

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.
January 19, 2005

REDACTED PROCEEDINGS IN CAMERA

BEFORE:

R. Hobbs,	Chairperson
L. Boychuk,	Commissioner

VOLUME 8

CAARS

VANCOUVER, B.C.

January 19th, 2005

IN CAMERA SESSION

(PROCEEDINGS RESUMED AT 11:17 A.M.)

THE CHAIRPERSON: Please be seated.

I think, Mr. Soulsby, we should return to
the results summary.

MS. HEMMINGSEN: A: Right. And we were actually
troubled by this outcome, and we explored whether,
within the rules, we'd have an opportunity to

And we confirmed with the independent
review that we couldn't. We would be violating the
selection on the lowest-cost dollar basis.

THE CHAIRPERSON: This may be an area where I can add
some value to customers. And I thought your answer
would be just what it is, that but for the rules of
the CFT, you would have chosen

It may be -- I don't know enough about
this yet, but it may be that

1 is helpful in moving
2 us to the outcome that's in the customer's best
3 interest.

4 So you know now what I want to try to do.
5 I need your help in telling me how I can get there.

6 **Proceeding Time 11:19 a.m. T33**

7 MS. HEMMINGSEN: A: Per the rules, because we explored
8 this. This was a significant issue for us. Per the
9 rules of the CFT we had to select

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14 to mitigate the Terasen
15 impacts. So perhaps that could be a recommendation
16 that stems from the decision that the contract is
17 supportive but it's recommended that B.C. Hydro secure

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19 THE CHAIRPERSON: But you now have DPP bound by contract.
20 You have DPP bound by contract

21 . If the Commission issues a decision that
22 approves portfolio three -- and this is a legal
23 question I suppose,

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26 Are both bids live, I suppose is
the question.
MS. HEMMINGSEN: A: My sense would be no, that they are
not, and furthermore I'd probably have some concerns

1 about overturning the competitively determined
2 outcome. I think you can get to the same -- because
3 basically wouldn't that mean you'd disallow the
4 contract and you'd be superimposing another contract
5 over top of that? Whereas if we can reach an
6 accommodation where we could achieve those terms as a
7 that
8 would be a better outcome than the Commission
9 endorsing the portfolio.

10 MR. SANDERSON: Mr. Chairman, although I was not
11 advising and can't tell you what the legal advice is
12 with respect to the obligations under the CFT, my
13 general understanding is this, that Ms. Hemmingsen is
14 exactly correct. The only binding commitment between
15 the parties is the EPA as it's been filed with the
16 Commission. Within the CFT process there's not an
17 ability to chose anything other than a winner under
18 that and it would be a rigid process.

19 **Proceeding Time 11:22 a.m. T34**

20 Having said that, once the CFT process is
21 complete, the commitment is recognized, as always, it
22 is free
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25 And so while you can't, from
26 Hydro's perspective, require it -- that is, B.C. Hydro

1 can't require it; given the history here, it certainly
2 can request it, and do it by

3 MS. HEMMINGSEN: A:

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15 THE CHAIRMAN: But then you'd be asking the panel to
16 approve a sub-optimal portfolio because of regulatory
17 parameters that were established in the earlier
18 decision. And that seems somewhat abhorrent to me. I
19 hate to think that regulatory decisions lead to
20 uneconomic outcomes. And what Mr. Sanderson is
21 suggesting is an approval of the sub-optimal project
22 in the hopes that the parties reach an accommodation
23 that leads to the optimal outcome.

24 MR. SANDERSON: Mr. Chairman, just to be -- with respect,
25 a little more precise as to what I meant, not maybe
26 what I said, because I think you probably captured

1 what I said; but what I meant was this.

2 The best project, Hydro's argument will be,
3 that has been presented for approval, that exists in
4 reality --

5 MS. HEMMINGSEN: A: Yeah.

6 MR. SANDERSON: -- and in fact, is the one that has been
7 filed. The EPA is the only project -- or, it's not
8 the only. It is the most cost-effective project for
9 which there exists the agreements necessary to come
10 forward to you and seek --

11 MS. HEMMINGSEN: A: Approval.

12 MR. SANDERSON: -- a determination of whether it should
13 be allowed to proceed. So this Commission will be
14 doing exactly what, in my respectful submission, and
15 I'll say this in final argument, it ought to be doing,
16 which is approving what is best amongst the
17 opportunities that are now available.

