Court of Appeal File No. CA32708

COURT OF APPEAL

IN THE MATTER OF THE *UTILIITIES COMMISSION ACT*, RSBC 1996, c.473

AND IN THE MATTER OF JANUARY 27, 2005, AND FEBRUARY 17, 2005, ORDERS OF THE BRITISH COLUMBIA UTILITIES COMMISSION

BETWEEN:

GSX CONCERNED CITIZENS COALITION,
BRITISH COLUMBIA SUSTAINABLE ENERGY ASSOCIATION,
SOCIETY PROMOTING ENVIRONMENTAL CONSERVATION

Appellants

AND:

BRITISH COLUMBIA UTILITIES COMMISSION
BRITISH COLUMBIA HYDRO AND POWER AUTHORITY
DUKE POINT POWER LIMITED PARTNERSHIP

Respondents

MEMORANDUM OF ARGUMENT OF GSXCCC, et al

GSX Concerned Citizens Coalition, et al, Appellants
William J. Andrews, Barrister & Solicitor
1958 Parkside Lane
North Vancouver, BC, V7G 1X5

British Columbia Utilities Commission, Respondent
c/o Boughton Peterson Yang Anderson
1055 Dunsmuir Street
Vancouver, BC, V7X 1S8
Attn: Gordon Fulton

British Columbia Hydro And Power Authority, Respondent
c/o Lawson Lundell
1600 – 925 West Georgia Street
Vancouver, BC, V6C 3L2
Attn: Christopher Sanderson, Q.C.

Duke Point Power Limited Partnership, Respondent
c/o Farris, Vaughan, Wills & Murphy LLP
2500-700 West Georgia Street
Vancouver, BC, V7Y 1B3
Attn: George K. Macintosh, QC
and, Bennett Jones LLP
4500, 855 – 2nd Street SW
Calgary, AB, T2P 4K7
Attn: Loyola Keough

Part I: Statement of facts

1. GSXCCC, *et al* adopt the facts set out in the March 22, 2005, affidavit of Anthony Leoni, filed in the Court of Appeal File No. CA032700, consolidated with this matter.

Regulatory context

2. This case concerns allegations of a reasonable apprehension of bias and violations of natural justice during a public hearing held by the Respondent British Columbia Utilities Commission under the *Utilities Commission Act* (the Act).

3. In March 2003, BC Hydro, through a wholly-owned subsidiary, applied under the Act to the Commission for a Certificate of Public Convenience and Necessity (CPCN) for a proposed Vancouver Island Generation Project (VIGP) at Duke Point on Vancouver Island. The Commission conducted a public hearing process, in which the Applicant GSXCCC participated along with numerous other intervenors.

4. On September 8, 2003, the Commission dismissed BC Hydro's application for a CPCN for VIGP (the VIGP Decision). The Commission Panel found that Hydro had not established that VIGP is the most cost-effective method of meeting the anticipated electricity capacity gap for planning purposes on Vancouver Island. The Panel invited BC Hydro to proceed with a Call For Tenders (CFT) and to re-apply to the Commission if necessary. (Cost-effective refers to cost on a *per unit* basis, i.e., cost per MW.)

5. BC Hydro implemented a CFT, and in November 2004 filed with the Commission an Electricity Purchase Agreement (EPA) and a VIGP Transfer Agreement (VTA) between Hydro and the Respondent Duke Point Power Limited Partnership (DPP).

6. On November 10, 2004, the Commission Panel began a public hearing process under s.71 of the Act. GSXCCC, *et al* and many other intervenors participated actively. The process included written Information Requests, pre-filed expert evidence, and oral public hearings.

7. On February 17, 2005, the Commission Panel issued Order No. E-1-05, allowing the EPA and VTA. This is the decision from which leave to appeal is sought.

