MEMORANDUM OF ARGUMENT

PART I: FACTS

1. This is an application to vary the Order of Mr. Justice Thackray denying leave to appeal Order L-10-05, rendered January 27, 2005 and Order E-1-05, rendered February 17, 2005 (the "Decisions") of the British Columbia Utilities Commission (the "Commission"). The Decisions concern the approval process for an Electricity Purchase Agreement (the "EPA") between the British Columbia Power and Hydro Authority ("BC Hydro") and Duke Point Power Limited Partnership ("DPP"). Under the DPP EPA, BC Hydro will purchase, for at least 25 years, the output from a gas-fired electricity generation plant that DPP proposes to construct at Duke Point, near Nanaimo.

2. This Application is brought by the Joint Industry Electricity Steering Committee (the "JIESC"), an association of many of the major industrial purchasers of electric power in British Columbia.

3. Additional background facts leading up to the application for leave to appeal are set out in Part 1 of the Applicant's Memorandum of Argument for Leave to Appeal found at Motion Book Volume 3, Tab 2.

PART II: POINTS IN ISSUE

4. Did the Chambers Judge err in principle or law in denying leave to appeal?

   (a) Did the Chambers Judge err in law by applying too stringent a test in determining whether leave to appeal should be granted?

   (b) Did the Chambers Judge err in principle or law in failing to recognize that the Commission breached the rules of natural justice by directing, as a condition of approval of the EPA, that BC Hydro enter into a long term firm contract for gas transmission for the Island Cogeneration Plant at Elk Falls, when the possibility of such a requirement was never a part of the Duke Point EPA Approval Proceeding?

   (c) Did the Chambers Judge err in principle or law by failing to consider whether the Commission should have adopted reasonable alternative means to allow disclosure of critical information behind the determination of the principle issue in the EPA Approval Proceeding, while preserving commercial confidentiality?

(d) Did the Chambers Judge err in principle or law by making a determination of the prospects of success on the issue of reasonable apprehension of bias, rather than deciding whether there was a substantial issue to be argued?

PART III: ARGUMENT

Test on an application to review

5. The test that ought to be applied by a reviewing court on an application to review an order of a Chambers Judge was set out in *Haldorson v. Coquitlam (City)*, where Lambert J.A. stated that the Court on the review must ask:

a) was the justice wrong in law?

b) was the justice wrong in principle?

c) did the justice misconceive the facts?

Haldorson v. Coquitlam (City) (2000) 5 CPC (5th) 225 (Tab 2 of Book of Authorities)

6. An application to discharge or vary a denial of leave to appeal by a Chambers Judge was recently allowed by a panel of this Court in a case where the Chambers Judge had denied leave on the ground that the appeal was unlikely to succeed. Writing for a unanimous panel, Hall J.A. stated "I, myself, have formed no concluded views on the matter, but I would say there exists a serious issue to be argued."

Dalhuisen v. Maxim's Bakery Ltd. 2002 BCCA 541 at para. 7 (Tab 1 of Book of Authorities)

(1) The Chambers Judge erred in law by applying too stringent a test in determining whether leave to appeal should be granted

7. Section 101(1) of the *Utilities Commission Act* provides that "an appeal lies from a Decision or Order of the Commission to the Court of Appeal with Leave of a Justice of that Court".

Utilities Commission Act, s. 101(1)

8. In *Queens Plate*, Taggart J.A. expressed the test for granting leave to appeal as "whether there is some prospect of the appeal succeeding on its merits". He further cautioned that there is "no need for a justice before whom leave is argued to be convinced of the merits of the appeal as long as there are substantial questions to be argued".

Queens Plate Development Ltd. v. British Columbia (Assessor of Area No. 9 – Vancouver) (1987) 16 B.C.L.R. (2nd) 104 (C.A.) at p. 109-110 (Tab 6 of Book of Authorities)

9. This test was further developed by this Court in *Omineca Enterprises Ltd. v. (British Columbia) Minister of Forests.* In that case a Chambers Judge had denied leave to appeal because in his view the appeal had no realistic possibility of success. Southin J.A., speaking for the panel, noted that there was a subtle distinction between that test and whether there were substantial questions to be argued. The proper test in the Court's view was whether there were substantial questions to be argued. Madam Justice Southin noted that "if a proposition is <u>not wholly devoid of merit</u>, it raises a substantial question to be argued" (emphasis added).

