a tension, if you

1 will, between the matters that are going to occur
2 before the proceeding and argument that's going to
3 happen after the proceeding, and to still get us to a
4 decision by February the 17th it's going to be the
5 panel's preference to have written argument, but
6 written argument in a way that certainly wasn't done
7 during the last proceeding, and it's also very likely
8 that there will be an oral phase of argument as well.
9 And that would suggest that, you know, it's a four
10 days, four days, three days and two days kind of
11 arrangement to get that done. The panel does find
12 that very helpful and so we don't want to lose the
13 benefit of that.

14 Does that change -- it probably doesn't
15 change your view with respect to the commencement of
16 the hearing but it may change your view with respect
17 to the length of the delay for the OATT.

18 MR. WALLACE: I'd move -- I don't recall the date you
19 said for making your decision on this one. It was
20 mid-February I believe.

21 THE CHAIRPERSON: February the 17th.

22 MR. WALLACE: The 17th. Then what I would recommend is
23 that the OATT hearings simply go out to February 21st,
24 that all of us are going to be involved in a very
25 intense process, no less yourselves, and getting
26 prepared for the OATT hearing, which in itself has a

1 huge amount of material and is a case, if not of first
2 impression, of first recent impression given that it
3 goes back quite a ways. There's no question from my
4 client's point of view that this hearing has the most
5 immediate monetary impacts, accepted or not accepted,
6 and the OATT, while it might be desirable to get on
7 with it, has been conceded by BCTC that they can use
8 the existing tariff on an interim basis and then put
9 in the new one afterwards.

10 **Proceeding Time 6:22 p.m. T9B**

11 So I would give both ourselves, or the
12 intervenors, and yourself and staff at least a chance
13 to complete one hearing before the next one is on,
14 because they are intense processes, they're difficult
15 and they do require energy and focus.

16 THE CHAIRPERSON: Thank you for that comment. Does that
17 assume preserving the start date for this proceeding?

18 MR. WALLACE: Mr. Chairman, I have a little trouble with
19 that, not knowing what information is forthcoming. I
20 would probably have moved this hearing, which I didn't
21 have the schedule, but it -- I thought the 11th --
22 starting on the 11th. I would have preferred, given
23 the magnitude and the time we have lost waiting for
24 information, and information yet to come, and we're
25 hoping that we will get more confidential information,
26 I would have moved this hearing to commence in Nanaimo

1 on the 15th and carry through on the 17th with this
2 hearing.

3 THE CHAIRPERSON: Thank you. Are there any other
4 comments with respect to the schedule?

5 MR. BOIS: Mr. Chairman, with respect to the schedule, I
6 would simply echo some of the comments already made
7 with respect to the information that's to come. Also
8 coming -- not that I'm using this as an excuse for me,
9 but coming late into the game, it's a little bit
10 daunting to get caught up with this information that's
11 already been filed, plus what's coming.

12 Now I'm not using that as a basis for
13 extending it, but I do think that the material that's
14 to come, and especially if you're going to rule on
15 confidential information, would suggest that the
16 hearing be adjourned -- or be commenced on the 15th.
17 And I think that in Nanaimo is probably the best place
18 to start it. At some point, it should go back to
19 Nanaimo for people there to have some idea of
20 participation as well. And then come back here on the
21 17th.

22 I think that's probably the best solution,
23 given that Mr. Sanderson has also volunteered to
24 provide a heads-up with respect to questions on cross-
25 examination. I'm a little bit concerned that that may
26 put B.C. Hydro in somewhat of a disadvantage as well,

1 in the sense that they're going to be dealing with
2 questions coming up, and ongoing evidence being
3 disclosed, as we do the oral portion of the hearing.
4 And so I think it's just a little bit better if
5 everyone gets their ducks in a row with respect to all
6 of their evidence, if we adjourn it a couple of days
7 to start.