Key concepts in the Commission's Decision

8. The Commission Panel ruled that "the principal issue" in the hearing is:

> Is Tier 2, Tier 1, or the No Award option the most cost-effective option to meet the capacity deficiency on Vancouver Island commencing in the winter of 2007/'08? [T1: 313-314]

9. In the context of the principal issue, "Tier 1" (or "the Tier 1 outcome") refers to the winning bid ("DPP without duct firing"). Potentially confusingly, in other contexts, "Tier 1" can refer to the five portfolios that were evaluated by the QEM (Quantitative Evaluation Methodology – discussed below) at the end of the CFT process.

10. In the context of the principal issue, "Tier 2" refers to a combination ("portfolio") of two specific projects that were bid into the CFT and met all the conditions except that even in combination they were not large enough to meet the minimum 150 MW capacity criterion. (For identification, one is the 75 MW wood-waste-fired generator proposed by Green Island Energy in Gold River; the other is a 47 MW gas-fired "peaker plant" proposed by Epcor in Ladysmith.)

11. The "No Award" option in the principal issue refers to a portfolio comprised of the Norske Canada Demand Management Project ("NCDMP" – up to 210 MW of electric load from Norske's Vancouver Island pulp mills that Hydro could pre-contract to utilize if necessary) plus a number of 23 MW mobile oil-fired generators that could be called into temporary service if necessary. The NCDMP is also included in the Tier 2 portfolio.

12. As in the 2003 VIGP Decision, the term "cost-effective" in the principal issue refers to the cost on a 'per unit of capacity' basis (i.e., per MW). In contrast, the CFT selected the 'least cost' portfolio from among the portfolios within the required 150-300 MW range, regardless of the size of the portfolio.

13. The component of the CFT that embodies the least-cost approach is the QEM, mentioned above. The QEM is a computer spreadsheet model that was run on five portfolios, the winning, least-cost portfolio being 'DPP without duct-firing' at 252 MW.

14. It is necessary to explain "duct-firing." Duct firing is a technical add-on to a gas-fired generator of the VIGP type that adds extra capacity (MW), albeit with less fuel efficiency than the main unit. It is known now, though it was not well known during most of the hearing, that the QEM, being a least-cost model, calculated the cost of an electricity purchase agreement from a VIGP-type plant *without* duct-firing as being *lower* than the cost of the same plant *with* duct-firing. The incongruous result is that the QEM would select a VIGP-type plant *without* duct-firing over the same plant *with* duct-firing even though that latter could well be more cost-effective (i.e., in terms of cost per MW).

15. It is also necessary to explain that of the five "Tier 1" portfolios evaluated by the QEM, three involved DPP (DPP using VIGP assets *without* duct-firing, DPP using VIGP assets *with* duct-firing, and DPP using VIGP assets without duct-firing plus the 47 MW Tier 2 proposal); and two involved a Competitor (Competitor using VIGP assets *without* duct-firing, and Competitor using VIGP assets *with* duct-firing.) It can be seen, therefore, that the QEM's least-cost focus means that 'DPP using VIGP assets *without* duct-firing' would automatically be the least cost of the three DPP portfolios and 'Competitor using VIGP assets *without* duct-firing' would automatically be the least cost of the two Competitor portfolios.

16. One last explanation. The term "cost effectiveness analysis" refers to a study done by BC Hydro after 'DPP without duct-firing' had been selected as the 'winner' of the CFT but before the EPA had been entered. The cost effectiveness analysis compares Tier 1 (DPP without duct-firing) with Tier 2 and No Award. It does so by calculating an NPV (net present value) cost of each of the three portfolios (cost to BC Hydro less the value of electricity acquired). Contentiously, however, the cost effectiveness analysis assigned to the Tier 2 and No Award portfolios large hypothetical charges for energy and capacity intended to equalize the portfolios for comparison purposes.

***Ex parte, in camera* session**

17. On January 19, 2005, the Commission Panel went into an *ex parte, in camera* session ("*in camera* session") with BC Hydro witness panel 2, counsel for BC Hydro and Commission counsel. GSXCCC, *et al* and all the other intervenors and their respective counsel were excluded.

