

COURT OF APPEAL

**IN THE MATTER OF UTILITIES COMMISSION ACT
R.S.B.C. 1996, c.473 as amended; and**

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

BETWEEN:

JOINT INDUSTRY ELECTRICITY STEERING COMMITTEE

APPELLANT

AND:

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

RESPONDENTS

Court of Appeal File No. CA032708

COURT OF APPEAL

**IN THE MATTER OF UTILITIES COMMISSION ACT
R.S.B.C. 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 THE RESPONDENT,
BRITISH COLUMBIA HYDRO AND POWER AUTHORITY**

**Joint Industry Electricity Steering Committee
(Court of Appeal No.: CA032700)**

DANIEL R. BENNETT

Bull Housser & Tupper
Barristers and Solicitors
3000 – 1055 West Georgia Street
VANCOUVER, British Columbia
V6E 3R3
Telephone: (604) 687-6575

**GSX Concerned Citizens Coalition,
British Columbia Sustainable Energy
Association, Society Promoting Environmental
Conservation
(Court of Appeal No.: CA032708)**

WILLIAM J. ANDREWS

Barrister and Solicitor
1958 Parkside Lane
NORTH VANCOUVER, British Columbia
V7G 1X5
Telephone: (604) 924-0921

**British Columbia Hydro and Power
Authority
(Court of Appeal Nos.: CA032700
and CA032708)**

**CHRIS W. SANDERSON, Q.C.
RON A. SKOLROOD**

Lawson Lundell LLP
Barristers and Solicitors
1600 – 925 West Georgia Street
VANCOUVER, British Columbia
V6C 3L2
Telephone: (604) 685-3456

**The British Columbia Utilities
Commission
(Court of Appeal Nos.: CA032700
and CA032708)**

GORDON A. FULTON

Boughton Peterson Yang Anderson
Barristers and Solicitors
1000 – 595 Burrard Street
VANCOUVER, British Columbia
V7X 1S8
Telephone: (604) 687-6789

**Duke Point Power Limited Partnership
(Court of Appeal Nos.: CA032700
and CA032708)**

LOYOLA KEOUGH

Bennett Jones
Barristers and Solicitors
4500, 855 – 2nd Street S.W.
CALGARY, Alberta
T2P 4K7
Telephone: (403) 298-3429

**GEORGE MACINTOSH, Q.C. and
SEAN HERN**

Farris Vaughan Wills & Murphy
Barristers and Solicitors
2500 – 700 West Georgia Street
VANCOUVER, British Columbia
V7Y 1B3
Telephone: (604) 684-9151

INDEX

	<u>PAGE</u>
PART 1 - STATEMENT OF FACTS	1
PART 2 - POINTS IN ISSUE	8
PART 3 - ARGUMENT	8
Test for Granting Leave to Appeal	8
Commission's Jurisdiction	9
Procedural Fairness Grounds	10
Reasonable Apprehension of Bias	15
Alleged Errors of Law	17
Summary and Conclusion	19
PART 4 - NATURE OF THE ORDER REQUESTED	20
PART 5 - LIST OF AUTHORITIES	21

Appendix "A" - *Utilities Commission Act*, R.S.B.C. 1996, c. 473 ss. 4(1)(a), 71 and 79.

Appendix "B" - *Administrative Tribunals Act*, S.B.C. 2003, c. 45 s. 11

PART 1
STATEMENT OF FACTS

INTRODUCTION

1. The Joint Industry Electricity Steering Committee ("JIESC"), the GSX Concerned Citizens Coalition, British Columbia Sustainable Energy Association and Society Promoting Environmental Conservation (collectively "GSXCCC") all seek leave to appeal from Order No. E-1-05 (the "Decision") of the British Columbia Utilities Commission (the "Commission" or "BCUC") dated February 17, 2005 in which the Commission accepted for filing an Energy Purchase Agreement entered into between British Columbia Hydro and Power Authority ("BCH") and Duke Point Power Limited Partnership ("DPP"). The Commission subsequently issued Reasons for Decision ("Reasons") for Order E-1-05 on March 9, 2005. JIESC and GSXCCC also seek leave to appeal from Commission Order No. L-10-05 pronounced January 27, 2005 (Reasons issued February 9, 2005) wherein the commission Panel refused to disqualify itself based upon a reasonable apprehension of bias.

2. It is the position of BCH that leave to appeal should be denied. In particular, BCH submits that the Decision is the result of a fair and reasonable process and reflects the Commission's extensive, careful and thorough analysis of the substantive issue before it. In the circumstances, it is respectfully submitted that there is no basis for this Court to intervene.

3. JIESC and GSXCCC allege many facts that are not relied upon in their arguments. BCH takes issue with many of these allegations but will only address disagreements that are relevant to the argument actually advanced by the Applicants.

HISTORY OF THE PROCEEDING

4. The Decision represents the culmination of a lengthy regulatory process that examined in detail the long term electricity needs of Vancouver Island. That process is canvassed in detail in the Commission's Reasons and BCH endorses the Commission's findings and description of events. The key elements of the process are summarized below.