8 THE CHAIRPERSON: Thank you.

9 MR. BOIS: Thank you.

10 THE CHAIRPERSON: Mr. Weisberg?

11 MR. WEISBERG: Thank you, Mr. Chairman. Mr. Sanderson
12 this morning in addressing the question of responses
13 to Information Requests, if I understood him
14 correctly, said that in the case of certain Green
15 Island Information Requests, that they involved
16 generation staff at B.C. Hydro in the preparation of
17 those responses. That, I understand, had not been
18 anticipated, and that there's a question, I
19 understood, of staff availability. Where that got us
20 to, I believe, is that those responses are not due
21 until -- or, not due, not expected to be prepared or
22 available until the first week of January.

23 MR. SANDERSON: I certainly can't commit to anything
24 before the first week of January at this time.

25 MR. WEISBERG: The point, Mr. Chairman, from our point of
26 view, is we asked for those IRs in anticipation of

1 evidence that we may wish to prepare, and that we
2 currently intend to prepare. We need those responses
3 to do that. I understand the difficulty for B.C.
4 Hydro, I'm not trying to pin down a specific date. I
5 think if we receive those responses in that first week
6 of January, we can probably work with that, provided
7 that Green Island is granted an extension beyond the
8 January 5th date that Mr. Sanderson indicated for the
9 deadline for intervenor evidence.

10 I think in fairness to my client, we are
11 entitled to receive the information that the Panel has
12 ruled in scope, to incorporate that into our evidence
13 if we choose, and to have the same amount of time --
14 actually in this case it would be less, than other
15 intervenors.

16 So given that, I think that Mr. Wallace's
17 suggestion is a very good one with respect to the
18 start date for this hearing. If the town hall meeting
19 currently scheduled for the 15th went ahead as
20 scheduled, but the start date for the public hearing
21 here in Vancouver was the 17th, then I would hope that
22 from the date of receipt of responses to the last of
23 the Green Island IRs, we would be able to find a week.

24 So, supposing that we receive them on the
25 5th, and perhaps your order could be that within seven
26 days of receipt, Green Island would file its evidence,

1 if any, and we do anticipate that we would, then I
2 believe that that schedule would accommodate that
3 requirement, so the 17th as a start date.

4 **Proceeding Time 6:22 p.m. T10B**

5 Regarding the OATT proceeding, we
6 appreciate BTC's flexibility in that regard, and I
7 think Mr. Wallace made an excellent suggestion given
8 how many people, yourself included, are involved in
9 both of these very intensive processes. And I believe
10 the -- I've forgotten now what date he suggested it
11 begin, but I think the point was that it would be
12 clear of the February 17th target date that you've set
13 for a decision in this matter. Thank you.

14 THE CHAIRPERSON: Anyone else?

15 MR. GATHERCOLE: Mr. Chairman, I would support Mr.
16 Wallace's suggestion with respect to the OATT
17 extension, for all the reasons he put forward, and I
18 think it's necessary given the overlap of yourself and
19 others.

20 I'm reluctant to support his suggestion on
21 this proceeding simply because Mr. Quail is counsel of
22 record in this proceeding. I do know that if it were
23 to commence on February 11th, Mr. Quail would continue
24 to be counsel of record. If it were put off to the
25 17th, he may not be available, but that would be
26 something we'd just have to deal with. But as I say,

1 I really can't speak for him as to what he would say
2 with respect to the timetable of this proceeding.

3 THE CHAIRPERSON: Is there anyone else who wishes to
4 speak to the schedule? Mr. Steeves.

5 MR. STEEVES: Keith Steeves presenting. Mr. Chairman, I
6 have a question concerning the filing of evidence now.
7 Please forgive me for not being very conversant here
8 on these matters, but the question I have here is
9 what, where, when, to whom do you file this evidence?
10 I am at a loss on this matter, so you will have to
11 direct me. Has the one date been set or pushed back
12 to January 5th?

13 THE CHAIRPERSON: We are currently considering that.
14 That's Mr. Sanderson's proposal. And then in terms of
15 circulating it, you would circulate it according to
16 our document protocols, which would call you to
17 circulate it to everyone here. But we will help you
18 in that at the Commission offices if that's
19 technically difficult for you.

20 MR. STEEVES: So this'll all be outlined then in the
21 documentation that will be sent out.

22 THE CHAIRPERSON: In the document -- yes, you can go to
23 our website and find our document filing protocols and
24 it sets it out for you.

