

BEFORE THE PUBLIC UTILITIES COMMISSION

In the matter of the Public Utilities  
Commission Act 1990 (No. 26 of  
1990)

- and -

In the matter of the  
application by the Guyana  
Electricity Corporation for  
approval to execute three  
mortgages and two  
debentures in favour of Blue  
and White Power Financing.

PAMADATH J. MENON, A.A.	-	Chairman
HUGH GEORGE	-	Member <i>H</i>
JOHN WILLEMS, A.A.	-	Member
CHANDRABALLI BISHESWAR	-	Member
BADRIE PERSAUD	-	Member

**REPRESENTATIONS** -

Consumers' Advisory Bureau of Guyana	-	Ms Eileen Cox, A.A. Vice-Chairman
Guyana Consumers Association	-	Mr Patrick Dyal, A.A. President Ms Sheila Holder

## DECISION

### PRELIMINARY -

Section 47 of the Public Utilities Commission Act 1990 (No. 26 of 1990) (the Act) reads as follows:-

- |   |        |   |
|---|--------|---|
| Approval by<br>the Commission to<br>issue of securities | 47.(1) | No public utility shall issue any stock, shares, or debentures or other evidence of indebtedness, payable after more than one year from the date thereof, unless it has first obtained the approval of the Commission for the proposed issue. |
|   | (2)    | The Commission may grant the approval for the proposed issue in the amount applied for or in any lesser amount, and subject to such conditions as it may deem reasonable or necessary to impose”.   |

The expression “Commission” in the above section is a reference to this Commission, namely, the Public Utilities Commission established by the Act.

2. On the 24th August, 1995, this Commission issued a notice to the Guyana Electricity Corporation (GEC) under section 56 of the Act intimating to GEC that this Commission would hold a public hearing on the 5th September, 1995, in respect of certain matters specified in that notice. One of the matters specified in the notice was, whether GEC had complied with section 47 of the Act in cases to which that section applies.

3. On the 10th June, 1996, this Commission wrote to GEC requesting it to furnish information as to whether, after the commencement of the Act, namely, 1st October, 1990, and up to the date of GEC’s reply to that letter, the GEC had issued any stocks, shares, debentures or other evidence of indebtedness, payable after more than one year after the date thereof, and if it had issued any such document/instrument to furnish particulars of the same. The information was required to be furnished on or before the 22nd June, 1996. In reply to the above-mentioned letter, the Corporate Secretary of GEC wrote to this Commission on 28th June, 1996, stating that since the commencement of the Act in October, 1990, to the date of that letter, GEC had not issued any stocks, shares, debentures or other evidence of indebtedness. The letter from the Corporate Secretary continued to state -

“However, we hereby seek the approval of the PUC in accordance with section 47 of the PUC Act, to issue -

- (i) A First Mortgage on the two Wartsila built 11MW power plants at Garden of Eden to the Wartsila Diesel Inc. to secure the sum of US\$9,260,000.00;
- (ii)(a) A First Mortgage on the 22MW power plant to be constructed at Kingston;
- (b) A Second Mortgage on the two 11MW power stations at Garden of Eden;
- (c) A First Mortgage on the properties situated at 40 Main Street and 257/259 Middle Street, of the Wartsila Diesel Caribbean Inc. to secure the sum of US\$13.5M.

The Corporation is obligated under Lease Agreement dated March 31, 1996 and May 9, 1996, with the respective companies to issue to the aforesaid Liens”.

4. In reply to the above letter from the Corporate Secretary of GEC, the Acting Secretary of this Commission wrote to her on the 4th July, 1996, requesting GEC to forward to this Commission copies of the four mortgages referred to in her letter, within one week, so as to enable this Commission to take a decision in regard to the request made by GEC. On the 10th July, 1996, the Acting Secretary of this Commission wrote to the Corporate Secretary of GEC reminding the GEC that under section 47 of the Act prior approval of this Commission was required before any debentures or other evidence of indebtedness payable after more than one year from the date thereof, was issued by the GEC. On the same date, namely, 10th July, 1996, this Commission received a letter dated 8th July, 1996, from the Corporate Secretary of GEC, which read as follows -

“As stated in my letter dated June 28, 1996, the Corporation is obligated under Lease Agreement dated March 31, 1996 and May 09, 1996, to provide collateral security to the Wartsila Diesel Inc. and Wartsila Diesel Caribbean Inc. respectively for financing provided. The Mortgage Deeds have not yet been executed, accordingly it is impossible to comply with your request”.

5. On the 25th October, 1996, this Commission received from GEC the following letter -

“Dear Sir,

**RE: MORTGAGES/DEBENTURES TO BE ISSUED BY THE CORPORATION IN FAVOUR OF BLUE AND WHITE POWER FINANCING**

Enclosed please find copies of the debentures and mortgages to be issued to Blue and White Power Financing submitted for your approval pursuant to section 47(1) of the PUC Act.

Please be informed that the Prime Minister has given approval for the borrowing in accordance with the Electricity Act, Chapter 56:01.