Reasons, pp. 1-13; JIESC Motion Book Tab 1.

VIGP and CFT background

5. BCH's peak demand forecast for Vancouver Island predicts a gap between electricity demand and the dependable supply resources available to meet that demand, beginning in the winter of 2007/08 ("**capacity shortfall**"). To meet its statutory obligation to serve, BCH proposed the Vancouver Island Generation Project ("**VIGP**"), a 265 MW combined cycle gas turbine plant at DPP, an industrial park at the outskirts of Nanaimo.

Affidavit #2 of John Kleefeld, Affirmed April 1, 2005 ("Kleefeld #2"), para. 3; BCH Reply Book Tab 1.

6. Through its wholly owned subsidiary, Vancouver Island Energy Corporation, BCH applied for a certificate of public convenience and necessity ("**CPCN**") for VIGP. In a decision issued in September 2003, (the "**VIGP Decision**") the Commission denied the CPCN as it concluded that BCH had not demonstrated that VIGP was clearly the most cost-effective means to reliably meet Vancouver Island's electricity needs.

Kleefeld #2, paras. 5 – 10; BCH Reply Book Tab 1; Exhibit "A" to leave Affidavit, JIESC Motion Book v.2.

7. In the VIGP Decision, the Commission made a number of key findings that subsequently informed its approach to the proceeding below:

- (a) The Commission found that an additional generation resource was necessary to meet the capacity shortfall it foresaw beginning in 2007/08, and that this generation should be located on Vancouver Island;
- (b) The Commission encouraged BCH to proceed with a Call for Tender ("**CFT**") process that BCH had indicated it would undertake if VIGP was not approved; and
- (c) The Commission indicated that it expected to be able to conduct an expedited process to consider and provide any approvals that might be required in connection with whatever solution to Vancouver Island's capacity needs that BCH proposed in light of taking the steps contemplated in the VIGP Decision.

Kleefeld #2, paras. 11 – 12; BCH Reply Book Tab 1.

8. Based on the VIGP Decision, BCH undertook a lengthy CFT process. The process was transparent and included both an open bidding process overseen by an independent reviewer, PricewaterhouseCoopers, and an opportunity for ratepayer involvement through

submissions to the BCUC that resulted in Commission recommendations relating to certain important elements of the CFT process. The Commission's recommendation repeated its commitment to expeditious review but expressly identified 90 days as being required for that purpose. The draft EPA included in the CFT documentation provided a 90 day allowance for Commission review.

Kleefeld #2, paras. 13 – 14; BCH Reply Book Tab 1.

The Proceeding Below: Prehearing Process

9. DPP was the winning bidder in the CFT (announced mid-October 2004). An Electricity Purchase Agreement ("EPA") and the VIGP Transfer Agreement ("VTA") were executed between BCH and DPP on November 16, 2004. On November 19, 2004, BCH filed the EPA with the Commission as required by section 71 of the *Utilities Commission Act* ("UCA"), and accompanied the filing with an extensive report (the "CFT Report") on the CFT Process. BCH distributed the CFT Report to interested parties, but requested that the Commission maintain the EPA in confidence.

Kleefeld #2, paras. 15 – 16, Exhibit "C"; BCH Reply Book Tab 1.

10. On November 25, 2004, BCH filed with the Commission a letter from DPP addressing the key milestone dates for the project. It said that to meet a commercial operation date of May 1, 2007, DPP would need a Commission decision by February 17, 2005; would need full notice to proceed by March 1, 2005, and would need to start construction by April 1, 2005.

Kleefeld #2, para. 18, Exhibit "E"; BCH Reply Book Tab 1.

11. On November 29 and 30, 2004, the Commission Panel appointed to review the EPA (the "Commission Panel") held a procedural conference to determine the appropriate process to conduct the review under section 71. The Commission Panel heard submissions from interested parties on a number of issues including: whether to hold an oral hearing; the scope of the review required; the confidentiality of the EPA; and the timing and procedural requirements stemming from scoping alternatives.

Kleefeld #2, paras. 17, 19; BCH Reply Book Tab 1.

12. The Commission Panel delivered an oral decision on November 30, 2004 in which it determined that in a departure from past practice it would hold an oral hearing, but the hearing was to be limited in scope. The Commission Panel subsequently released Order No. G-106-04 on December 3, 2004, setting out the regulatory agenda.

Kleefeld #2, para. 20, 21 Exhibits "F" and "G"; BCH Reply Book Tab 1.

13. Two intervenors, JIESC and the BC Old Age Pensioners, sought reconsideration of the Commission's determination with respect to both the scope of the hearing and the extent to which confidentiality would be maintained with respect to the EPA.

14. On December 22, 2004, the Commission Panel issued Order No. G-119-04 which it ordered disclosure of virtually all information relating to the EPA with the exception of certain pricing terms. Order G-119-04 also set out a revised regulatory agenda.

Kleefeld #2, para. 25, Exhibit "I"; BCH Reply Book Tab 1.