25 MR. STEEVES: Oh, good, thank you.

26 I have one other question. In the public

1 seven days -- I'm not sure if he meant working days or
2 calendar days -- but even five working days prior to
3 the time when we're supposed to put our evidence in.

4 THE CHAIRPERSON: Thank you, Mr. Andrews. Yes?

5 MR. CARPENTER: Sorry, I thought there might be other
6 people on the list, Mr. Chair. Just because there's
7 now been a formal proposal with respect to dates for
8 the OATT hearing I thought that I would rise again. I
9 think it was mentioned a February 21st date. The other
10 suggestion was some point shortly after your ruling on
11 the CFT if that's going to be by the 17th. Either one
12 of those are at certainly the end of where BCTC would
13 have liked to go here but can accommodate that.

14 Having said that, there are dates that we
15 are working towards right now, including a December
16 31st filing date for information responses or
17 information requests on the intervenor evidence,
18 that's coinciding with this. It's coinciding with
19 other things which are going on right now such as the
20 SCMP IRs and there's a revenue requirements
21 application that needs to be filed by the end of the
22 year. So taking into account that those dates were
23 set based on a January 25th hearing date, if there's
24 going to be relaxation of the start of the hearing
25 date, we would prefer that there be some relaxation of
26 those dates at this point as well. Thank you.

1 THE CHAIRPERSON: Okay. Mr. Sanderson.

2 MR. SANDERSON: Mr. Chairman, just two points arising.

3 One is in respect of Mr. Wallace's general proposal we
4 take no objection to it, that is the hearing starting
5 on the 15th in Nanaimo and then proceeding on the
6 Monday, I guess it's the 17th back here.

7 We take no position. At least -- well,
8 when I say "we", I certainly take no position on the
9 OATT. I'm not doing the OATT. So I don't have any
10 instructions on that so will say nothing.

11 I will respond to Mr. Weisberg to this
12 extent though. He's asked for the potential for delay
13 in the filing of his evidence because of our
14 acknowledged difficulty in responding to Green Island
15 11 series. That is very specific evidence. As I
16 indicated it relates to generation. I'm prepared to
17 accept that there may be an element in his evidence
18 that depends on dispatch from B.C. Hydro's resources
19 elsewhere on the Island for 25 years and if that
20 information and that element of it as evidence can't
21 be provided then I understand that.

22 But he's also indicated over the course of
23 today that he's expecting to file potentially either
24 net present value version or something, depending on
25 your order, with respect to Green Island's bid, and I
26 got the sense that one way or another he's going to be

1 tendering evidence that relates not to what Hydro is
2 going to do in the future but rather what Green Island
3 proposes to do in the present. And it's my respectful
4 submission at least that evidence which is not
5 dependent on Hydro's responses should be filed on
6 January 5th so we've got as much time to figure out our
7 position with respect to that as we can get.

8 So I see no reason for delay on that and as
9 a general approach I would suggest the same, that we
10 establish January 5th as the date and then as Mr.
11 Andrews would have it, and I think I agree with him,
12 if necessary leave to parties to apply if subsequently
13 filed information causes them to need to elaborate
14 their evidence or otherwise seek relief of some sort.

15 THE CHAIRPERSON: Mr. Weisberg, can you accommodate Mr.
16 Sanderson's request?

17 **Proceeding Time 6:37 p.m. T12B**

18 MR. WEISBERG: I think that was a fair point. To the
19 extent that our evidence does not rely on responses
20 from B.C. Hydro, and he was fairly specific to the --
21 and I will be more specific. To the extent that we
22 file details around Green Island's tender, there is no
23 basis for us to have an extension beyond other
24 parties. Agreed.

25 The evidence, however, that we will -- that
26 we intend to prepare, based on the responses from B.C.

1 Hydro, we would like to do that as a package.

2 So I'm agreeing that regarding Green
3 Island's bid, whatever evidence we intend to file, we
4 can live with the January 5th date. For the remainder
5 of our evidence, because we are waiting for the pieces
6 in the responses to Information Requests that
7 presumably will remain outstanding at least until the
8 5th, we would ask for an extension of 7 days from the
9 date of receipt of those responses.