18. The *in camera* session occurred prior to GSXCCC, *et al* and the other intervenors cross-examining Hydro witness panels 3 and 4, and prior to the intervenors presenting their own oral evidence to the Commission Panel.

19. After the *in camera* session, the cross-examination of Hydro's next witness panels resumed. On January 22, 2005, however, after the redacted transcript of the *in camera* session was released, counsel for GSXCCC, *et al* raised with the Panel a concern about a reasonable apprehension of bias arising from the *in camera* session. (T11:2467)

20. On January 24, 2005, the Panel heard an application by GSXCCC, *et al* for an order that the Panel disqualify itself on the grounds of a reasonable apprehension of bias and denial of procedural fairness and natural justice during the hearing. [Exhibit C20-35, Leoni Affidavit, Exhibit V]

21. The application was supported by virtually all of the intervenors; BC Hydro and DPP opposed it. [Page 1, Appendix B to BCUC Letter No. L-10-05, Leoni Affidavit, Exhibit W]

22. The two main themes of the reasonable apprehension of bias argument are that a reasonable observer would conclude:

    (1) that the statements by the members of the Commission during the *in camera* session reveal that the Commission Panel had already concluded that DPP, with or without duct firing, was the most cost-effective option for Vancouver Island before the Panel had heard the cross-examination of Hydro witness panels 3 and 4, and prior to the intervenors presenting their own oral evidence to the Commission Panel; and

(2) that the Panel's decision to enter an *in camera* session and its comments during the session show favouritism to BC Hydro not justified by the claim that the legal and jurisdictional topics discussed were properly subject to confidentiality.

23. On January 27, 2005, the Panel dismissed the reasonable apprehension of bias argument, with reasons to follow.

24. Immediately following the Panel's dismissal of the reasonable apprehension of bias application on January 27, 2005, the Panel Chair invited parties "to make any procedural requests that you might have that arise from the matters that were raised during *in camera* session." [T14:2887] Counsel for GSXCCC, *et al* moved to recall Ms. Hemmingsen for cross-examination, *inter alia*, "regarding the comments that she made in the *in camera* session to the effect that the DPP without duct firing is not the most cost-effective means of meeting the perceived capacity shortfall on Vancouver Island…" [T14:2887-2888] The Panel dismissed the motion.

25. On February 9, 2005, the Panel issued its Reasons for dismissing the reasonable apprehension of bias application: Letter No. L-10-05, Appendix B [Leoni Affidavit, Exhibit W]

Part II: Points in issue

26. The following points are in issue on this leave application:

(1) Is the proposed appeal sufficiently important generally and to the parties to warrant leave being granted?

(2) Is the proposed appeal of practical utility?

(3) Does the proposed appeal have sufficient merit to warrant leave being granted?

(4) Do the Applicants, GSXCCC, *et al*, have a right to appeal with leave?

(5) What conditions should be imposed to a grant of leave?

Part III: Reasons why leave should be granted

The importance of the proposed appeal

27. Public confidence in the objectivity and neutrality of the British Columbia Utilities Commission is at stake in this application for leave to appeal. The fact that virtually all of the intervenors in this major Commission public hearing process supported a motion that the Commission Panel be disqualified highlights the seriousness of the fairness issues.

28. In addition, the Commission's consideration of approval or disallowance of the EPA and VTA for the Duke Point Power project under s.71 of the Act involves enormous consequences for the public interest:

    (1) The EPA would cost $308-million NPV for capacity alone.

    (2) GSXCCC, *et al* maintains that the EPA is *not necessary*. There are numerous, reasonably-priced options that in various combinations would provide entirely satisfactory solutions to the potential 'capacity gap for planning purposes' between the date of the zero-rating of the HVDC cables and the in-service date of the proposed 230 kV cables.