15. On January 6, 2005, the Commission issued Reasons for its confidentiality ruling in Order No. G-119-04. In that ruling, the Commission balanced the public interest in favour of disclosure on the one hand and the importance of bidder privacy on the other. The Commission held that the public interest in disclosure trumped the privacy interests of the successful bidder but not those of unsuccessful bidders. Accordingly, the Commission ordered the release of virtually all information relating to the EPA but decided to maintain in confidence any information relating to unsuccessful bids.

Kleefeld #2, para. 25-26, Exhibit "I"; BCH Reply Book Tab 1.

16. No party directly sought any further relief from the Commission's decision with respect to confidentiality. JIESC did seek further disclosure pursuant to Order No. G-119-04, but this was denied on January 11, 2005.

Kleefeld #2, para. 27; BCH Reply Book Tab 1.

17. On January 10, 2005, BCH wrote the Commission to ask that certain procedures be established at the hearing to facilitate completion in time to permit a decision by February 17, 2005 as the Commission had previously indicated it intended to do. BCH suggested that to meet that timetable, the evidentiary phase of the hearing likely needed to be complete by January 28,

2005. It suggested further that this in turn implied time limits be established for each of the witness panels that were scheduled to testify.

Kleefeld #2, para. 28; BCH Reply Book Tab 1.

18. The December 16, 2004 JIESC request for reconsideration of the scope of the process was rejected for Reasons delivered on January 13, 2005 in the form of Letter No. L-3-05. Those reasons cited the unique requirements of section 71 and held that the extent of review under that provision was to be determined by the Commission based on its assessment of the public interests that were in issue.

Kleefeld #2, para. 32, Exhibit "L"; BCH Reply Book Tab 1.

19. On January 14, 2005, GSXCCC sought reconsideration of aspects of both the scope of the hearing and the hearing schedule. In reasons dated January 27, 2005 contained in Letter No. L-8-05, that application was rejected.

Kleefeld #2, para. 33, Exhibit "B"; BCH Reply Book Tab 1..

The Proceeding Below: The Hearing

20. The hearing progressed in accordance with the Schedule established by the Commission. BCH had four direct witness panels and one rebuttal panel. The four direct panels dealt with Policy, the CFT process including, the QEM model, the independent review process and the cost effectiveness analysis. DPP also put up a witness panel, as did JIESC, GSXCCC and five other intervenors. Consistent with BCUC practice, the direct evidence of each of the parties was submitted in writing in advance.

Kleefeld #2, para. 34; BCH Reply Book Tab 1.

21. At the end of the cross examination of BCH's witness Panel 2 dealing with the CFT process, the Chairman asked some questions on the record and then indicated that he had a final area of questioning that he believed he needed to pursue initially *in camera* because it was necessary to discuss confidential bidding information from an unsuccessful bidder. He suggested that the proceeding continue *in camera* with only Commission staff and counsel, BCH counsel and staff, the witnesses and the Commissioners present.

Kleefeld #2, para. 37, Exhibit "O"; BCH Reply Book Tab 1.

22. Before proceeding in the above manner the Chair indicated his intention to subsequently disclose to all parties his line of questioning initially undertaken *in camera*. Neither JIESC or GSXCCC, nor any other intervenors, objected to the Commission Panel's proposed procedure.

Transcript, p1722, GSXCCC Motion Book, Tab 2

23. During the ensuing discussion with Panel 2, the Chair made one comment that subsequently gave rise to GSXCCC's disqualification application. That comment is reproduced in the Motion Books of each of JIESC and GSXCCC.

Kleefeld #2, para. 38, Exhibit "P"; BCH Reply Book Tab 1.

24. During the course of the Panel 2 session, the Chair directed counsel for BCH and Commission counsel to consider how best to make public the discussions. Counsel agreed to redactions that they considered would allow the balance of the transcript to be released without breach of unsuccessful bidder confidences. This proposal was made to the Commission Panel who agreed; a redacted transcript was then released on January 21, 2005.

Kleefeld #2, para. 38; BCH Reply Book Tab 1..

25. On review of the transcript, GSXCCC brought a motion for the Commission Panel to disqualify itself based upon a reasonable apprehension of bias. The motion was opposed by BCH, DPP and Terasen Gas (Vancouver Island) Inc.

Kleefeld #2, para. 39; BCH Reply Book Tab 1.

26. When the redacted version of the transcript was first released, Commission counsel explained the intention of the redactions to the parties. Counsel for DPP advised the Commission that to the extent any redactions were made to protect confidentiality with respect to any of its unsuccessful bids, DPP did not require the redactions. Subsequently, the Commission instructed BCH and Commission Counsel to consider what redactions could be eliminated. On January 24, 2005, a version of the transcript with no material redactions was released to all parties.

Kleefeld #2, para. 40, Exhibit "P"; BCH Reply Book Tab 1.

27. The Chair also clarified for all parties exactly why the initially *in camera* session was held so that intervenors could understand the context in which the impugned remarks were made.

Kleefeld #2, para. 39, Exhibit "R"; BCH Reply Book Tab 1.