10 THE CHAIRPERSON: Mr. Sanderson, is that meeting your
11 request?

12 MR. SANDERSON: Not exactly. Close.

13 MR. WEISBERG: It's Christmas, Chris.

14 MR. SANDERSON: What I would ask of Mr. Weisberg is that
15 every effort be made by Green Island to separate that
16 which is reliant on the generation information that we
17 can't get him, and from the rest of the information
18 which has already been responded to or will be by
19 Friday. And I think I'm content to leave it that if
20 Mr. Weisberg will make a good-faith effort to do that,
21 and file as much as possible on January 5th, then we
22 can leave it there.

23 THE CHAIRPERSON: I do think, Mr. Weisberg, that Mr.
24 Sanderson's request is a reasonable one, and I would
25 encourage you to accommodate him as best you can.

26 MR. WEISBERG: We will do that. The only further

1 clarification from what Mr. Sanderson just said is I
2 believe that there are two IRs, 13.1 and 13.2, that
3 don't relate directly to generation information.

4 That's the --

5 THE CHAIRPERSON: And they were not on Mr. Sanderson's
6 list. You will be getting those on Friday, on my
7 notes.

8 MR. SANDERSON: That's right, I was just going to rise to
9 say that, Mr. Chairman. They're not on my list of the
10 ones that I'm advised, at least today, that we know we
11 aren't going to be able to get done by Friday. So my
12 hope is, you'll have those Friday. It's only the 11
13 series that will not be filed by then.

14 MR. WEISBERG: Very helpful. Then we will do our utmost
15 to accommodate the January 5th deadline for intervenor
16 evidence.

17 THE CHAIRPERSON: Okay.

18 MR. WEISBERG: And to distinguish between the two types
19 of evidence, if I can call it that.

20 THE CHAIRPERSON: In fact, Mr. Sanderson, on my notes,
21 portions of the 11 series you will be filing on
22 Friday. 11.1 --

23 MR. SANDERSON: Yes, that is true. To be precise, if I
24 can again, according to my notes, anyway -- the ones
25 that we know we won't make Friday on are 11.2, 11.4,
26 11.5 and 11.10.

1 THE CHAIRPERSON: So you will get some answers by the end
2 of the week --

3 MR. WEISBERG: Very good.

4 THE CHAIRPERSON: -- with respect to 11.1 and it will be
5 easy enough to check, but in any case, you're going to
6 get portions of series 11, if you can accommodate Mr.
7 Sanderson on a reasonable-efforts basis, I'd encourage
8 you to do that.

9 MR. WEISBERG: We will do everything we can. Thank you.

10 THE CHAIRPERSON: Is there anyone else who wishes to
11 speak to the regulatory timetable?

12 Are there any other matters that anyone
13 wishes to --

14 MR. FULTON: Mr. Sanderson can go first, Mr. Chairman.
15 It is Christmas.

16 MR. SANDERSON: Don't be so generous, Mr. Fulton.

17 Mr. Chairman, I'm only rising because
18 there's one matter that was raised earlier, I'm not
19 sure whether Mr. Tennant is still here, but Vanport
20 Sterilizers Inc. did raise an issue with respect to an
21 outstanding IR. And for the record, there is a letter
22 dated December 22nd, which I think is today, which we
23 had not previously seen, which is the third in a
24 series of letters.

25 MR. FULTON: And that letter should be marked now, Mr.
26 Chairman, as Exhibit 39-3.

1 (LETTER FROM VANPORT STERILIZERS DATED DECEMBER 22,
2 2004 MARKED EXHIBIT 39-3)
3 MR. SANDERSON: The difficulty we'd had with the first
4 two letters was, it wasn't clear to us they disclosed
5 a question which was appropriate for IR. I think that
6 to the extent that there is a question now identified
7 by virtue of Exhibit 39-3, it's become compellingly
8 apparent that the question is out of scope. It is a
9 question that relates to the GSX Pipeline, and just to
10 show that no matter what B.C. Hydro does in this,
11 somebody's going to be unhappy. The question as I
12 understand it is: Why on earth have you given up on
13 GSX? And that is clearly, in my respectful
14 submission, outside the scope of the proceeding as
15 you've defined it.