    (3) The EPA would lock British Columbia into the greenhouse gas consequences of a gas-fired generation plant for at least 25 years.

The utility of the proposed appeal

29. If leave is granted, the outcome of the proposed appeal will have a direct and immediate impact on the EPA and the VTA, and, hence, the DPP project, all of which are effectively in abeyance pending the outcome of the consolidated Applications for Leave to Appeal. [March 3, 2005, Letter from BC Hydro to the Commission, Zabrack affidavit, Exhibit A.]

The prospects of success of the proposed appeal

30. In considering an application for leave to appeal a decision of an administrative tribunal, the Court considers, *inter alia*, whether there is some prospect of the appeal succeeding

on its merits: *Queen's Plate Development Ltd. v. Vancouver Assessor, Area 09*, (1987), 16 B.C.L.R. (2d) 104 (C.A.).

31. GSXCCC, *et al* respectfully submit that the proposed does have strong prospects of succeeding on the merits. In the following paragraphs, the reasonable apprehension of bias ground is examined in some detail, and the other grounds for appeal are addressed briefly.

1. Reasonable apprehension of bias

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

> … the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. … that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?"

33. GSXCCC, *et al* respectfully submit that the Commission Panel's Reasons for dismissing the reasonable apprehension of bias application actually *support* the ground for appeal.

34. First, the Panel openly acknowledges the nature of the problem:

> The Commission Panel acknowledges that if certain isolated portions of the transcript are taken alone and not put in their context, there might be a concern as to whether the Commission Panel members had closed their minds to persuasion before all the evidence and argument had been heard. [Page 5, Appendix B to BCUC Letter No. L-10-05, Leoni Affidavit, Exhibit W]

35. Second, the Panel attempts to explain itself by emphasizing that during the *in camera* session the "Panel restricted its inquiry to an analysis of Tier 1 outcomes and not the cost-effectiveness of other projects or a comparison of Tier 1 projects to other possible outcomes". [Page 4, Appendix B to BCUC Letter No. L-10-05, Leoni Affidavit, Exhibit W] With respect, this dramatically misses the point. The Panel's comments during entire

in camera session are predicated on the assumption the only alternatives being considered by the Panel are DPP *with* duct-firing and DPP *without* duct-firing: that is exactly what would cause a reasonable person to conclude that the Panel had rejected any other alternatives before having heard all the evidence.

36. Third, the Panel's related argument that "The in-camera session was … not directed to the overall principal issue identified for this proceeding" [Page 4, Appendix B to BCUC Letter No. L-10-05, Leoni Affidavit, Exhibit W] does not withstand scrutiny. After the Panel dismissed the reasonable apprehension of bias argument and invited any procedural motions arising from the *in camera* session, counsel for GSXCCC, *et al* asked that Ms. Hemmingsen be recalled for cross-examination on a point that is incontrovertibly central to the principal issue: her evidence that DPP without duct-firing (the Tier 1 outcome) is not the most cost-effective option for meeting the capacity gap on Vancouver Island. Ironically, the Panel refused the request to recall the witness, on the basis that "the apparent purpose was no more than to once again confirm <u>what she had already stated</u>." [Page 7, Appendix B to BCUC Letter No. L-10-05, Leoni Affidavit, Exhibit W, underline added]

37. Fourth, the Panel implies that examining the Panel members' impugned statements "in their entire context" somehow reveals the statements to have been "conditional." [Page 5, Appendix B to BCUC Letter No. L-10-05, Leoni Affidavit, Exhibit W] Yet, the Panel offers no explanation of how the context of the *in camera* session ought to cause unconditional statements to be understood as being conditional. On the contrary, a reasonable person would expect that during an *in camera* session the Panel would be especially careful to emphasize explicitly the conditional nature of any statements intended to be conditional.