28. Oral argument on the disqualification motion was made on Wednesday, January 26, 2005. The motion was dismissed by the Panel on Thursday, January 27, 2005, with reasons provided on February 9, 2005. The Commission Panel concluded that a reasonable person, fully informed and having thought the matter through, would not think that the Commission Panel had predetermined the issue it was required to determine pursuant to section 71 of the UCA.

Kleefeld #2, paras. 42-43, Exhibit "W" to leave Affidavit, JIESC Motion Book v. 2.

29. On February 17, 2005 the Commission issued its Order E-1-05 accepting the EPA and on March 9, 2005 the Commission released its Reasons for Decision. The Decision contained a condition relating to an agreement being reached between BCH and Terasen Gas Vancouver Island Ltd ("TGVI") for gas transportation to DPP and to the Island Co. Generation Plant ("ICP").

Kleefeld #2, paras. 45-46, Exhibit "S"; BCH Reply Book Tab 1.

30. TGVI and BCH are engaged in discussions to reach an agreement for gas transportation service to both the DPP plant and ICP.

Affidavit of Dawn Farrell, para. 3; BCH Reply Book Tab 3.

31. On March 1, 2005, BCH and DPP signed an agreement that addresses the uncertainty for the project brought about by these Leave Applications. Under that agreement, the construction commencement date and all subsequent dates are delayed by the number of days between February 17, 2005 and the date on which the Leave Applications or appeal are resolved in the Respondents' favour. If leave is granted, BCH has a unilateral right to terminate the EPA. If BCH does not exercise that right and the appeal remains unresolved on June 30, 2005, it has a right to terminate the EPA. If an appeal is successful or unresolved on July 31, 2005, the EPA comes to an end. The result of this arrangement is that the six-month break-in period contemplated in the EPA to ensure operational reliability is being reduced by every day that the leave application or appeal remains outstanding. The longer commencement of construction is

delayed, the greater the risk that the DPP plant will not be available if called upon during the 2007/08 winter peak period.

Affidavit of Bev Van Ruyven, sworn April 1, 2005 paras. 7-9; BCH Reply Book Tab 2.

PART 2

POINTS IN ISSUE

32. It is the position of BCH that leave to appeal should be denied on all of the proposed grounds raised by the Applicants.

PART 3

ARGUMENT

Test For Granting Leave To Appeal

33. Leave to appeal from a decision of an administrative tribunal will generally be determined based upon the six factors set out in *Queens Plate Development Ltd v. Vancouver Assessor, Area 9*. In *Crestbrook Forest Industries Ltd. v. Columbia Natural Gas Ltd.*, Macfarlane J.A. stated the test more succinctly in regards to appeals from decisions of the BCUC:

“Something more than a meritorious appeal is needed in order to justify a justice of this Court in granting leave. I think it is sufficient in this case to ask whether there is an important question of principle raised by the appeals and secondly, whether, if this Court should grant leave, that there are practical consequences of significance which would follow.”

Queens Plate Development Ltd. v. Vancouver Assessor, Area 9 (1987), 16 B.C.L.R. (2d) 104 (CA) at 109 – 110;

Plateau Pipe Line Ltd. v. British Columbia (Utilities Commission) [2002] B.C.J. No. 423 (C.A.), aff'd [2002] B.C.J. No. 802 (C.A.).

Crestbrook Forest Industries Ltd. v. Columbia Natural Gas Ltd., [1984] B.C.J. No. 1873 (C.A.) at para. 5.

34. This Court has also held that appeals from decisions of the BCUC are limited to questions of law or jurisdiction. Findings of fact are immune from review by virtue of s 79 of the UCA.

Plateau Pipe Line Ltd. v. British Columbia (Utilities Commission) (C.A.), *supra*

35. Applying the relevant principles to the proposed grounds of appeal raised by the Applicants, it is submitted that leave to appeal should be denied.

The Commission's Jurisdiction and the Specific Issue Before It

36. The hearing before the Commission was conducted pursuant to section 71 of the UCA which requires the filing of energy supply contracts with the Commission and which empowers the Commission to determine whether such contracts are in the public interest.

37. In its Reasons, the BCUC addressed the scope of its authority under section 71 and the nature of the process it adopted in order to fulfill that authority:

"The EPA was filed pursuant to section 71 of the UCA. A filing pursuant to section 71 neither requires a hearing nor approval. Nevertheless, the Commission does have the authority to determine, following a hearing, that the EPA is not in the public interest and to declare the contract or portions of it unenforceable or make any other order it considers advisable in the circumstances.

The Commission Panel established a hearing process pursuant to subsection 71(2) to review the EPA. Having determined that a hearing was appropriate, the Commission Panel exercised its discretion to determine the nature of the process and the issues and evidence it considered necessary to determine whether the contract was in the public interest. On November 30, 2004, after submissions from parties, the Commission Panel established the scope for the issues that it concluded needed review."

Reasons, pp. 12 – 13; JIESC Motion Book Tab 1.