Yours sincerely,

GUYANA ELECTRICITY CORPORATION”  
(Sgd.) Maxine Alexander-Nestor,  
Corporate Secretary”

#### **APPROPRIATE MINISTER -**

6. We may dispose of one issue here itself, namely, assuming the statement in the above letter that the Prime Minister has given approval for the borrowing, is correct, whether that is sufficient for the present purposes. Obviously the above letter was referring to the approval required under section 26 of the Electricity Act, Cap 56:01. Under subsection (2) of that section, as amended by section 59 of the Public Corporations Act 1988 (No. 21 of 1988), the approval of the Minister assigned general responsibility for public corporations or, where there is no such Minister, of the President of Guyana, was required as to the amount to be borrowed, the sources of the borrowing and the terms on which the borrowing may be effected, before GEC can validly borrow any sum of money. (In this connection the definition of “Minister” in section 2(k) of the Public Corporations Act 1988, which will apply for the purpose of interpretation of section 59 of that Act, may be taken note of). Similarly, under subsection (3) of that section, the approval of the Minister assigned general responsibility for public corporations or of the President is required to enable GEC to validly create a fixed or floating mortgage or charge over its undertaking or assets or any of them to secure any borrowing by it. At the relevant time the Prime Minister was not the person assigned general responsibility for public corporations. So, if what GEC wanted to convey through the above-mentioned letter was that subsections (2) and (3) of section 26 of the Electricity Act have been complied with in respect of the borrowing and execution of the mortgages and debentures, it is not correct. However, this is a defect which can be remedied even at this stage particularly since the person who was the Prime Minister at the relevant time is now the President of Guyana. It is hoped that GEC will take requisite steps to remedy the defect.

#### **DOCUMENTS SUBMITTED BY GEC -**

7. There is another issue which has to be considered. As stated in the letter of GEC dated 28th June, 1996, the mortgages referred to in that letter were proposed to be issued by GEC as obligated under the Lease Agreements dated 31st March and 9th May, 1996. Section 26 of the Electricity Act,

Cap. 56:01, contemplates the creation of fixed or floating mortgages or charges over its undertaking or assets by GEC only if there was a borrowing by GEC.

8. Another aspect is that though the letter from the GEC, dated 25th October, 1996, stated that along with that letter copies of the debentures and mortgages to be issued to Blue and White Power Financing were being submitted, only the copy of a debenture proposed to be issued in respect of the Wartsila Plant at Kingston was enclosed with it. Subsequently, in reply to the request of this Commission, dated 14th November, 1996, GEC forwarded to this Commission along with its letter dated 27th November, 1996, copies of the following fourteen(14) documents: -

- (1) Turnkey Contract dated July 31, 1996 between GEC and Wartsila Diesel .
- (2) Lease Agreement dated May 9, 1996 between GEC and Wartsila Diesel.
- (3) Amendment No. 1 to the Lease Agreement dated July 31, 1996.
- (4) Assignment Agreement of Lease Agreement dated July 31, 1996.
- (5) Partial Assignment Agreement of Turnkey Contract dated July 31, 1996.
- (6) Guarantee dated July 31, 1996.
- (7) Ground Lease dated August 22, 1996.
- (8) Power Purchase Agreement dated August 22, 1996.
- (9) Agreement dated August 22, 1996.
- (10) Government Guarantee dated August 22, 1996.
- (11) Letter of Support from the Government of Guyana dated August 22, 1996.
- (12) Operation and Maintenance Agreement with First and Second Amendments.
- (13) Repayment Schedule for Garden of Eden Lease.
- (14) Garden of Eden debenture.

The above letter of 27th November, 1996, from the GEC goes on to state further -

“Please note that documents submitted relate to the Kingston project except items (12), (13) and (14) above. The documents for the Garden of Eden project are similar except with the appropriate changes.”

It took quite some efforts on the part of this Commission to receive from GEC copies of the documents relating to the Garden of Eden project relating to the Second 11MW Wartsila plant.

9. GEC's letter of 27th November, 1996, referred to above, also stated -

“With regard to the debenture the capital sums were overstated and should now read US\$9,260,000. and US\$13,870,000 for Garden of Eden and Kingston respectively. The parties are also reviewing certain clauses in the debenture, particularly clauses 4 and 5 - where contrary to the agreement between the parties, a floating charge is created on all of the Corporation's properties which are not subject to the fixed charge. Items 10 and 45 have been deleted from the Schedule A to the Debenture.”

The amounts mentioned in the earlier version of the debentures were U.S.\$10,929,000.00 and U.S.\$14,070,000.00 respectively.

10. On the 22nd November, 1996, this Commission wrote to GEC requesting it to furnish to this Commission a copy of any Legal Opinion in respect of the mortgages and debentures proposed to be issued by GEC, whether obtained from the Attorney General's Chambers or GEC's Legal Advisors. The same request was repeated in a notice issued by this Commission to GEC on 29th November, 1996. We never received a copy of the legal opinion, if any, received by GEC in respect of the above documents, nor have we been told, in spite of repeated questioning at the public hearings, as to who provided legal advice to GEC in respect of the issue of the above documents. It may be pointed out here that the total amount proposed to be covered by the two sets of documents is about US\$23M.

11. Superseding the drafts of the mortgages and debentures which GEC had earlier submitted for approval, on 31st December, 1996, GEC submitted to this Commission a new set of documents. These are -

- (i) A First Mortgage in respect of the transaction relating to the Second 11 MW Wartsila Plant at the Garden of Eden;
- (ii) A debenture in respect of the above transaction;
- (iii) A First Mortgage in respect of the transaction relating to the 22MW Wartsila plant at Kingston;
- (iv) A Second Mortgage in regard to the above transaction; and
- (v) A debenture in respect of the transaction relating to the above plant.



We are proceeding on the basis that the final versions of the mortgages and debentures, for the issue of which GEC is seeking approval, are the above-mentioned documents.

12. We have to consider the following matters before deciding whether or not approval is to be granted for the issue of the above documents.