16 **Proceeding Time 6:42 p.m. T13B**

17 THE CHAIRPERSON: Mr. Tennant, you are still here.

18 MR. TENNANT: Mr. Chairman, B.C. Hydro said that they
19 would respond earlier to our requests for a -- or they
20 would recognize and respond to our exhibits and this
21 hasn't happened, so I'd request that you order them to
22 come up with a formal response to our two earlier
23 exhibits, please.

24 THE CHAIRPERSON: I suspect because your letter of
25 December 22nd provides more clarity for B.C. Hydro with
26 respect to what you may have been asking in the first

1 two letters, that Mr. Sanderson's position is that
2 your request is out of scope. My suggestion, Mr.
3 Tennant, if this is satisfactory to you and Mr.
4 Sanderson, is that you leave this letter with the
5 Panel. We'll make a determination as to whether or
6 not it's in scope or out of scope and advise you in
7 writing of that.

8 MR. TENNANT: I would appreciate that. Thank you.

9 THE CHAIRPERSON: Thank you.

10 MR. WALLACE: Mr. Chairman, I have simply one information
11 response where we got what we would call an inadequate
12 response or a misunderstood response. I'm not sure if
13 we should deal with that now or if that could simply
14 be dealt with a written process which I'd commence
15 tomorrow morning by sending a letter to Mr. Sanderson
16 alerting him to it, and either get a response or an
17 objection, in which case I could write to the
18 Commission.

19 THE CHAIRPERSON: What's your preference, Mr. Sanderson?

20 MR. SANDERSON: I think at this time of night a written
21 process like that is just fine.

22 THE CHAIRPERSON: Okay.

23 MR. WALLACE: Thank you, Mr. Chairman.

24 THE CHAIRPERSON: Mr. Steeves would like to speak again.

25 MR. STEEVES: Thank you, Mr. Fulton. Mr. Chairman, I
26 would like to back up and basically raise the issue of

1 B.C. Hydro's pleading major burden on the questions of
2 IRs. I would have brought up this question or issue
3 last Friday. However, because of the sequence of
4 things that happened I didn't manage to do so.

5 So I would like to start just by a quick
6 backup and say that I would sympathize with B.C.
7 Hydro, perhaps even empathize with them, with regards
8 to all the questions that they have received, the 904
9 questions. Many of these questions would definitely
10 be material that would be out of scope and would
11 seriously burden on B.C. Hydro in order to acquire the
12 information.

13 And the second point would be the
14 intervenors would be coming to this hearing process
15 with different amounts of experience and knowledge,
16 and hence they would have a very large number of
17 questions.

18 And the third point would be that there
19 would be a large redundancy in the intervenor
20 questions that would be presented.

21 And fourth, the lack of organization among
22 the intervenors would cause sort of a mass amount of
23 confusion which has occurred, which we witnessed last
24 Friday.

25 Also there had been comments within the IR
26 or the intervenors' responses, for example, Mr. David

1 Lewis, Mayor of the Village of Gold River, in his
2 letter of December 21st under the paragraph "With
3 regards to the timetable and schedule," on page 2. He
4 makes a number of points there.

5 However, at this point in time I would want
6 to bring up this issue of extraordinary burden
7 argument which was detailed on the transcripts of
8 December 17th, Volume 3, page 390, Volume 2, [sic] in
9 which B.C. Hydro claims, I would have to say, would be
10 fallacious. This is issue of burden is a problem of
11 B.C. Hydro's own making, and it is B.C. Hydro that is
12 setting the confined timetable -- that's on line 4 of
13 the same page -- for this review. And the question
14 is, if there were no schedule or timetable for this
15 review, would there be any burden? And in my opinion,
16 no, not likely, and hence as far as we know or I know
17 the world will not come to an end on February 18th if
18 this schedule is not met. So what's the rush?

19 **Proceeding Time 6:47 p.m. T14B**

20 Now with this in mind I'd like to remind
21 the Commission of my own earlier statement that I gave
22 to the Commission on transcript November 29th, Volume
23 1, page 121, lines 20 to 25, just to very quickly
24 rephrase it.

25 "B.C. Hydro may have a time limit but the
26 people of B.C. do not."