38. The Commission's reasoning in this regard is relevant to a number of the proposed grounds of appeal raised by JIESC and GSXCCC, however two key points should be underscored:

- (a) Unlike its broad mandate over public utilities under Part 3 of the UCA, the Commission's mandate under section 71 is relatively narrow – it is to determine whether the EPA is in the public interest. This is a matter of opinion or discretion falling within the exclusive jurisdiction of the Commission and therefore subject to considerable deference by the Court;

Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetary Co., [1958] S.C.R. 353 at 357; citing *Union Gas Co. of Canada v. Sydenham Gas & Petroleum Co.*, [1957] S.C.R. 185;

Kootenay, Okanagan Electric Consumers Association v. Utilicorp United Inc., [1987] B.C.J. No. 1657 (C.A.);

Solex Gas Processing Corp. v. Alberta (Energy and Utilities Board), [2004] A.J. No. 1370.

- (b) The process adopted by the Commission was specifically tailored to fulfill that mandate. This exercise of the Commission's discretion is also entitled to considerable deference.

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at 837;

British Columbia (Securities Commission) v. Pacific International Securities Inc. (2002), 2 B.C.L.R. (4th) 114 (C.A.) at 122.

The Procedural Fairness Grounds

39. Both JIESC and GSXCCC raise grounds of appeal that go to the fairness of the hearing process below. In the case of JIESC, the fairness issues are interwoven with its allegation of a reasonable apprehension of bias, however the procedural fairness and bias grounds will be addressed separately here in keeping with the Notices of Application for Leave to Appeal.

(i) Governing Principles

40. The scope and content of the duty of fairness will vary depending upon the particular administrative decision in issue. The Supreme Court of Canada has articulated a number of factors as being relevant to determining the content of the duty of fairness in a given instance, including: the nature of the decision being made and the process followed in making it; the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; the importance of the decision to the individual or individuals affected; the legitimate expectations of the person challenging the decision; and the choices of procedure made by the agency itself. The Court has also emphasized that underlying the above factors is the notion that:

“...the purpose of participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, **appropriate to the decision being made and its statutory, institutional and social context**, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.” (emphasis added)

Baker v. Canada (Minister of Citizenship and Immigration), *supra* at 837-840.

41. The scope of the duty of procedural fairness must also be considered in light of the Commission's statutory authority to determine its own processes. For example, section 11(1) of *The Administrative Tribunals Act*, S.B.C. 2004, c. 45 authorizes the Commission to “make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it”. Similarly, section 4(1)(a) of the *Utilities Commission Act* specifically directs the

Commission to "conduct its proceeding in a manner it considers convenient for the proper discharge and speedy dispatch of its duties under this Act."

42. This is consistent with the common law principle that administrative tribunals are the masters of their own procedure. This Court has endorsed that principle as well as the notion, taken from *Baker*, that a tribunal's choice of procedures is entitled to deference:

"It is now well settled law that all administrative tribunals must provide procedural fairness....However, administrative tribunals are the masters of their own procedures and, unlike Courts, need not be shackled by all of the requirements of natural justice; rather, they are entitled to devise flexible procedures adapted to their needs in order to achieve a certain balance between the need for fairness, efficiency and predictability of outcome."

...

"Recognition must be given to their institutional restraints and to their expertise. Here, the Commission has a broad procedural discretion and it has a base of experience on which to gauge the efficacy of the procedures it has adopted. It must proceed fairly, but it also must be given scope to perform its public-interest functions efficiently and effectively. Thus while it is not determinative, the Commission's selection of the point of balance between its choice of procedures and the rights of the appellants must be given weight."

British Columbia (Securities Commission) v. Pacific International Securities Inc.,
supra at 120, 122.

(ii) Analysis

43. Consistent with the Supreme Court's approach in *Baker*, the hearing process adopted by the Commission was fair and open and afforded all participants an opportunity to present their evidence and their views. In this regard, the following facts are relevant:

- (a) The hearing and resulting Decision flowed out of the previous VIGP proceedings where both JIESC and GSXCCC had an extensive opportunity to present evidence and arguments concerning Vancouver Island's electricity needs;
- (b) Based on the VIGP proceeding, the Commission was able to, and did, form a view on the prejudice to the public interest that could occur if implementation of a cost-effective solution to Vancouver Island's capacity needs was delayed. The Commission communicated its commitment to design an expedited process to protect that public interest in the VIGP decision and again in January 2005;
- (c) The Commission invited and received submissions from all interested parties about the scope of the hearing and the procedures to be utilized;

- (d) The Commission's determinations on the scope of the review and the treatment of confidential information were the subject of further submissions in connection with the reconsideration application brought by the JIESC;
- (e) All parties were given the opportunity to make submissions on timing issues, including both the length of the evidentiary phase in general and the specific allotment of time for the witness panels, including the allotment of time for cross-examination;
- (f) All parties had the opportunity to present fully their evidence in support of their positions. Consistent with the Commission's normal practice, written evidence was received from the parties in advance of the oral hearing;
- (g) All parties were given the opportunity to cross-examine the witness panels put forward by the other parties.

44. The procedures adopted by the Commission represented its attempt to appropriately balance the need for expeditious review, the need to hear all relevant viewpoints and the need to focus on those issues that were central to its view of the public interest. The Commission's balancing in this regard should be afforded significant deference by the Court. In light of that deference, there is no prospect that any of the procedural complaints advanced by the Applicants as proposed grounds of appeal, either individually or collectively, will be found to constitute a denial of procedural fairness. Each will be addressed in turn.