- (i) Whether there is justification for the execution of the documents referred to in the previous paragraph;
- (ii) Whether the provisions in the Electricity Act, Cap. 56:01, in relation to the execution of the above documents have been complied with;
- (iii) Whether there is justification for the execution of both mortgages and debentures in respect of the same amounts and same properties;
- (iv) If the security documents are required to be executed, what should be the amounts, the rate of interest and other terms and conditions.

The Commission heard these matters at the public hearings on 9th and 18th December, 1996, and 9th January, 30th January, 13th February, 20th October, and 18th November, 1997. A considerable amount of irrelevant evidence was produced at the hearings by GEC and, consequently, the concerned public had to be given an opportunity to make their submissions in regard to the same. One such matter was the appropriateness of choosing the Wartsila Plant in preference to other offers. Since the rates charged by GEC are outside the purview of this Commission we do not propose to go into the question whether from the point of view of cost the Wartsila deal should have been preferred to other offers. No question as to safety or environmental protection was raised at the public hearings in regard to these Wartsila Plants. We, therefore, propose to confine this decision to relevant matters in issue, namely, matters enumerated above. The pause between March and September this year, in regard to the hearing of these matters was because we thought that since negotiations for structural changes and capitalisation of GEC were going on we should await the outcome of those negotiations. However, since GEC pressed for an early decision, we resumed the hearings last October and completed the same this month.

13. Meanwhile, there were changes in two of the members of the Commission. We, therefore, enquired from GEC whether they would like to have a de novo hearing or whether they would agree to the re-constituted Commission proceeding on the basis of evidence already on record. GEC agreed to the latter course and we have proceeded accordingly.

## TURNKEY CONTRACTS -

14. We will take up first the two Turnkey Contracts, one dated 4th August, 1995, in respect of the second 11M.W. Wartsila Plant at the Garden of Eden and the other dated 31st July, 1996, in respect of the 22M.W. Wartsila Plant at Kingston.

15. The Turnkey Contract in respect of the Garden of Eden Plant is executed by Wartsila Diesel, Inc. of Annapolis, Maryland, U.S.A. and GEC. Under the Turnkey Contract Wartsila Diesel, Inc. undertook to construct a 11M.W. heavy fuel diesel power project at the Garden of Eden Station and to provide the materials and supplies, technical, professional and construction personnel and supervision, tools and equipment and the services required. On the completion of the execution of the contract, ownership of the facility was to have vested in GEC.

16. Under the above mentioned Turnkey Contract GEC had to pay U.S.\$11,060,000 to Wartsila Diesel, Inc. The Turnkey Contract specifically states that a third party financing institution is to be identified, who would be responsible for financing the facility. Para. 2.1(d) of the Turnkey Contract obliges GEC to obtain sufficient financing for the facility with the assistance of Wartsila Diesel, Inc. and to co-operate in the performance of all the activities necessary for such financing as outlined in Exhibit F to the Turnkey Contract. Exhibit F to the Turnkey Contract reads as follows -

### "GENERAL DESCRIPTION OF ANTICIPATED FINANCING STRUCTURE

\*GEC will establish a special purpose subsidiary Guyana Power Company ("GPC") for the specific purpose of operating the 22MW with. GEC will assign this EPC contract to GPC, with appropriate modifications, which will not affect the material terms of the transaction, to reflect the change in parties. GEC will transfer its existing (first 11MWe) WD-supplied generation assets to GPC, together with the lease of the parcel of land and easements necessary for the existing and new facilities and any portions of the Facility which have already been constructed at the time of financial closing. GPC shall not conduct any business except as described in this Exhibit.

\*For the account of GPC, Financing Entity will make progress payments to Contractor as called for under Article VI of this Agreement.

\*GPC will enter into a finance lease agreement with the Financing Entity. Payments by GPC under the financing lease will be at a level calculated to cover interest and principal amortization on the funds advanced by Financing Entity (including funded reserves), financing costs, and ancillary costs such as political risk insurance. GPC understands and accepts that it may be required to fund as further security a reserve to cover lease payments to Financing Entity. When all financing payment have been made, the lease will terminate and the GPC will have unencumbered title to the Facility. This finance lease may be pre-paid at any time, subject to the terms and conditions of the lease agreement.



\*GPC will enter into all other agreements necessary to assure the continuous operation of the Facility over the term of the financing, including an operations and maintenance agreement with Dempoco and a fuel supply agreement with a reliable and creditworthy fuel supplier.

\*All such agreements and other GPC assets (including the existing WD generation equipment) will be assigned as security to a trust for the benefit of Financing Entity. As further security, GEC will agree that while the financing is outstanding, it will not transfer or further encumber any of its interest in GPC. Any sale of GPC on its assets will require the repayment of the full balance outstanding under the lease agreement.

\*As security against default under the lease, GPC will enter into a power purchase agreement, acceptable to the Financing Entity to provide 22 MW of power to GEC, using the existing generation plant and the new Facility. The performance by GEC of its obligations under the contingent power purchase agreement will be guaranteed by the Government of Guyana, such guarantee to be supported by security as the parties may agree upon. (In lieu of this, the Government of Guyana will agree to guarantee the payment of the outstanding lease balance either through (i) a lump-sum prepayment, or; (ii) a continuation of the payments remaining of the lease). The power purchase agreement will transfer to Financing Entity upon a default by GPC under the finance lease and all payments under the power purchase agreement will be made by GEC directly to the Financing Entity. To assure Financing Entity of adequate cash flow to make lease payments and continue Facility operations, GEC as power purchaser will commit to an amount equivalent to cover the payment due under the lease and O&M agreements. The term of the power purchase agreement will be at least equal to the term of the financing.