18 **Proceeding Time 11:25 a.m. T35**

19 There is nothing to stop the Commission,
20 and there's nothing stopping the parties from acting
21 on the Commission observing that if certain things
22 were to happen, then there might be a better one. And
23 if those things do happen -- that is, both parties see
24 it in their mutual interest to revise the agreement in
25 a particular way, then obviously that observation by
26 the Commission will be a significant incentive to the

1 parties to do it and an encouragement for them to do
2 it.

3 But the Commission is not going to be
4 approving a suboptimal results because the ultimate
5 results are not ones which it's capable, or anyone
6 else is capable of making happen at this stage,
7 because we don't know what the pronponent is going to
8 do. The pronponent doesn't have to say yes. And
9 neither B.C. Hydro nor the Commission, with great
10 respect, can make the pronponent say yes, the pronponent
11 being , if you take my meaning.

12 MS. HEMMINGSEN: A: The other thing that Mr. Eckert has
13 just identified is there is an opportunity to make a
14 change that would not be reasonably expected to have
15 an adverse consequence to the parties. So possibly it
16 could be worked into a contractual amendment that
17 would be required to the extent

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26 COMMISSIONER BOYCHUK: Just to go back to your point, Mr.

1 Sanderson, your argument to us would be that we
2 approve the contract as filed and make suggestions, am
3 I understanding that correctly? Or are we in a
4 position to -- let's say we didn't accept that
5 position, to say we're entitled under the Act to not
6 enforce certain provisions.

7 Is there some way that we would be in a
8 position to have more weight or more motivation for
9 the parties to come up to something, not approve the
10 EPA unless certain conditions are met, or certain
11 provisions are included?

12 MR. SANDERSON: Commissioner, it will be my submission in
13 argument that the Commission does not have
14 jurisdiction to define what a contract ought to be.
15 In other words, it has a contract before it. It can
16 seek -- it can prohibit all or part of that contract
17 from being enforced, but it can't write the contract
18 and then compel the parties to act pursuant to it.
19 Much as in the circumstance we might have it
20 otherwise, I think that will be the position with
21 respect to your powers under Section 71.

22 MS. HEMMINGSEN: A: Yeah.

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24 MR. SANDERSON: I understand the separate point, which is
25 that perhaps under the CFT that there's an ability to
26 do something, and that's not something I'm prepared to

1 speak to right now. But speaking narrowly to
2 Commissioner Boychuk's question in terms of the powers
3 under Section 71, my view is it doesn't confer the
4 ability to write a contract, if you want, on the
5 Commission.

6 COMMISSIONER BOYCHUK: Mr. Sanderson, haven't we already
7 done that previously though? I don't have it in front
8 of me, but didn't Dr. Jaccard when he was chairman of
9 the Commission make a suggestion with respect to
10 another Section 71 application? I don't have it with
11 me now, but I thought we had done that previously,
12 that there was some scope in terms of the actual
13 provisions of the contract.

14 Mr. Fulton, can you assist me, was that
15 with West Kootenay Power or something like that?

16 MR. FULTON: I'm sorry, I don't have any present
17 recollection of that, Commissioner Boychuk.

18 COMMISSIONER BOYCHUK: Okay.

19 MR. SANDERSON: I confess I don't. I will also observe
20 that B.C. Hydro and Dr. Jaccard didn't always see eye
21 to eye with respect to the jurisdiction of the
22 Commission.

23 COMMISSIONER BOYCHUK: We're not to argue the legal
24 aspects of it, but I just wanted to raise that because
25 I appreciate your strong position will be what you've
26 suggested it will be, and I'm trying to understand

1 what our options might be, given your legal position
2 and what this Commission has done in the past,
3 recognizing that we're not bound by precedent.
4 MR. SANDERSON: You've given me a strong encouragement to
5 look for that decision.
6 THE CHAIRPERSON: It's the decision for the approval of
7 the transfer of the Brilliant Dam. There's a 60-year
8 contract on Brilliant, and if you look at that
9 decision, that will answer the question for you. But
10 on my recollection it's not inconsistent with the
11 position you've just taken, Mr. Sanderson.

12 It was done in a manner that suggests to me
13 that we should explore here, and that is Dr. Jaccard
14 sent the parties back to further negotiations and said
15 that the pricing provisions for the latter 30 years of
16 the contract were unsatisfactory and that he wasn't
17 going to approve the contract unless there was a
18 change made. The parties came back with a change and
19 then he approved the contract.

20 **Proceeding Time 11:30 a.m. T36**

21 It wasn't in the context of a CFT, which
22 makes it more difficult to do, and also was -- there
23 was less risk to Dr. Jaccard that he was going to lose
24 the deal altogether than there might be here, although
25 that is difficult to assess. But in that case he had
26 a utility and somebody he had considerable moral

1 suasion over, and perhaps more than in this context.