(a) **Restricted Scope of Hearing**

45. Both JIESC and GSXCCC allege that the Commission breached the requirements of procedural fairness and natural justice by unduly restricting the scope of the hearing to considering only "Tier 1, Tier 2 or No Award." While the Commission in its initial scope ruling described as the Principal Issue whether one of these three options is the most cost-effective option for meeting Vancouver Island's capacity shortfall, it did not limit the hearing to that issue. Moreover, in its subsequent Letter No. L-3-05 dated January 13, 2005, issued in response to JIESC's reconsideration application, the Commission clarified its intentions:

"While the Commission Panel has identified the principal issue there remains considerable latitude for parties to pursue issues related to the CFT criteria and resource options. In its scope ruling, the Commission Panel indicated that issues regarding the implications of the CFT criteria for certain resources including co-generation may be pursued during this proceeding and the Panel cautioned that evidence from developers might be helpful in its determination of whether the

DPP is the most cost-effective resource for Vancouver Island at this time....the Commission may during the course of this proceeding "hear evidence that inherent bias against "non-gas" projects or unduly stringent criteria in the CFT disadvantaged or excluded certain projects....In the Commission Panel's view, the identified scope of the proceeding will be more than adequate to satisfy the public interest test and to assist the Panel to fulfill its statutory obligations with respect to energy supply contracts filed under section 71 of the Act."

BCUC letter no. L - 3 - 05, Exhibit "M" to Kleefeld #2, at p. 2; BCH Reply Book Tab 1.

46. Thus, the Commission clearly and appropriately turned its mind to the process requirement in light of its assessment of the public interest placed in issue by the EPA.

(b) Undue Haste

47. While undue haste is identified as a ground of appeal, there is no evidence and virtually no argument advanced to the effect that either JIESC or GSXCCC was in any way prejudiced or prevented from participating fully in the hearing due to the schedule set by the Commission Panel.

(c) Reliance on Confidential Information

48. JIESC argues in paragraphs 54-61 that the Commission failed to address confidentiality concerns in a manner consistent with the rules of natural justice. Review of the record indicates this ground of appeal cannot succeed.

49. The Commission was concerned about and received submissions on the question of confidentiality very early in the proceeding. On November 24, 2004, it sought submissions on the point on November 29, 2004. BC Hydro wished to protect all information submitted to it in confidence as part of the bidding process that led to the award of the EPA. Some parties wanted full disclosure of all information submitted by all bidders. Other parties sought some middle ground.

50. The Commission reached its determinations on this issue in stages. First, it determined on November 30, 2004 that:

- (a) BC Hydro should make its evaluation model in the CFT process (the "QEM") available to any party prepared to enter into a confidentiality agreement; and

- (b) BC Hydro should make available to the Commission and its staff the executed EPA, the QEM and all input data relating to all bids used in the QEM.

Once it had the data, the Commission committed to consider the extent to which it would be released to interested parties based on submissions from BC Hydro and DPP.

Kleefeld #2, Exhibit "F" at p. 314; BCH Reply Book Tab 1.

51. JIESC and BCOAPO sought reconsideration of that Decision. The Commission heard argument on that application December 22, dismissed it as premature on December 24, 2004 for reasons released January 6, 2005 in Order No. G-119-04. In its Reasons, the Commission turned its mind to *Sierra Club* decision upon which the Applicants rely and weighed the appropriate factors in balancing the public interest in disclosure vs. the public interest in maintaining the integrity of the bidding process. Its decision should be given significant deference in this regard.

Kleefeld #2, Exhibit "I"; BCH Reply Book Tab 1.

52. In paragraph 55, JIESC complains that it was not given adequate time to assess confidential information that it had successfully persuaded the Commission should be released. The JIESC did not seek procedural relief from the Commission in connection with the information at that time and, as such, it should not be permitted to seek relief from this Court.

(d) ***In Camera* Session**

53. Both JIESC and GSXCCC address the issue of the *in camera* session as part of their bias argument which is addressed below. However, from a procedural fairness perspective, based upon the facts set out in paragraphs 24-27 above, it the fact that the session was initially held *in camera* had no impact upon the transparency or fairness of the hearing.

54. When the hearing is examined in its entirety, it is apparent that it was conducted in a fair, reasonable and transparent manner which afforded all interested parties ample opportunity to advance their positions fully. A further appeal to this Court on procedural fairness grounds is therefore both unnecessary and unwarranted.

55. With specific reference to the test for granting leave to appeal, it is submitted that the procedural fairness grounds raise no issues of importance concerning the Commission's jurisdiction and are bound to fail on appeal. Moreover, there is no practical utility in granting leave to appeal given the extensive and thorough review of the substantive issues that has already occurred, both in the VIGP proceeding and the proceeding below.