\*The documents will provide GEC and GPC with notice of alleged defaults and a reasonable period to cure defaults pursuant to any of the various alternatives available to GEC and GPC prior to the exercise of remedies by the Financing Entity. Upon an uncured default, GEC/GPC will have the opportunity to (i) have the Government of Guyana prepay the amounts owed to the Financing Entity and to take title to all collateral, including the old and new generation equipment, or (ii) have the remaining payments due under the lease guaranteed by the Government of Guyana. If GEC/GPC does not exercise this right, the Financing Entity shall exercise all its rights under the lease agreement.”

17. GEC did not establish a subsidiary as contemplated by the terms of the aforesaid Exhibit F.

18. In fact Hon'ble Samuel Hinds, then Prime Minister, in his evidence before the Commission stated that the two Turnkey Contracts were not acted upon. The following extracts are from the transcript of the public hearings of this Commission on 9th January, 1997 -

“Chairman: Was it that when the Turnkey Contracts were entered into the Government thought they would be able to finance the deal from its own funds or from other financing?”

Mr Hinds: I think that we felt that other financing may have been available, may

have been arranged.

Chairman: So it was converted into a lease because the other financing was not coming.

Mr Hinds: I would answer yes to that, but with these details may be I could have someone else, may be Mr Ronald Ally speak more accurately and in more detail. But I would say yes, we expected initially that financing would have been arranged - a bank or insurance company, and we did look both locally and off-shore, would have come forward and provided the financing.”

19. The General Manager of GEC, Mr Rabindranauth Singh, in his presentation at the public hearing on 9th January, 1997, confirmed that the lease arrangements were entered into consequent on the failure to find financing for the construction of the two plants.

20. The following from the transcript of the public hearing on 18th December, 1996, when Mr Raymond Gaskin, who was the Chairman of the GEC at the time of the signing of the Turnkey Contract relating to the second 11MW Wartsila Plant at Garden of Eden, gave evidence, is also relevant. The following passage relates to the above-mentioned Turnkey contract -

“Mr Ganpatsingh: Was there an initial downpayment of U.S.\$1m?

Mr Gaskin: I would not be able to recall all that now.

Mr Ganpatsingh: The Schedule of Payments indicate that there was .....Exhibit ‘C’. Do you have it there?

Mr Gaskin: Yes, I think there was some kind of downpayment of \$1M.

Mr Ganpatsingh: There was an initial downpayment of U.S.\$1M?

Mr Gaskin: Yes, I think I now recall that part of it.

Mr Ganpatsingh: And the GEC was mandated to find financing for the balance, along with Wartsila.

Mr Gaskin: There was some arrangement to seek financing or some talk about finding financing, and I think that collapsed. The people who were recruited to do that claimed that they could not have found it or something like that.”

21. As regards the Turnkey Contract relating to the 22MW Wartsila Plant at Kingston there are some other interesting aspects. The Turnkey Contract was executed on 31st July, 1996, after the Lease Agreement which was executed on 9th May, 1996. The Lessor is Wartsila Diesel Caribbean, Inc; a corporation incorporated in the Commonwealth of Puerto Rico and the Lease Agreement states that the Lessee, that is GEC, and the Lessor will enter into a Turnkey Contract. As a matter of fact the Turnkey Contract was entered into by GEC with Wartsila Diesel Inc., incorporated under the laws of the State of Louisiana, United States of America and having offices at Annapolis in the State of Maryland in that country, and not Wartsila Diesel Caribbean, Inc.

22. Besides, the Lease Agreement dated 9th May, 1996, in regard to the Kingston Wartsila Plant has a curious provision, which is not contained in the Lease Agreement dated 31st March, 1996, relating to the second Wartsila Plant at Garden of Eden. Para. 2.2(e), which is part of the Representations and Warranties of Lessor, reads as follows -

“(e) in keeping with Lessor’s internal policies, no illicit payments have been made or will be made by Lessor in connection with this Lease Agreement.”

The addition of this provision could possibly be only because of the requirements under the laws in force in the Commonwealth of Puerto Rico.

23. In any case, the two Turnkey Contracts did not contemplate the execution of any mortgages or debentures by GEC. What was contemplated by Exhibit F attached to the two Turnkey Contracts was that the Guyana Power Company, a newly formed special purpose subsidiary of GEC, would enter into a finance lease agreement with a third party Financing Entity.

The above-mentioned Exhibit F further provided -

“When all financing payments have been made, the lease will terminate and GPC will have unencumbered title to the Facility. This finance lease may be pre-paid at any time, subject to the terms and conditions of the lease agreement.”

## **LEASE AGREEMENTS -**

24. This takes us to the two Lease Agreements. The first Lease Agreement is dated 31st March, 1996, and relates to the second 11 MW Wartsila Diesel Plant at Garden of Eden and the Lessor was Wartsila Diesel, Inc. located at Maryland, United States of America. The second Lease Agreement was dated 9th May, 1996 and relates to the 22MW Wartsila Diesel Plant at Kingston and the Lessor was Wartsila Diesel Caribbean, Inc. located in the Commonwealth of Puerto Rico. The provisions of both are similar.