1 And I would still hold and maintain this position.
2 And so now from my own limited understanding of the
3 law I happened to go down to the library on the
4 weekend and check a couple of business law library
5 texts and -- now again I'm not a lawyer and I'm trying
6 to fit this process or proceedings or the problem into
7 some type of context in which to put it.

8 Now just to be very brief here, the way I
9 saw it, if we may assume that B.C. Hydro is the
10 defendant and the intervenors here are the plaintiffs,
11 the situation that I would see this being into is
12 under the law of torts where the situation would be a
13 case of negligence and the -- I believe it's -- the
14 test that they used is, to use the Latin phrase, *res*
15 *ipsa loquitur*, "things speak for itself." In this
16 situation the defendant, B.C. Hydro, must prove
17 itself; i.e. it must prove its burden, provide the
18 information and hence this is what they have to do.

19 And why am I raising this issue? Well, my
20 position is that B.C. Hydro requests relief of burden
21 on their Exhibit B-8 and that is not acceptable. If
22 anything, B.C. Hydro should not be allowed to claim
23 relief of burden with impunity. B.C. Hydro has to be
24 both accountable and responsible for its actions and
25 before this hearing and to the people of B.C.

26 So in conclusion there has to be some sort

1 of consequence to B.C. Hydro if it is to be permitted
2 relief of the burden. And they can't have it both
3 ways. If they don't get the burden, well, then they
4 shouldn't get the schedule. If they want the schedule
5 then they should have to have the burden. Is that
6 fair? That's what I'm asking.

7 So I'll leave it at that and I'll leave it
8 with you. Thank you very much.

9 THE CHAIRPERSON: Thank you, Mr. Steeves. Mr. Fulton,
10 you've been trying to get on your feet.

11 MR. FULTON: Two of the three matters have now been
12 removed from our list, Mr. Chair, and the last one
13 that I have relates to the Town Hall meetings. I am
14 coordinating the presenters at this point and I have
15 had one request relating to two items. First, whether
16 PowerPoint facilities will be available. I understand
17 that the hearing officer can take a screen and a
18 projector and a cable but that the parties would need
19 to bring their own computers with the PowerPoint
20 loaded on it so there may be some PowerPoint
21 presentations. That will be communicated with them.

22 There was also a request from the same
23 individual about: What are the issues that they can
24 deal with? My proposal would be that I reference them
25 to transcript 309 to 315 in transcript 453. 453 was
26 the transcript reference where you will find the T1,

1 T2, no award. And it may well be that a letter from
2 the Commission in that respect would be helpful to
3 them or certainly the information on the website
4 relative to the issues that are in scope at this
5 point.

6 THE CHAIRPERSON: You're suggesting that the Commission
7 send the --

8 MR. FULTON: The Commission secretary send out a
9 broadcast e-mail for the purposes of the Town Hall
10 meeting. The issues that the Commission will be
11 considering are those issues that -- or the matters
12 that are in scope are those that are found at the
13 transcript references that I have referred to and also
14 that there will be certain equipment available but if
15 people want to do PowerPoint they should bring their
16 own computer and ideally a hard copy of the
17 presentation in advance would be helpful as well.

18 THE CHAIRPERSON: It's not -- and I don't think you were
19 suggesting this, Mr. Fulton, but it's not my intention
20 to confine the presentations on January the 15th to the
21 scope of this proceeding. But I am going to insist
22 that the presentations be confined to ten minutes.
23 And if that can be accommodated, using a PowerPoint
24 presentation, that's satisfactory. But they do need
25 to be confined to the ten minutes.

26 **Proceeding Time 6:52 p.m. T15B**

1 MR. FULTON: Yes. I had taken it, Mr. Chairman, that
2 while there are issues that we have scope for these
3 proceedings, that there was going to be some latitude
4 for people to depart from those issues, within reason.

5 THE CHAIRPERSON: Yes. Yes.

6 Are there any -- I hesitate to ask -- are
7 there any other matters before we close this pre-
8 hearing conference?

9 VOICES: Merry Christmas.

10 THE CHAIRPERSON: And you too. We're closed.

11 **(PROCEEDINGS ADJOURNED AT 6:53 P.M.)**

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