38. Fifth, the Panel responds to the argument that the content of the *in camera* session (beyond the answer to the first question (T8:1741)) could not be properly characterized as "confidential" by implying, incorrectly, that the intervenors consented in advance to the *in camera* session. The Panel states, "input was sought from the parties as to whether there was an objection for the Commission Panel to go into an in-camera session. None

were received." [Page 5, Appendix B to BCUC Letter No. L-10-05, Leoni Affidavit, Exhibit W]

39. In fact, the Panel Chair had already made it perfectly clear that he intended to have an *in camera* session on this topic. However, counsel for GSXCCC, *et al* rose to ask that at least the intended topics be put on the public record. (T8:1720)

40. With respect, the Panel's response, even as paraphrased in its Reasons for dismissing the application, can, only be described as obscure:

> The topics were characterized as addressing results from the QEM that are apparent from the model in terms of some of the total valuations of different portfolios that were analyzed; inquiring from a ratepayer impact perspective the comparative impacts between one portfolio and another portfolio; and what conclusions the Commission could properly draw from those differences. Further, there was to be further explanation of the differences and the ranking the QEM model then placed on the different portfolios in light of those differences (T8: 1721). [Page 3, Appendix B to BCUC Letter No. L-10-05, Leoni Affidavit, Exhibit W]

41. In the end, the strongest evidence that the content of most of the *in camera* session was not properly characterized as confidential is the fact that, apart from DPP's consent to the release of the answer to the first question (referred to above), the transcript of all but a portion of the rest of the session was eventually released.

42. In conclusion on this ground, GSXCCC, *et al* respectfully submit that the merits are sufficiently strong to warrant the granting of leave.

2. Denial of procedural fairness and natural justice

43. GSXCCC, *et al* are aware that JIESC intends to address this ground fully in its Argument.

3. Misinterpretation of "public interest"

44. In defining its approach to review of an EPA under s.71 of the Act, the Panel states:

> However, the Commission Panel notes that once a competitive market-based process has been undertaken and firm commitments from bidders have been obtained, a competitive process should, in most circumstances, be accepted as

> persuasive evidence of the cost-effectiveness of the resultant successful bid. [Reasons for Decision, p.13]

45. Similarly, the Panel states:

> In most circumstances, the competitive process should be sufficient to establish that the awarded contract was the most cost-effective bid. [Reasons for Decision, p.102-103]

46. The Panel's Reasons for Decision make it clear that it allowed the EPA precisely these grounds, namely that the EPA represents the winning portfolio in BC Hydro's CFT competitive bid process. In so doing, the Panel failed to apply, or, alternatively, seriously misinterpreted, the "public interest" test in s.71 of the Act.

47. In addition, the Panel conspicuously fails to inform its construction of the meaning of "the public interest" under s.71 of the Act by considering the precautionary principle as a norm of customary international law. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town),* [2001] 2 S.C.R. 241

4. Assignment of risk of carbon tax liability to shareholder

48. While the EPA transfers to DPP the risk of financial liability for the emissions of greenhouse gases, the Commission Panel acknowledges that BC Hydro may not have successfully transferred from itself to DPP the potential legal liability for carbon taxes on the natural gas purchased by BC Hydro for use in the proposed DPP plant. The Panel states:

> The Commission Panel acknowledges the possibility that future GHG regulation could be implemented in such a way that the burden is placed upstream from the plant and could therefore be borne by BC Hydro. [Reasons for Decision, p.48]

49. The Panel then states that it considers a carbon tax scenario "less likely" than an emissions charges scenario. Nevertheless, the Panel goes on to state that Hydro's "shareholder" (the provincial government) could be left to pay for future carbon tax liabilities associated with Hydro's use of DPP under the EPA. The Panel states:

> Furthermore, in accepting this EPA, the Commission is not providing any direction regarding future recovery of GHG costs that may be borne by BC