25. A series of events had to take place before each of the Lease Agreements became legally

binding. (See para. 3.3 of the Lease Agreements). These included -

- (i) GEC should assign the right to purchase the generating plant (Facility) constructed under the Turnkey Contract to a special purpose project company (Blue and White Power Financing). This has been done.
- (ii) The special purpose project company should have purchased the generating plant from Wartsila Diesel, Inc. or Wartsila Diesel Caribbean, Inc., as the case may be. What has really happened is that Wartsila Diesel, Inc. and Wartsila Diesel Caribbean, Inc. have assigned their rights under the Lease Agreements to Blue and White Power Financing.
- (iii) In the case of each of the two Lease Agreements, an Operations and Maintenance Agreement should have been executed between GEC and Wartsila Operations, Inc. Instead an Operations and Maintenance Agreement entered into between GEC and Wartsila Diesel Development Corporation, Inc. on 1st January, 1994, in relation to the First 11MW Wartsila Plant at Garden of Eden was extended by subsequent amendments to the Second 11MW Wartsila Plant at Garden of Eden and the 22MW Wartsila Plant at Kingston.
- (iv) The Government of Guyana had to issue a Letter of Support to Blue and White Power Financing -This has been done.
- (v) A Power Purchase Agreement was to be executed between Blue and White Power Financing and GEC. This has been done.
- (vi) The Government was to issue a guarantee to Blue and White Power Financing guaranteeing the payment obligations of GEC under each of the Power Purchase Agreement. This has been done.
- (vii) GEC has to take out an irrevocable letter of credit in favour of Blue and White Power Financing for the rent payable under each of the Lease Agreements for three months and keep it replenished whenever Blue and White Power Financing draws upon it. By Agreements dated 22nd August, 1996, the above provision was amended to give GEC an option to open an Escrow Account instead of taking out a Letter of Credit. The two Letters of Credit have been executed, as stated by the Chairman of GEC in his presentation on 13th February, 1997.

GEC was further required, at its own expense, to cause property insurance to be carried and maintained in amount of the full replacement value of the two generating plants, namely, the second 11 M.W. Wartsila Diesel Plant at Garden of Eden and the 22MW Wartsila Diesel Plant at Kingston. In addition, GEC was required, at its own expense, to cause general liability insurance, public liability



insurance and other insurance covering third party liability to be carried and maintained in such amounts as Blue and White Power Financing may reasonably require to be carried and maintained. (See para. 7.3 of the Lease Agreements).

26. The above-mentioned documents protect the interests of Wartsila Diesel, Inc. and Wartsila Diesel Caribbean, Inc. (which protection is, consequent on assignment, available to Blue and White Power Financing) as follows -

- (i) The irrevocable letter of credit covers payment of three months' rent at any given time. Whenever there is a draw down of the letter of credit, GEC is required to replenish it within 5 days. There is an amendment to the Lease Agreement authorising the establishment of an Escrow Account, instead of the taking out of a Letter of Credit, for an amount equal to three months' rent.
- (ii) In the event of any default by GEC of the terms of the Lease Agreements, Blue and White Power Financing is entitled to terminate the Lease Agreements and to take possession, not only the 22MW Diesel Wartsila Plant at Kingston and the Second 11 MW Wartsila Diesel Plant at Garden of Eden, but also the existing First 11 MW Wartsila Diesel Plant at Garden of Eden presently owned by GEC, and operate the same and sell the electricity generated to GEC or to third parties. In the latter case GEC has an obligation to wheel electricity output at GEC's cost for the Blue and White Power Financing.
- (iii) The Power Purchase Agreements, entered into between Blue and White Power Financing and GEC, make provisions relating to the purchase by GEC of electricity from Blue and White Power Financing when the latter has taken possession of the two 11 MW Wartsila Diesel Plants at Garden of Eden and the 22 MW Wartsila Diesel Plant at Kingston.
- (iv) By Guarantee Agreements entered into between the Government of Guyana and Blue and White Power Financing, the performance of the obligations under the Power Purchase Agreements, including payments, is guaranteed by the Government.
- (v) The existing 11MW Wartsila Diesel Plant and the Second 11MW Wartsila Diesel Plant at Garden of Eden and the 22MW Wartsila Diesel Plant at Kingston are to be operated and maintained by a Wartsila Entity under the Operations and Maintenance Agreement.
- (vi) The Letters of Support issued by the Government of Guyana to Blue



and White Power Financing (referred to as 'Company' in that document) provides wide ranging protection to the interests of that Company. We will refer to some of the provisions of the Letter of Support, dated 22nd August, 1996, issued in relation to the Garden of Eden Plants. It is issued in consideration of the Company's undertakings in the Lease Agreement in regard to the second 11 MW Wartsila Diesel Plant and the Company entering into the Power Purchase Agreement. In this Letter of Support the following documents are referred to as 'Operative Documents', namely, the Letter of Support, the Lease Agreement, the Power Purchase Agreement, the Guarantee, the Turnkey Contract, the Partial Assignment Agreement, the Operations and Maintenance Agreement, the Debenture, the Letter of Credit, the Ground Lease and the Mortgage. To quote a part of the Letter of Support -

- “1. The Government approves and endorses the terms of, will not hinder the performance of any party of, and will take any action necessary to support the implementation of the Operative Documents.
2. The Government shall not sell or privatize any material portion of the assets or functions of GEC without the written consent of the Company, unless, as a result of such sale or privatization:
  - (a) there is no material adverse or significant change in the assets, liabilities, revenues or general financial condition of GEC, and
  - (b) other than the Government, each of the consolidated beneficial holders of over fifty percent (50%) of the shares of GEC or who control GEC are Acceptable Holders (as defined hereafter).