Reasonable Apprehension of Bias

(i) Governing Principles

56. The test for determining the existence of a reasonable apprehension of bias is an objective one – would a reasonable person, properly informed and viewing the matter realistically and practically, conclude that the decision-maker would not decide fairly? The Supreme Court has also emphasized that the apprehension of bias must be substantial, as distinct from a mere suspicion or sensitivity, that the conduct giving rise to the apprehension must be considered in context and that the inquiry is very fact specific.

Committee for Justice and Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369 at 394;

Baker v. Canada (Minister of Citizenship and Immigration), *supra* at 849 to 850;

Wewaykum Indian Band v. Canada, [2003] 2 S.C.R. 259 at 294-295.

(ii) Analysis

57. The allegation of a reasonable apprehension of bias is advanced by the Applicants in two different ways. JIESC alleges attitudinal bias based upon the overall conduct of the hearing. These issues have been addressed above under the heading "Procedural Fairness Grounds" and, as submitted there, do not support leave to appeal being granted.

58. JIESC and GSXCCC also focus on the comments of the Chair in his discussion with BCH Panel 2. It is important to note that these comments were made with the full knowledge and intention that they could and likely would become public. They became public at the direction of the Commission before any submissions were received from the Appellants or any other intervenors. Accordingly, a reasonable person would view those in the same way they would if made initially in the presence of all parties. However, when the impugned comments of the Panel Chair are examined in the light of the test set by the Supreme Court, it is apparent that

those comments do not give rise to a reasonable apprehension of bias. In particular, they do not suggest that the Chair, or the Commission Panel, has predetermined the issue. In context, it is apparent:

- (i) the Panel Chair expressly professes not to know enough about the issue yet to have enabled him to make up his mind; and
- (ii) the outcome that he is seeking is whatever is in the customer's best interest. Far from giving rise to a reasonable apprehension of bias, the Chair's comments in fact make it clear that he understood fully the Commission's statutory mandate under section 71.

See paras. 21-27 above.

59. Furthermore, there is no error of law or principle in the manner in which the BCUC considered and determined the GSXCCC disqualification motion that would warrant the intervention of this Court. The Commission was very much alive to the principles set out by the Supreme Court and it applied those principles in considering and rejecting the GSXCCC's application that the Commission Panel recuse itself.

Reasons for Decision on GSXCCC Disqualification Motion, Appendix "B" to Letter No. L-10-05 at p.2; Exhibit "W" to leave Affidavit, JIESC Motion Book v.2.

60. The Commission Panel considered the impugned comments of the Chair in their entire context and concluded that an informed person, viewing the matter realistically and practically, would not conclude that the Commission had prejudged the matter or would not decide the issue fairly.

61. Lastly, as the Commission also notes in its Reasons on the disqualification motion, subsequent to the *in camera* session and the comments of the Panel Chair giving rise to GSXCCC's bias allegations, the Chair explained to all parties what had transpired, a virtually complete transcript was released and the Commission invited submissions from all parties on how to address the issues that had arisen *in camera*.

Reasons for Decision on GSXCCC Disqualification Motion, Appendix "B" to Letter No. L-10-05 at pp. 5 – 6; Exhibit "W" to leave Affidavit, JIESC Motion Book v.2.

62. In the circumstances, there is simply no credible basis for alleging reasonable apprehension of bias on the part of the Commission or the Panel Chair.

63. An allegation of bias, including reasonable apprehension of bias, goes to the heart of the Commission's decision-making function and challenges the integrity of the regulatory process. It is for this reason that the Courts have consistently required that allegations of bias meet a stringent test pursuant to which the apprehension of bias must be both substantial and realistic in accordance with an objective standard. The allegation advanced in this case falls far short of that standard and must be rejected.

64. Viewed in the context of the test for granting leave to appeal, the disqualification application based upon reasonable apprehension of bias was fully considered by the Commission and properly rejected based upon well-established principles. This proposed ground of appeal is bound to fail.

Alleged Errors of Law

(i) Standard of Review

65. The applicable standard of review is determined in accordance with the "pragmatic and functional" analysis which requires consideration of a number of contextual factors.

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982 at 1003 – 1011;

Re Cartaway Resources Corp., [2004] 1 S.C.R. 672 at 692.

66. While the UCA provides for a statutory appeal, with leave, which would suggest a lower degree of deference, the remaining factors support a finding that the decision of the Commission that the EPA is in the public interest warrants a high degree of judicial deference. As noted above, the determination of public interest by the Commission is a matter of opinion or discretion based upon the facts found by the Commission. Such findings of fact are protected by a privative clause (section 79 of the UCA). Moreover, determination of what is in the public interest is at the core of the Commission's statutory mandate and falls squarely within its specialized expertise. In the circumstances, the Court should only interfere with the

Commission's decision if it finds that the decision is unreasonable, in the sense of there being no rational basis to support it.

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557 at 589-598;

Re Cartaway Resources Corp., *supra* at 693.

(ii) **Analysis**

(a) **Public Interest**

67. JIESC in paragraphs 46-51 provides no basis for its argument that the BCUC improperly limited the scope of the issues it considered in determining the public interest. Far from limiting itself inappropriately, the Reasons for Decision made clear that the Commission considered in exhaustive detail the very question the JIESC says it should have, namely whether "there are any other resources which are a more cost-effective option to meet the alleged capacity deficiency."