> Hydro. Indeed, given the evidence provided by BC Hydro and DPP in this proceeding in reviewing the allocation of any future GHG costs associated with the DPP plant and borne by BC Hydro, the Commission may reasonably conclude that such costs are not prudent or justified, and should therefore be allocated to the shareholder rather than the ratepayer. [Reasons for Decision, p.48, underline added]

50. This, says GSXCCC, *et al*, is beyond the Commission's jurisdiction.

51. Furthermore, it is totally contrary to the public interest under s.71 for carbon tax liability implications of the EPA, whether "less likely" or not, to be deliberately excluded from the comparison of the cost-effectiveness of the EPA and the cost-effectiveness of other options for meeting the capacity gap on Vancouver Island that may have less or no potential carbon tax liability.

5. Long-term project for short-term problem

52. The Panel itself concluded that the Vancouver Island electricity capacity gap for planning purposes should will exist between the F2008 zero-rating of the HVDC lines and a deemed F2010 in-service date for the Vancouver Island Transmission Reinforcement Project (230 kV lines). [Reasons for Decision, pp.82-83]

53. The Panel also acknowledges the most of the intervenors made arguments along the lines of JIESC's argument that "the EPA [is] a very expensive long-term solution to a short-term problem."

54. The Panel then rejects this fundamental criticism of the EPA, for what GSXCCC, *et al* contend is no legitimate reason.

55. The Panel states:

> The Commission Panel accepts BC Hydro's and DPP's submissions that Vancouver Island has a long-term supply problem requiring both generation and transmission solutions. [Reasons for Decision, p.99]

56. There are two problems with this conclusion. First, the evidence cited by the Panel indicates at most that "…on-Island generation would provide significant reliability and capacity benefits leading to a more reliable system even after the transmission line is

built." [Reasons for Decision, p.99] There is no evidence that Vancouver Island *requires* both new generation and renewed transmission.

57. Second, this conclusion ignores the *cost* of the EPA. The objection to the EPA is that its *cost* is vastly out of proportion to the short-term capacity gap, which remains BC Hydro's fundamental rationale for the EPA.

58. The Panel goes on to state:

> The Commission Panel accepts the conclusion of the VIGP Decision that the next logical resource addition is on-Island generation. Although the CFT was driven initially by a near-term capacity deficit on the Island, the longer-term benefits to the Island and system were considered in the VIGP Decision. [Reasons for Decision, p.99]

59. Here, with respect, the rationale breaks down. The VIGP Decision did not endorse on-Island generation as the next resource addition *no matter what the cost*. Indeed, the VIGP Decision rejected the application for a CPCN for VIGP because VIGP had not been shown to be the most cost-effective option. The Panel here abdicates its responsibility to determine whether the *EPA* is the most cost-effective option (even using that overly narrow criterion).

6. Norske Demand Management improperly rejected

60. In the much-used phrase "capacity gap for *planning* purposes," the planning criteria referred to are the "single contingency" (or "N-1") criteria established by the WECC and endorsed by the Commission.

61. The Panel acknowledges that the WECC N-1 planning criteria allow for planned interruptions of electrical load in response to a severe contingency. The Panel states:

> The WECC has developed and published criteria that apply to transmission planning (WECC Reliability Criteria, dated April 2004) that have been previously endorsed by the Commission. The BCTC reference identifies allowable system responses to Category B (single contingency) events (WECC Reliability Criteria, Table 1, p. 24). NorskeCanada observes that the footnote to Category B of Table 1 allows for planned or controlled interruptions to electrical supplies to radial customers or local network customers in response to a first contingency under certain circumstances

> (NorskeCanada Argument, p. 7). BCTC confirmed that shedding or curtailing load in response to a severe contingency would not necessarily be perceived as a violation of North American Electricity Reliability Council ("NERC") and WECC planning criteria (T10: 2285). BCTC stated that such responses to severe contingencies have been considered for just about every critical region of the system (T10: 2287). [Reasons for Decision, p.80, underline added]