Acceptable Holders are persons who meet each of the following tests during the term of the Lease Agreement or the PPA: (Power Purchase Agreement):

- A. no Acceptable Holder or any affiliate thereof is in litigation with the Company, Wartsila (or any affiliate of either the Company or Wartsila); and
- B. no Acceptable Holder or any affiliate thereof is manufacturer of diesel engines or other power

generation equipment; and

- C. as demonstrated to the Company by financial statements audited within the previous twelve months in accordance with Generally Accepted International Accounting Principles, each Acceptable Holder has:
- (1) a tangible net worth in excess of fifty million US dollars (US\$50,000,000); and
  - (2) sales revenues in excess of one hundred million US dollars (US\$100,000,000).

In the event of the sale or privatization of any material portion of the assets or functions of GEC, the Government will ensure that: (i) the successor to GEC assumes and fully honors and performs all of GEC's obligations under the Operative Documents, and has the experience and the financial capacity to honor and perform such obligations, and (ii) all of the obligations of the Government under the Operative Documents shall continue in full force and effect."

27. It may appear to a prudent person that the above arrangements assure full protection for the interests of the Lessors under the two Lease Agreements.

#### **UNDERTAKING TO EXECUTE MORTGAGES -**

28. However, the two Lease Agreements did not stop at the above arrangements. In addition to the above arrangements, GEC undertook to execute security documents. These, in regard to the second 11 MW Wartsila Diesel Plant at Garden of Eden, were the following -

- (a) a grant to the lessor of a first lien on any and all right, title and interest of GEC in the Facility that is, the second 11 MW Wartsila Diesel Plant, and in all additions, attachments, accession, and substitutions thereto;
- (b) a grant to the Lessor of (i) a mortgage and pledge constituting a first lien on the Facility Site (that is, the real property where the Facility will be located) (ii) a mortgage and pledge constituting a first lien on the Existing Station, that is, the first 11 MW Wartsila Diesel Plant at Garden of Eden, including a lease or right of use of the land on which the Existing Station is located, (iii) an assignment of all insurance policies relating to the Facility and the Existing Station; and (iv) an assignment of all material agreements related to the Facility and Existing Station;
- (c) execution and delivery of such additional documents, including financing

statements, certificates of title, affidavits, notices and similar instruments, in form satisfactory to Lessor, necessary or appropriate to perfect and maintain such security interests and assignments.

In regard to the 22MW Wartsila Diesel Plant at Kingston the security documents which GEC undertook under the Lease Agreement to execute were -

- (a) a grant by GEC to the Lessor of a first lien on any and all rights, title and interest of GEC in the Facility, that is the 22 MW Wartsila Diesel Plant at Kingston, and in all additions, attachments, accession, and substitutions thereto;
- (b) a grant to the Lessor of (i) a mortgage and pledge constituting a first lien on the Facility site, (that is the real property where the Facility will be located), including a lease or right of use of the Facility Site; (ii) a mortgage and pledge constituting a second lien on the Existing Stations, that is, the two 11 MW Wartsila Diesel plants at Garden of Eden, and on the site of the Existing Stations, including a lease or right of use of the land on which the Existing Stations are located; (iii) a mortgage and pledge constituting a first lien on GEC's property consisting of land and buildings thereon, located at 40 Main Street, Georgetown, (iv) a mortgage and pledge constituting a first lien on GEC's property consisting of land and buildings thereon, located at 257-259 Middle Street, Georgetown; (v) an assignment of all insurance policies relating to the Facility and the Existing Stations; and (vi) an assignment of all material agreements related to the Facility and the Existing Stations;
- (c) such additional documents, including financing statements, certificates of title, affidavits, notices and similar instruments, in form satisfactory to Lessor, necessary or appropriate to perfect and maintain such security interests and assignments.

In the case of both Lease Agreements the execution of additional security documents referred to in this paragraph are stated to be undertaken by GEC for securing its obligations to the Lessor under the Lease Agreements.

29. Though the two Lease Agreements provide only for the execution of mortgages and pledges (three in number), the two Letters of Support, both dated 22nd August, 1996, issued to Blue and White Power Financing by the Ministry of Finance refer to an undertaking by GEC to execute a Debenture in each of those cases in addition to the mortgages. The Debentures are required to cover items of property covered by the mortgages. There is discrepancy, between the Lease Agreements and the Letters of Support in regard to the property to be secured also. The Letter of Support in regard to the Garden of Eden Plant states that the property to be secured by the Mortgage, as well as the Debenture, shall be the sites of the second 11 MW Wartsila Diesel Plant and the first 11 MW

Wartsila Diesel Plant, including GEC's improvements to them, while the mortgage and pledge, which GEC agreed to execute under para. 10. 1(b) of the Lease Agreement applicable to the Second Wartsila Plant at Garden of Eden was required to charge, in addition to the sites of the two 11MW Plants, also the First 11MW Plant.

30. The Letter of Support in regard to the 22MW Wartsila Diesel Plant at Kingston refers to the execution both of a Mortgage and Debenture charging the site of that plant, including GEC's interest in any improvements to it, and the two Garden of Eden electricity generating facilities, including GEC's interest in any improvements to them.

31. Neither of the Letters of Support refers to any undertaking by GEC to mortgage the land and buildings located at 40 Main Street, and 257-259 Middle Street, Georgetown, though the Lease Agreement relating to the Kingston Wartsila Diesel Plant requires these items of property to be mortgaged.