2 But nevertheless that approach may have
3 some merit in it. I'd like your comments now with
4 respect to whether there is any merit in that
5 approach.

6 MR. SANDERSON: Mr. Chairman, let me just define the
7 approach and then we should discuss whether it's
8 appropriate to address that now or whether we can
9 address that as part of argument.

10 If I understand your suggestion it would be
11 -- would it be sensible for the Commission to
12 indicate, I suppose, based on what it is privy to,
13 that the record might not otherwise be, that it
14 doesn't view the result that has been put forward as
15 optimum in the larger sense, that therefore under
16 Section 71 the contract isn't approved, but indicate
17 that it would be if, and then lay out what the terms
18 of the "if" would be.

19 I think that's something that I frankly
20 hadn't contemplated as a particular way. Legally, I
21 completely agree with you, it's distinct from the
22 questions that Commissioner Boychuk asked, and my
23 strong position as she characterized it does not
24 attach to the suggestion you are making. Clearly it's
25 within your powers to reject a contract and clearly
26 it's within your powers to say why and to speculate

1 about what might be different in different
2 circumstances.

3 So the issue is not so much a
4 jurisdictional one as it is a policy one and I think
5 I'd like to confer with Hydro before I certainly say
6 anything about it. And I think it's probably
7 something Hydro wants to think about pretty carefully.
8 Because there are, I think, policy implications to
9 taking that approach, and if you are asking for a
10 policy response then Hydro should have the opportunity
11 to think about that.

12 MS. HEMMINGSEN: A: And I also want to have that
13 opportunity but there's a couple of considerations
14 that we can talk about right now. I mean, I would be
15 concerned about overturning the competitive process
16 based on the rules. I agree that we all have a
17 concern that it didn't produce the cost effective --
18 the most cost effective outcome in terms of what was
19 bid in. That was a bit of a trade-off in the
20 simplification of the model.

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It sets a policy direction going forward that possibly is a good thing, as well as B.C. Hydro, in designing its contracts put in those provisions to have the option to secure that extra capacity or output on a first right of refusal basis. So it's not necessarily a bad policy directive.

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I mean, I agree with Mr. Sanderson that we'd want to consider that further.

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THE CHAIRPERSON: I think we should. So I'd ask you to do that. That means that we'll need to have another in-camera session in order to do that.

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Proceeding Time 11:35 a.m. T37

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MR. SANDERSON: Mr. Chairman, there is an element of cost-effectiveness here, so maybe we can deal with this again at the end of Panel 4. As well, I think this debate should be on the record. That is, I think we should find a way to have this discussion, as much as we can, off the confidential record, and I don't have a suggestion right here as to how we can do that, but I think we need to find a way, if we're going to have this debate, to make it a public debate, because I think it's -- you know, it's a pretty central issue. And it's not really unique to this particular outcome.

1 So we need to find a way to let people make
2 submissions on this in argument, I think.

3 MS. HEMMINGSEN: A: Right.

4 THE CHAIRMAN: What occurs to me, Mr. Sanderson, that --
5 it may not be breaching confidence for the disclosure
6 of the fact that there is a bid that is optimal for
7 customers than the winning bid, and I think that opens
8 it up for public comment, if -- you know. That may be
9 all that's necessary to fully open it up.

10 MR. SANDERSON: I agree. And what I would like to do is
11 consult with counsel who are advising with respect to
12 the CFT process, who as I've said is not me, as to
13 whether that disclosure is a concern within that
14 process. I mean, that process in some sense is still
15 alive, and I would like to just take advice from them
16 as to whether that -- whether we could do something
17 like that. Because I agree with you, it -- if we can,
18 then it may be as simple as you've suggested.

19 MS. HEMMINGSEN: A: I think that's an important
20 consideration. A related consideration in terms of if
21 the action would be to overturn the contract, that
22 could possibly be detrimental to future calls, because
23 proponents could then come in and kind of target
24 specific terms and conditions that benefited them, you
25 know, and put that in front of the Commission, which
26 could add to the kind of regulatory burden that we

1 would all face. So I think that's an important
2 consideration, that it doesn't sort of set up for a
3 lobbying kind of effort in front of the Commission, to
4 change terms to the benefit of proponents. Not to
5 ratepayers.

6 THE CHAIRMAN: What helps, though, if we look at the
7 numbers.

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9 MS. HEMMINGSEN: A: Yeah.