62. Despite acknowledging that controlled load shedding complies with the WECC criteria, the Panel rejects the Norske Canada Demand Management Project (NCDMP) because the Panel rejects it as a long-term measure. The Panel states:

> **The Commission continues to endorse the WECC Reliability Criteria, and specifically the adoption of the N-1 planning criteria.** Although the WECC Reliability Criteria recognize controlled load shedding as an appropriate response to single contingency events, the Commission Panel does not consider this an appropriate response in the context of long-term planning for the Vancouver Island transmission system except for radial loads. [Reasons for Decision, p.81, bold in the original, underline added]

63. Remarkably, the Panel does not comment on the fact that Vancouver Island's identified capacity gap is short-term, not long-term; but the Panel does laud the NCDMP as a short-term measures:

> However, the Commission Panel does view the NCDMP as a valuable and useful tool outside the CFT process. Controlled load curtailment in response to multiple contingencies or as a short-term operational measure is preferable to the alternative of a cascading system disturbance with uncontrolled characteristics. **Therefore, the Commission Panel encourages BC Hydro to actively pursue discussions with NorskeCanada with the objective of beginning a trial of load curtailment during the maintenance outage period of 2005.** [Reasons for Decision, p.81, bold in the original]

64. In conclusion on this ground, the Commission had before it no evidence to support its conclusion that the NCDMP is not a viable option for addressing the Vancouver Island electricity capacity gap for planning purposes between the F2008 zero-rating of the HVDC lines and the deemed F2010 in-service date of the Vancouver Island Transmission Reinforcement Project (230 kV lines).

8. Reversal of onus

65. The Panel takes a reverse onus approach to its authority under s.71 of the Act. In its conclusion, for example, the Panel states:

> The Commission Panel acknowledges some deficiencies within the CFT process conducted by BC Hydro but finds no compelling evidence that the outcome of the competitive bidding process is not in the public interest and should therefore be overturned, particularly in light of the imminent capacity shortfall on Vancouver Island commencing in the winter of 2007/08 with the zero rating of the HVDC line. [Reasons for Decision, p.101, underline added]

66. This application of a reverse onus approach in the instant case coincides with the Panel's general proposition, noted above, that "In most circumstances, the competitive process should be sufficient to establish that the awarded contract was the most cost-effective bid." [Reasons for Decision, p.102-103]

67. GSXCCC, *et al* take the position that once the Commission begins a hearing regarding an electricity supply contract filed pursuant to s.71 of the Act, the onus is on the utility to show that the contract is in the public interest.

Statutory right to appeal with leave

68. The Applicant's right to apply for leave to appeal the Commission's decision is found in section 101 of the *Utilities Commission Act*.

Conditions

69. GSXCCC, *et al* has cooperated with the Respondents to ensure an expedited hearing of this leave application consistent with the Applicants' right to adequate time to prepare. GSXCCC, *et al* would continue to cooperate in order to achieve an early resolution of the appeal.

Part IV: Nature of order requested

70. The Applicants GSXCCC, *et al* request an order granting leave to appeal to the Court of Appeal for British Columbia from the order of R.H. Hobbs, Chair, and L.A. Boychuk, Commissioner, of the British Columbia Utilities Commission ("Commission") pronounced the 27th day of January 27, 2005, ("L-10-05"), and the 17th day of February, 2005, ("E-1-05") at Vancouver, British Columbia.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

_____

William J. Andrews,
Solicitor for the Appellant

March 23, 2005
North Vancouver, BC

Part V: Table of Authorities

Authority	**Paragraph(s) in which Authority referred to**
114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241	47
Committee For Justice And Liberty et al. v. National Energy Board et al., 68 D.L.R. (3d) 716 (S.C.C.), reversing 65 D.L.R. (3d) 660, De Grandpre, J., dissenting	32
Queen's Plate Development Ltd. v. Vancouver Assessor, Area 09, (1987), 16 B.C.L.R. (2d) 104 (C.A.)	30