Omineca Enterprises Ltd. v. (British Columbia) Minister of Forests
(2000), 91 B.C.L.R. (3d) 74 (C.A.) at para. 16 (Tab 4 of Book of Authorities)

10. The phrase "wholly devoid of merit" illustrates that the threshold on leave to appeal applications is relatively low, recognizing the limits on time and materials available for consideration by the Court during the Course of a Leave Application. A Leave Application is not intended to be a full and final review of the merits of an appeal.

11. The Chambers Judge appears to have applied a more onerous test, failing to cite *Omineca*, and instead citing earlier cases that suggest a requirement that the Applicant demonstrate that the Appeal is "meritorious", or "prima facia meritorious" a stronger test than that applied in *Omineca*. While the distinction between a "realistic probability of success" and "substantial questions to be argued" is a subtle one, as noted by Southin J.A. in para. 13, it is an critical one.

Re: Consumers Association of Canada (B.C. Branch)
[1994] B.C.J. No. 3152 (C.A.) (Tab 8 of Book of Authorities)
Reasons, para. 25 (Motion Book v. 1, Tab 1)

12. While the Chambers Judge mentioned the "substantial question to be argued" test, it is clear from the balance of the reasons, discussed in more detail in the later sections of this submission, that he denied the leave application based on his determination that there was "no reasonable prospect of success for the appellants in the appeal". It is submitted that "no reasonable prospect of success for the appellants in the appeal" is a rewording of the "realistic probability of success" test rejected by this Court in *Omineca* at para. 13 and 16 and that accordingly reliance on that test constitutes an error.

Reasons, paras. 73 and 74 (Motion Book v. 1, Tab 1)

(2) The Chambers Judge erred in principle or law in failing to recognize that the Commission breached the rules of natural justice by directing, as a condition of approval of the EPA, that BC Hydro enter into a long term firm contract for gas transmission for the Island Cogeneration Plant, when the possibility of such a requirement was never a part of the Duke Point EPA Approval Proceeding.

13. The Approval of the Duke Point EPA required the Commission consider the arrangements between Terasen and BC Hydro for the delivery of natural gas to Duke Point to fuel the generation plant to be built there. The Duke Point Plant was designed to burn only natural gas and accordingly, it was not unreasonable for the Commission to require a "firm" rather than an "interruptible" gas transmission contract between BC Hydro and Terasen to ensure a fuel supply was available to the plant to provide the reliable provision of electricity pursuant to the DPP EPA.

14. BC Hydro currently purchases electricity from a different and entirely unrelated electricity generation plant on Vancouver Island, the Island Co-Generation Plant (ICP) pursuant to a separate long term contract. The ICP plant, unlike Duke Point Plant, is dual fired. That is it can be fuelled by gas or oil, and accordingly does not require an agreement for firm gas transportation with Terasen. The JIESC estimates the cost to BC Hydro, and its customers, of entering into a firm contract with Terasen, instead of an interruptible contract that reflects the flexible nature of the service ICP requires, is in excess of $4 million per year and could be much higher, as a firm contract limits cost management and mitigation by BC Hydro.

Affidavit of L. Guenther, para 10 (Motion Book v. 1, Tab 5)

15. The subject of BC Hydro's gas transportation arrangements with Terasen for the delivery of natural gas to the ICP facility at Elk Falls was never raised by the Commission, BC Hydro or the Intervenors during the course of the Duke Point EPA proceeding. Furthermore, whenever ICP was raised in other contexts, BC Hydro was adamant that ICP was not part of this proceeding.

Affidavit of L. Guenther, para. 11 (Motion Book v. 1, Tab 5)

Transcript, p. 410 (Exhibit "G" to Affidavit of A. Leoni, Motion Book v. 2)

16. In spite of the fact that the gas transportation arrangements for ICP were never raised, in the Decision granting approval of the EPA, the Commission stated that:

> Any acceptance of the EPA by the Commission panel will be subject to BC Hydro purchasing firm gas transportation service from TGVI [Terasen Gas (Vancouver Island) Inc.]...to serve both the DPP plant and the ICP.
>
> Decision, p. 58 (Motion Book v. 1, Tab 3)

17. The importance of the gas transportation arrangements for the customers lies in the costs cited previously. The importance of the gas transportation arrangements to the approval of the DPP EPA is clearly confirmed by the fact that the requirement to enter into these firm transportation arrangements is the <u>only</u> condition on the approval of the plant. Nothing else about the application was elevated to this status. This requirement is not a secondary matter, it is fundamental, and yet no notice was given to anyone that the Commission was considering it at all.