32. Mr Rabindranauth Singh, General Manager of GEC, stated in his presentation at the public hearing on 20th October, 1997, as follows -

“So in essence the total liability, as it were, lease liability of the GEC to Wartsila Diesel was at that time in the order of U.S.\$22 million, of which the GEC was requesting the PUC to approve the issue of mortgages and debentures for the existing 11MW Power Station, the GEC's rights in the (new) 11MW Station as well as the 22MW Station. These rights initially were a down payment of about 1.5 million for the Garden of Eden Power Station and a down payment of \$3.5 million for the Kingston Power Station.

In addition, both the land, or the portion of the land, sorry, where the Garden of Eden Power Station is located, that was part of the mortgage as well as the portion of the land where the Kingston Power Station was constructed.

The total value of these assets as per balance sheet was in the order of about \$15 million.”

Mr Rabindranauth Singh did not mention anything about the inclusion in the mortgage, relating to the Kingston Wartsila Plant, of the items of property at Main Street and Middle Street, Georgetown.

33. The above-mentioned portion in Mr Rabindranauth Singh's statement is not consistent with the final version of the Mortgages presented by GEC to this Commission on 31st December, 1996. The Mortgage relating to the Kingston Wartsila Plant seeks to charge, in addition to other items of property, also the property at Lot 40 Main Street and Lots 257 to 259 in South Cummingsburg, (Middle Street), Georgetown.

#### **DEBENTURES** -



34. We will deal here with the question of the issue of the Debentures. After a careful consideration of all the aspects we are of the view that we will not be justified in granting approval for the issue of the two Debentures. Issue of the Debentures is not a requirement under the two Lease Agreements and there are other adequate safeguards for the performance by GEC of its obligations under those Agreements. Secondly, under section 25(1) of the Electricity Act, Cap. 56:01, Debentures can be issued by GEC only for borrowing money, and with the approval of the Minister assigned general responsibility for public corporations. Such approval has not been obtained by GEC in the present case.

35. In this connection it may be pointed out that even where GEC secures a borrowing by a mortgage or charge, the terms of the mortgage or charge may empower the mortgagee or chargee to appoint a receiver of the whole or any part of the property mortgaged or charged and empower the mortgagee or chargee and any receiver appointed by him to take possession of and sell all or any of the property mortgaged or charged and to carry on the undertaking and business of GEC and to exercise and enjoy all or any of the powers, rights, privileges, franchises and exemptions exercisable or enjoyed by GEC. (See section 26(3) of the Electricity Act, Cap. 56:01). The mortgage documents submitted for the approval of this Commission, however, do not seek to confer on the mortgagee all of the above powers.

#### **APPROVAL FOR MORTGAGES -**

36. The remaining question is whether approval should be given for the execution of the three mortgages GEC proposes to execute in favor of Blue and White Power Financing - one in relation to the lease transaction in respect of the second 11 MW Wartsila Diesel Plant at Garden of Eden and two in relation to the lease transaction in respect of the 22MW Wartsila Diesel Plant at Kingston, particularly having regard to the various other arrangements, referred to earlier made to secure the interests of the Lessor under the two Lease Agreements. We find it difficult to understand why the management and legal advisers of GEC found it incumbent to execute these documents, which in the view of this Commission should not have been necessary.

37. However, we have to take into account public interest. We would not like to do anything to disrupt the supply of power to the people of Guyana, including the manufacturing and business entities.

38. Referring to the critical power generation situation when the transactions relating to the two Wartsila Plants were agreed to, Mr Rabindranauth Singh, GEC's General Manager, stated in his deposition before this Commission on 9th January, 1997, as follows -

“To begin with, I think that it is no secret that the GEC's generating facilities had been coming to the end of their life and a decision had to be made on securing additional generation. In our submission to the PUC since October, 1995, we did



indicate that the additional 11MW would have been acquired by the GEC. At that particular time a contract had already been signed between GEC and Wartsila Diesel for the construction of the facility.

It was the intention of both parties that they would have worked together to secure the finance. In fact during the period of August of 1995 up until the end of the year, Wartsilla, GEC and an investment bank which Wartsilla had engaged, tried to secure financing in the order of about \$11m for the project. The efforts were unsuccessful.

It was then agreed that Wartsilla would seek to finance the facility, and this is where the Lease Agreement came about after Wartsilla agreed to take the debt on to their books, and for that it was made pretty clear that they would like to take the option to have the deal re-financed, if possible, and the GEC also made it clear that we wanted that option since this was quite necessary for us to seek alternative financing should such an opportunity arise.

So it was in March of 1996 that we signed the Lease Agreement for the second 11 MW which was an extension to the existing 11MW. The situation at that time with the GEC, and I think most persons will recall, including the Consumers' Association who had a public discussion just around the same time, the situation in the GEC was one in which the existing generating equipment, in particular the main power station at Kingston had almost collapsed. Of those units, just one was operating, and at that time a decision was taken to have additional generation as quickly as possible."

39. Everybody who was living in Guyana during the latter part of 1995, should have suffered badly from the difficult situation in the electricity sector. In the latter part of 1995, this Commission had started a series of public hearings in regard to the inadequacies of the supply of electricity by GEC and its erratic nature. This apparently had awakened it to its responsibilities to the people of Guyana. No useful purpose would be served, so far as these proceedings are concerned, by going into the question whether the problems were created by blindly following the prescriptions by multilateral lending agencies or as a result of the lack of prompt and planned approach by GEC to the solution of its problems. There was a crisis and the solution GEC found was the execution of the two Lease Agreements. By the terms of the two Lease Agreements GEC had undertaken to execute the three mortgages and pledges referred to in paragraph 28 above. We grant approval to GEC to execute two of the above-mentioned mortgages and pledges - one first mortgage, in relation to the Garden of Eden second 11 MW Wartsila Diesel Plant and another first mortgage in relation to the 22MW Wartsila Diesel Plant at Kingston.

