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Shenanigans at BCUC hearings ~ Patrick Brown

A motion by GSXCCC and other intervenors to disqualify members of the BC Utilities Commission Panel from hearing the application for approval of the Duke Point Power project was rejected by the Panel on Thursday, January 27. The motion, which had resulted in day-long arguments on the Wednesday, alleged that the panel had predetermined its conclusions before the end of the public hearings, and that this created 'a reasonable apprehension of bias' on the Panel's part.

The main part of the evidence for the motion referred to a session, held on January 19, that included only the Panel and applicant BC Hydro. The transcript of this in-camera session was made available in redacted (meaning some parts were blanked out) form on January 21, and in a less redacted form on January 22.

The session included a discussion between the panel members and their counsel, GA Fulton; CW Sanderson, QC, Hydro's lawyer, and Hydro's Mary Hemmingson, about the winning bid selected as a result of Hydro's Call for Tenders (CFT) which sought private sector bids on power generation for Vancouver Island in 2007.

That winning bid was from Duke Point Power (Pristine Power Inc.) but it did not include duct firing, which would have resulted in an extra 28Mw of capacity. Evidence presented by a Hydro witness panel suggested that had the bid included duct firing, the proposal would have been more 'cost-effective', but not lowest cost.

Discussion at the private session revolved around how, since the proposal including duct firing was preferable, the panel could ensure that it was adopted, since the Electricity Purchase Agreement which was the subject of the hearing did not include duct firing. The BCUC chair asked BC Hydro for help in a strategy to achieve this. From the transcript:

'The Chairperson: This may be an area where I can add some value to customers. And I thought your answer would be just what it is, that but for the rules of the CFT, you would have chosen Pristine with duct firing. It may be—I don't know enough about this yet—but it may be that the coincidence that both portfolios are the same proponent is helpful in moving us to the outcome that's in the customer's best interest. So you know now what I want to try to do. I need your help in telling me how I can get there.'

Apprehension of Bias

Bill Andrews, representing the GSXCCC, charged that this discussion, taking place before the conclusion of the hearings (and particularly before intervenors' witnesses had been heard) was a clear indication that the panel had already made up its mind to approve the Duke Point proposal. It constituted a denial of procedural fairness and natural justice during the hearings, he said.

The result was a day of legal argument redolent of *Alice Through the Looking Glass* (which was on CBC-TV the Sunday before last).

Andrews had made the motion to disqualify on Monday January 24, so Tuesday had been a day off so that representatives for all sides could decide what they were going to say. Even before Andrews led off on Wednesday, Chairperson Robert Hobbs stated that he had not known they were going to discuss these points in an in-camera session until it happened, and that the lone remaining Commissioner Boychuk didn't know either.

This protestation of innocence didn't deter Andrews. He accused the panel of setting out to help BC Hydro, and of advising Hydro (and no one else) of this through the in-camera session.

Plenty of Support for GS-XCCC

Andrews, who also represents BCSEA (BC Sustainable Energy Association) and SPEC (Society Promoting Environmental Conservation), received plenty of support for his motion from the JIESC (industrial users), BCOAPO (BC Old Age Pensioners' Organization, along with other consumer groups), Green Island Energy (an unsuccessful bidder), Mayor Lewis of Gold River (where Green Island Energy is based), the CEC (commercial consumers) and others.

RB Wallace, representing the JIESC, added a long list of complaints about rulings made by the panel during the hearings, mainly related to BCUC's attempt to produce a decision within a 90-day time limit that the Commission had agreed with BC Hydro. In particular, that the actual figures in the Electricity Purchase Agreement remained confidential, and much of the other information required of BC Hydro by intervenors had not been provided until the last week of 2004, nearly 50 days into the 90 day period.

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F.J. Weisburg, appearing for Green Island, went so far as to accuse the panel of wanting to 'collude' with Hydro to change or improve the deal. Essentially, he accused the panel of attempting to find a short cut to its predetermined decision. Mayor Lewis of Gold River, speaking of BCUC: 'Institutions can be granted power and responsibilities. They cannot be granted integrity. Integrity for and respect of an institution is earned.' He concluded his presentation with a short quote from James Bovard: 'Democracy must be more than two wolves and a sheep voting on what to have for dinner.'

K. Steeves, supporting the GXCCC motion, noted the Pristine Power proposal with duct firing 'is much more of a polluter than Pristine without duct firing' and accused the panel of ignoring environmental arguments. Shadybrook Farms' Dodie Miller (who has been involved in this process for five years), listed procedural decisions, including limitations of scope, choice of venues (Vancouver, not Nanaimo), unequal time allowed for cross-examinations, and the adoption of the February 17 decision date, as all being favourable to the proponents. She made the point that the remarks made in the in-camera session clearly indicated that the panel was aware that intervenors and others in the hearing process would be concerned about being left out of the discussion.

Plenty of Opposition

Those opposing the GSXCCC motion included Hydro itself and Duke Point Power. Hydro's counsel Sanderson led off by saying that the private session and the apprehension of bias could not be connected. The 'in camera' aspect was rendered meaningless by the release of the transcript, he said, implying that it wouldn't have made any difference when the other participants in the hearing would have found out what had happened. Anyway, he continued, they should have objected at the time. There was no evidence, he said, that the panel had made up its mind:

'And then, you move into the 'So what?', if you will, of that piece of evidence. 'It may be.' Now, I stress as no one else has, 'It may be.' Not that it is, not that anything is a certain state of affairs, but rather they may be, and to emphasize it, you say, 'I don't know enough about this yet.' Ernestine, Lily Tomlins' telephone operator character, couldn't have put it better!

He quoted, as precedent, 'Newfoundland Telephone Company versus Newfoundland Board of Commissioners', as a far clearer example of apprehended bias than BCUC. He complained that the complainants had not complained earlier in the hearings. If the Commission stands down, he said, it would prejudice the interests of both the applicant and the public. And, if eventually a court decides that there was bias, then we're no worse off than if the panel stood down now.

L. Keogh, appearing for Duke Point Power, quoted a Saskatchewan Court of Appeal case concerning the Chiropractic Association of Saskatchewan. A Mr Johnson, appearing for Terasen Gas, said he doesn't support pre-judging, claimed to be disinterested, but raised a question of 'necessity': 'There is no other panel of the Commission that can hear this EPA application in the timeframe that is required to meet the timing of this project.' GA Fulton, Commission Counsel, quoted a case involving Lord Hoffman, who because of his association with Amnesty International, was asked to stand down from the trial of General Pinochet.

And At the End

Mr. Andrews had his turn at rebuttal: 'I turn to the facts of the case rather than talking about how it was important to turn to the facts of the case.' He noted that Duke Point P had stated that it would not proceed with the project unless the Court of Appeal has dealt with any appeal. (This would appear to make it difficult for Hydro to argue that there is no bias on the part of the Panel because it admits the possibility that the Court of Appeal might find that there is.)

But Chairman Hobbs had the final word. At 1:30pm on Thursday, January 27, he dismissed the GSXCCC application 'with reasons to follow.'

So on Thursday afternoon, the hearing continued ...

The Chairman: Mr. Bois? You're on your feet. You can have the mike.

C. Bois (Norske): Oh, go ahead. Say what you were going to say.

Chairman: Well, I'd rather hear from you.

Mr. Bois: I thought I may not have to say it.

Chairman: I'd rather hear from you first.

Mr. Bois: Well, maybe I'd rather hear from you ... ✍