18. The JIESC would have wanted to address such an important long term firm commitment had it known it was under consideration because the costs of firm gas transportation service will have a serious impact on members of the JIESC and all BC Hydro ratepayers in British Columbia.

Affidavit of L. Guenther (Motion Book v. 1, Tab 5)
Affidavit of D. Potts (Motion Book v. 1, Tab 4)

19. The Chambers Judge misconceived the facts by stating that "it seems clear that this issue was dealt with to some extent at the hearing and that the applicants were aware of the matter". While a firm gas transportation agreement with regard to the DPP plant was contemplated and discussed in the proceeding, such an agreement was never contemplated or in any way raised in connection with the ICP Plant. Rather, on those few occasions when issues related to ICP were raised during the proceeding counsel for BC Hydro took the position that they were outside the scope of the proceeding.

Reasons, paras. 58 and 59 (Motion Book v. 1, Tab 1)
Transcript, p. 410 (Exhibit "G" to Affidavit of A. Leoni, Motion Book v. 2)

20. The Chambers Judge appears to have accepted BC Hydro's argument that the Applicants will have the opportunity to argue the matter of the requirement of a firm gas transportation agreement for the ICP before the Commission when the rate agreed between TGVI and BC Hydro is brought forward for approval. (Reasons para. 60) This is incorrect. When the rate is brought forward for approval the contract will be submitted on the basis that BC Hydro was ordered to enter into it by the Commission, and the issues that will be discussed will be around the rate to be charged for firm service not whether firm service is required as determined in this proceeding.

21. The Chambers Judge states "I fail to understand how this 'subject to' provision could be said to undermine the legal correctness of the Committee's decision, or to impugn it procedures". (Reasons para. 61) In making the EPA subject to a firm gas transportation agreement for the ICP even though that issue was not before it, the Commission committed an error in law and excess of jurisdiction. None of the parties had any notice that the Commission would consider gas transportation to ICP as part of this proceeding, and accordingly were not able to properly argue against the requirement for a firm gas transportation agreement for the ICP.

22. Where a tribunal treats an issue as relevant which it initially treated as irrelevant, there is an obligation to allow parties to deal with the newly emerging concerns. Failure to do so results in a breach of the rules of natural justice. It is this breach of natural justice which undermines the legal correctness of the Commission's decision. By failing to recognize this issue, the Chambers Judge erred in law and principle.

Re City of Penticton and British Columbia (Energy Commission)
(1979) 96 D.L.R. (3d) 345 (C.A.) (Tab 7 of Book of Authorities)
Reasons, para. 61 (Motion Book v. 1, Tab 1)
Peters and Saskatchewan Human Rights Commission v. University Hospital Board [1983] 5 W.W.R. 193 (Sask. C.A.) at para. 53 (Tab 5 of Book of Authorities)
I.A.M. Lodge 2309 v. Canada (Labour Relations Board)(1988), 33 Admin. L.R. 227 (F.C.A.) at p. 229 (Tab 3 of Book of Authorities)

(3) The Chambers Judge erred in principle and law by failing to consider whether the Commission should have adopted reasonable alternative means to allow disclosure of critical information behind the determination of the principal issue in the EPA Approval Proceeding while preserving commercial confidentiality.

23. The JIESC recognizes that the Commission has the right to receive information in confidence pursuant to Sec 71(5) of the Utilities Commission Act and Section 42 of the Administrative Tribunals Act. Section 42 of the *Administrative Tribunals Act* provides that:

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

Neither of the two preceding Sections have been considered by any Court.

24. The right to hold information confidential is not a matter of unfettered discretion. The right of parties to know the case they have to meet goes to the heart of our judicial and administrative legal system. The restrictions on the powers of Boards and Courts to direct information to be held in confidence are discussed in *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835, 120 D.L.R. (4th 12) and in *Sierra Club of Canada* vs. *Canada (Minister of Finance)* (2002), 211 D.L.R. (4th) 193 (S.C.C.). At paragraph 40 in *Sierra Club* the Court endorses the test from *Dagenais* that is:

> "A publication ban should only be ordered when:
>
> a. Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trail, because reasonably available alternatives measures will not prevent the risk; and
>
> b. The salutary effects of the publication ban out way the deleterious effects to the free expression of those affected by the ban [emphasis in the original]."