Reasons, pp. 76-100; JIESC Motion Book Tab 1.

68. JIESC differs with the Commission's conclusion relating to the public interest not the factors considered by the Commission.

69. Similarly, with respect to onus, JIESC seeks to elevate a single sentence in a 103-page Decision into a precise legal conclusion so as to impugn it. The only fair reading of the Decision is that the Commission believed that the CFT bidding process, although not perfect, did yield a cost-effective resolution. The Commission reached its conclusion in this regard based on the totality of the evidence before it. That is what it is required to do under the Act.

Kootenay, Okanagan Electric Consumers Assn v. Ulitcorp United Inc, *supra* at pp. 5-6.

70. To the extent that GSXCCC in paragraphs 44-47 argues additional factors should have been considered, the Supreme Court has held that public interest is a matter of opinion or discretion for the Commission based upon its findings of fact. The Appellants, in argument before the Commission and in their material here, have not identified a different meaning of the term "public interest" than articulated by the Commission. In these circumstances, it would be

inappropriate for this Court to engage in the academic exercise of considering and expounding upon the meaning of public interest in section 71.

(b) **Contract with TGVI**

71. TGVI and BCH are engaged in discussions to reach an agreement for gas transportation service to both DPP and ICP. Pursuant to Commission Order E-1-05 BCH intends to advise the Commission on April 4, 2005 that progress towards an agreement has been made but more time is required for resolution of outstanding issues.

Affidavit of Dawn Farrell, sworn April 1, 2005, BCH Reply Book Tab 3.

72. Any agreement that is reached between TGVI and BCH will be a 'rate' and have to be filed with the Commission pursuant to section 61 of the UCA. The Applicants and any other interested party will be free at that time to raise concerns they have with respect to whether the rate is just and reasonable.

73. Until an agreement is filed, JIESC's suggestion that ratepayers may be prejudiced by its contents or that there would be any other practical consequence associated with whether this condition stands or not is entirely speculative. This Court should not hear an appeal with no demonstrated practical consequence.

(c) **Substantive errors**

74. The proposed grounds of appeal raised by GSXCCC concerning carbon tax liability, the long term need for the EPA and the Norske Demand Management proposal are all questions of fact that fall squarely with the BCUC's jurisdiction and, as such, are immune from review by virtue of section 79 of the UCA.

Summary and Conclusion

75. Of the factors identified in the *Queens Plate* decision, three are of direct importance to these Leave Applications:

- (a) No issue of significance arises concerning the Commission's jurisdiction. No public interest issue is identified by the Applicants and in any event the question of public interest under section 71 falls squarely within the Commission's regulatory authority;

- (b) None of the proposed grounds of appeal have any prospect of success on appeal nor do they raise substantial questions warranting review by this Court. Again, the decision is the result of a fair and reasonable process, tailored to meet the Commission's public interest mandate, and reflects the Commission's extensive and careful analysis of the issue before it; and
- (c) There is no benefit or practical utility to granting leave to appeal given the thorough manner in which the matter has been canvassed, both in the hearing below and in the VIGP proceeding. In contrast, there is clear prejudice to the public interest, in the form of BCH's ability to provide a reliable source of electricity to Vancouver Island in 2007, if the DPP project continues to be delayed as a consequence of this proceeding.

Affidavit of Bev Van Ruyven, paras. 7-9; BCH Reply Book Tab 2.

76. In all of the circumstances, it is submitted that there are no grounds for granting leave to appeal.

PART 4

NATURE OF THE ORDER REQUESTED

77. BCH respectfully submits that leave to be appeal be denied with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: April 4, 2005



Chris W. Sanderson Q.C.



Ron A. Skolrood
Counsel for the Respondent, British
Columbia Hydro and Power Authority

PART V

LIST OF AUTHORITIES

1. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817
 2. *British Columbia (Securities Commission) v. Pacific International Securities Inc.* (2002), 2 B.C.L.R. (4th) 114
 3. *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369
 4. *Crestbrook Forest Industries Ltd. v. Columbia Natural Gas Ltd.*, [1984] B.C.J. No. 1873 (C.A.)
 5. *Kootenay, Okanagan Electric Consumers Association v. Utilicorp United Inc.*, [1987] B.C.J. No. 1657 (C.A.)
 6. *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetary Co.*, [1958] S.C.R. 353
 7. *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557
 8. *Plateau Pipe Line Ltd. v. British Columbia (Utilities Commission)* [2002] B.C.J. No. 423 (C.A.), aff'd [2002] B.C.J. No. 802 (C.A.)
 9. *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982
 10. *Queens Plate Development Ltd. v. Vancouver Assessor, Area 9* (1987), 16 B.C.L.R. (2d) 104 (CA)
 11. *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672
 12. *Solex Gas Processing Corp. v. Alberta (Energy and Utilities Board)*, [2004] A.J. No. 1370
 13. *Union Gas Co. of Canada v. Sydenham Gas & Petroleum Co.*, [1957] S.C.R. 185
 14. *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259
-