10 THE CHAIRMAN: And that may help with respect to that
11 concern. It may be that we are able, because of that,
12 to restrict this to just

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14 MS. HEMMINGSEN: A: Yeah. It just raises the spectre
15 of kind of setting up that expectation in the future.

16 THE CHAIRMAN: Yeah. How often, though, would one expect
17 that there would be an optimal project, from the
18 customer's perspective, that's not the winning bid?

19 MS. HEMMINGSEN: A: Right. And it relates to some of
20 the questions you asked me, is that, you know, we need
21 to look at this process and determine what are kind of
22 some of the appropriate parameters of it, and what are
23 some things that also didn't work, and one of our
24 obvious objectives out of this is to have somewhat
25 more flexibility and discretion, so we can avoid this
26 type of situation occurring.

1 THE CHAIRMAN: Right.

2 MS. HEMMINGSEN: A: I mean, it did -- I'm very pleased
3 that you zoned in on this, because it did trouble us,
4 as well.

5 THE CHAIRMAN: Sure.

6 Mr. Fulton?

7 MR. FULTON: I did want to say on the record that I share
8 Mr. Sanderson's concerns about a certain amount of
9 this having to be on the public record, to the extent
10 that we can, because otherwise I think it is very
11 problematic, and it may well be that ultimately after
12 Mr. Sanderson's taken his instructions, that he and I
13 can come to a -- come up with a proposal that will be
14 satisfactory to the Chair, and will involve the other
15 participants to these proceedings.

16 **Proceeding Time 11:40 a.m. T38**

17 THE CHAIRMAN: Yeah. I think, it's my impression,
18 anyway, that everyone agrees, fully agrees with any
19 effort to disclose what is not confidential. And to
20 do in a way that makes this a public debate.

21 I think that's as far as we can go now. I
22 think your suggestion, Mr. Sanderson, in dealing with
23 this at the end of Panel 4, is -- has some
24 considerable merit, just in terms of the flow of the
25 hearing. Ms. Hemmingsen is back, the -- this is an
26 issue -- this is an important issue. And it's one

11 MR. FULTON: Mr. Chairman, I do want to speak to the
12 point of having more than one *In Camera* session, and
13 it's to this effect -- that we've indicated that there
14 are potentially two *In Camera* sessions. My concern
15 would be that if we start adding *In Camera* sessions to
16 this proceeding, that we can't accomplish in the two,
17 that there will be a heightened level of concern from
18 the other participants, and the public, that decisions
19 are being made outside the public process. So to the
20 extent that we can keep the number of *In Camera*
21 sessions to two, that would be my preference and my
22 recommendation.

24 THE CHAIRMAN: Maybe to assist that, then -- so that we
25 can try to accomplish that, although I think the
26 public interest always trumps that; but nevertheless,

1 if you were to respond in writing, Mr. Sanderson, as a
2 result of the issues that are -- or with respect to
3 the issues that are raised now in confidence, that
4 will give the panel an opportunity to review that so
5 that the next *In Camera* session may very well be the
6 last one. And we can -- and if there are issues that
7 arise as a result of that, that lead to us issuing a
8 confidential letter, that may be preferable, Mr.
9 Fulton, if that's your advice, to a series of *In*
10 *Camera* sessions. Replace a series of *In Camera*
11 sessions with some confidential document exchanges. I
12 find this much more helpful, though. I mean, it's
13 much more dynamic.

14 MR. SANDERSON: Mr. Chairman, I think I favour Mr.
15 Fulton's suggestion that in terms of whether to
16 respond in writing or a second session, et cetera,
17 once I've received instructions, I'll talk to Mr.
18 Fulton and we'll jointly, maybe, come up with a
19 suggestion as to what the best way to proceed is,
20 bearing in mind both what Mr. Fulton said and what you
21 said.

22 THE CHAIRMAN: Right. I also think it's preferable if
23 counsel provides comments with respect to this *In*
24 *Camera* session, than I do. I will confirm that, what
25 you have said, but I'd prefer that counsel speak to
26 whatever needs to be spoken to, when we return at 2

1 o'clock. Is that satisfactory?

2 MR. SANDERSON: Yes, Mr. Chairman. Again, Mr. Fulton and
3 I will work out what that implies for us both, but we
4 take the direction.

5 MR. FULTON: And if we have some difficulties over what
6 might be said, we will be back before you, Mr.
7 Chairman.

8 THE CHAIRMAN: Fine. Thank you. Are there any -- is
9 there anything else anyone wishes to raise before we
10 -- okay.

11 We are adjourned, then, until 2 o'clock.

12 **(PROCEEDINGS ADJOURNED AT 11:45 A.M.)**

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