25. At paragraph 46 of the *Sierra Club* decision the Court stated:

> "The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. <u>Third, the test requires the judge ordering the ban to consider no only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk</u>." [Emphasis added]

26. The generally accepted public interest in openness and disclosure was recognized by the BC utilities Commission itself when, during the course of the original VIGP Decision, which led to the call for tenders in the current matter, the Commission stated at p. 71, "**In future applications the commission Panel expects BC Hydro to use assessment models which can be made public so that the various components and assumptions can be assessed and tested by intervenors.**" (Bold in original)

VIGP Decision, p. 71 (Exhibit "B" to Affidavit of A. Leoni, Motion Book v. 2)

27. During the course of the hearing there were a number of disputes regarding the confidentiality of information causing a degree of "fog" as to what needed to be produced, what did not need to be produced and when. In spite of this there are only two areas where confidentiality needs to be raised before this Court, Appendix 3 and Appendix J.

28. Appendix 3 concerned the pricing terms of the contract and was ordered produced by the Commission after argument and a discussion of the principles in the *Sierra Club* decision in Order G–119–04 made December 24, 2004 with Reasons following on January 26, 2005. The prime reason to know about Appendix 3 in this Application is to be able to distinguish it, and arguments about its admission, from Appendix J. It is important to recognize that in its Reasons for Decision for Order G-119–04 the Commission stated "although there may be other documents that the Intervenors may wish to seek produce, the Commission panel does not expect that the disclosure of documents other than Appendix 3 of the EPA is necessary at this time for the Intervenors to fully participate in this proceeding. Therefore the focus of these reasons will be the release of Appendix 3 of the EPA."

Reasons for Order G-119-04, p. 7 (Exhibit "I" to Affidavit of A. Leoni, Motion Book v. 2)

29. **"Appendix J"** refers to the detailed assessment and information that supported the conclusions in the Cost Effectiveness Analysis conducted by BC Hydro senior management in determining whether to proceed with the DPP EPA. The purpose of the Cost Effectiveness Analysis was to compare the cost effectiveness of the DPP plant against two other possible alternatives: (1) a portfolio of two smaller generation projects on Vancouver Island; and (2) accepting no bids at all and using short-term contingency options. The Commission characterized this analysis as the "principal issue" in the hearing.

30. The conclusions of BC Hydro under the Appendix J analysis were public, but the detailed figures, assumptions and calculations underlying those conclusions were never disclosed to the public or to intervenors, in spite of requests by counsel for the JIESC that the Commission find reasonable alternative ways to restrict the ban while preserving the confidentiality of commercially sensitive information. This withholding of fundamental information made it impossible for the JIESC to challenge the assumptions and calculations upon which the decision on the principal issue in the hearing was to be based.

31. The JIESC continued to seek release of the analysis contained in Appendix J after Order G-119-04 regarding Appendix 3 was released, in its ongoing efforts to find reasonable alternatives to restrict the ban while preserving the confidentiality of commercially sensitive information, but was not successful in doing so.

32. In a letter to the Commission dated January 3, 2004, after the disclosure of the Appendix 3 information, counsel for the JIESC again requested that the Commission consider releasing all important confidential information:

> "The JIESC supports transparency and openness and continues to urge the Commission to make all confidential information in this proceeding publicly available. Even with the information ordered made public on December 24th, confidentiality of some information continues to make this hearing much harder than it needs to be and leaves many unanswered procedural questions."

33. During the hearing counsel for the JIESC, raised the possibility that more appropriate confidentiality processes could be adopted by the Commission:

> "Some tribunals have dealt with this sort of matter. I think the International Trade Tribunal has processes under which information is provided to counsel and consultants cross-examinations do happen in confidence under a non-disclosure agreements."

Transcript, p. 697 (Exhibit "H" to Affidavit of A. Leoni, Motion Book v. 2)

34. In a letter to the Commission dated January 12, 2005, in response to a letter from BC Hydro, counsel for the JIESC pointed out that:

> "Someone must test this confidential material through cross-examination and must present argument on its significance. The Commission must find ways for counsel and consultants on behalf of all parties to examine the material, with meaningful time for review and consideration, as other boards such as the Canadian International Trade Tribunal have done in even more sensitive and difficult cases." [Exhibit "N" to Affidavit of A. Leoni #1]

35. The importance of Appendix J, and the unfairness of being unable to properly challenge its assumptions and calculations, is clearly evident in the Commission Decision when the Commission decides that the DPP is more cost effective that the straw men, "Tier 2" and "No Award". In making its Decision the Commission dismisses the JIESC arguments that Appendix J, properly adjusted, does not support the selection of the DPP EPA, stating that the JIESC's submissions were "reached without the full benefit of the confidential numbers filed with the Commission." This clearly demonstrates the problems the JIESC faced in arguing against the conclusions of Appendix J without access to the confidential material.

Decision, p. 92-93 (Motion Book v. 1, Tab 3)

36. The Chambers Judge states at paragraph 44 that the Commission was justified in its confidentiality rulings due to the fact that the Commission considered the *Sierra Club* case and

"applied the strictest possible test in making its confidentiality orders". In coming to this conclusion, the Chambers Judge erred in two ways. First, the Commission only looked at the *Sierra Club* test in conjunction with the disclosure of Appendix 3, and not with regard to any other important confidential information, including Appendix J. Secondly, the Commission did not consider the second part of the test in *Sierra Club*, which requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as reasonably possible while preserving the commercial interest in question.

Reasons, para. 44 (Motion Book v. 1, Tab 1)

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 211 D.L.R. (4th) 193 at para. 46 (Tab 10 of Book of Authorities)

37. Since the Commission did not apply the *Sierra Club* test correctly, it was an error of law for the Chambers Judge to hold that the requirements in *Sierra Club* had been met. Further, the Chambers Judge erred in his determination that it was insufficient for the applicant to submit that the confidentiality orders were too broad. By failing to recognize that overbreadth is a ground for overturning a confidentiality order under the second component of the test in *Sierra Club*, the Chambers Judge failed to apply the principle in *Sierra Club* and erred in law.

Reasons, para. 47 (Motion Book v. 1, Tab 1)

Sierra Club of Canada v. Canada (Minister of Finance), supra at para. 46

(4) The Chambers Judge erred in principle or law by making a determination on the merits of the issue of reasonable apprehension of bias

38. Before the Chambers Judge, a large part of the argument circulated around allegations of apprehension of bias or pre-determination by the Commission with respect to the EPA application. Those allegations centered around a statement made by the Chair, in an *in camera*, ex parte hearing:

> 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 Pristine with duct firing. It may be – I don't know enough about this yet but it may be the coincidence that both portfolios are the same proponent are helpful in moving us to the outcome that is in the customer's best interest. <u>So you know what I want to try to do. I need your help in telling me how I can get there</u>. [emphasis added]

Transcript, pp. 1741-1742 (Exhibit "S" to Affidavit of A. Leoni, Motion Book v. 2)

39. Before the Chambers Judge, the JIESC argued that this statement, in its context, was sufficient evidence to support a reasonable apprehension of bias or pre-determination on the part of the Commission. In his Reasons at para. 52, the Chambers Judge stated that "while it is open to the applicants to make that argument, the counter-argument has greater validity". At para. 54, the Chambers Judge stated that "a full consideration of the context in which these remarks were made does not demonstrate bias."

Reasons, paras. 52 and 54 (Motion Book v. 1, Tab 1)

40. The preceding statements show that the Chambers Judge erred in law by making a conclusion on the merits of the bias argument, rather than considering whether the applicants had raised a substantial question to be argued.

Other factors in Granting Leave to Appeal

41. This Court is the JIESC's first and only opportunity to appeal the Decisions and accordingly it is important that the Applicants have a full opportunity to be heard.

Sequoia Springs West Development Corp. v. British Columbia (Minister of Transportation)
2000 BCCA 482 at para. 28 (Tab 9 of Book of Authorities)
Letter from Gordon Fulton (Exhibit "X" to Affidavit of A. Leoni, Motion Book v. 2)

PART IV: ORDER SOUGHT

42. The JIESC submits that the order of the Chambers Judge should be varied and leave to appeal be granted.

DATED at the City of Vancouver, in the Province of British Columbia, this 3rd day of May, 2005.

BULL, HOUSSER & TUPPER
Per:

Solicitor for the Applicants