40. The execution of a second mortgage of the Garden of Eden properties, for the purpose of securing the performance by GEC of its obligations under the lease transaction relating to the 22 MW Wartsila Diesel Plant at Kingston could not be justified by any stretch of imagination and though it is required to be executed pursuant to the Lease Agreement relating to the above-mentioned Plant, we refuse to grant permission for its execution.

## RATE OF INTEREST -

41. The final versions of the mortgages (Exhibits 15 and 27) submitted for the approval of this Commission provides for a rate of interest of 14% per annum, which is stated to be a "Default Rate".

42. We summoned Dr Gobin Ganga, Director of Research, Bank of Guyana, as a witness. According to his evidence, Libur, or London Inter-Bank offer rate, for loan for six months was 5 and 17/32%. Having regard to the magnitude of the borrowing the rate will be 1% or 2% more. If the loan is for five years, he said, one would expect that the interest rate would not be more than 1 ½% more than Libur. He also deposed that it is important to note that there are two Libur rates, one is the U.S. dollar rate and another a sterling rate. The sterling rate is higher than the U.S. dollar rate by 1%. He said that the above rates do not take into account country risk. In answer to a specific question from the legal counsel for GEC, Mr M.L. Ganpatsingh, Dr Ganga stated -

"No, I wouldn't be able to tell you anything about country risk at this time."

43. Mr Ronald Ally, Chairman of the Board of Directors of GEC, in his presentation on 13th February, 1997, pointed out that Dr Ganga did not take into account country risk. He said -

"Most of the loans, especially commercial loans originating in Guyana, arise out of the US dollar market and basically the Prime Rate of the US banks is what will have to be considered.

The US dollar rate for the past year has been 8.25%. A normal credit risk is therefore priced between 1% and 3% above Prime, and bear in mind there are a number of risks which are necessary to consider in any financing transaction".

He went on to point out -

"Lending rates in essence will normally reflect and are a function of the combination of risk allocation of capital, cost of funds, servicing costs, obviously a profit margin, a competitive environment and usury limitations".

He drew our attention to the case of a loan taken by the Mechala group. To quote from Mr Ally's presentation -

"An example worth mentioning is the case of the Mechala group, a leading Jamaica business. This group was successful in raising U.S.\$75 million in the US market via a three year bond, and they were able to secure that at an interest rate of 12.75% which is considered attractive by the business community".

He drew our attention also to the fact that Demerara Distillers Limited had recently borrowed U.S.\$ 2 million from the Hamilton Bank at an annual rate of interest of 9.75%. He said that Banks DIH had secured a loan of U.S.\$2.5 million at an annual rate of interest of 11%.

44. But it has to be pointed out that the loan that GEC required was U.S.\$23 million and GEC's credit rating cannot be compared to that of Demerara Distillers Limited or Banks DIH.

45. Having considered all the facts and circumstances we are of the view that an annual rate of interest of 12% is reasonable. However, we find that while the Debentures, the execution of which we are disallowing, provide for an annual rate of interest of 12%, the mortgages provide for a rate of interest of 14% per annum, which is described as "Default Rate". We reduce the rate of interest payable under the mortgages to 12% per annum. Since under para. 10 of both the Lease Agreements, the Mortgages are undertaken to be executed to secure all of GEC's obligations to the Lessor under the Lease Agreements, interest will become payable under the two mortgages only if GEC defaults in performing or fulfilling any of those obligations and only from the date of the default. Interest will be calculated only on the value or amount of the default. We would also like to add that GEC should make every effort to re-finance the arrangement with a loan at a lower rate of interest.

#### **AMOUNT OF THE MORTGAGES** -

46. The principal sum under the proposed mortgage relating to the second 11 MW Wartsila Diesel Plant at Garden of Eden is U.S.\$9,260,000 and in regard to the 22 MW Wartsila Diesel Plant at Kingston is U.S.\$13,870,000. However, these shall be the maximum amounts. The actual principal amount for which GEC shall be liable under each of the two mortgages shall be, subject to the maximum referred to above, the actual value or amount of default under the respective Lease Agreement.

#### **OTHER TERMS** -

47. The obligation to execute the two mortgages was undertaken by GEC, as stated in para. 10.1 of the two Lease Agreements, in order to secure all of its obligations under the Lease Agreements to the Lessor, which at present is Blue and White Power Financing. The provisions in the draft Mortgage documents relating to obligations and defaults should be modified accordingly.

#### **FINANCIAL VIABILITY OF GEC** -

48. Section 28 of the Electricity Act, Cap. 56:01, reads -

*General duties and powers of the Corporation in	It shall be the duty of the Corporation so to exercise and perform its functions under this Act as to secure that the total revenues of the Corporation are not less than sufficient to meet its total outgoings properly chargeable to revenue
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financial matters account in accordance with the provisions of section 31 taking one year with another.”

On a review of the evidence, we are satisfied that there will be no contravention of the above section on account of the execution of the two mortgages.

**ORDER** -

49. In the light of the above discussions and conclusions we make the following Order -

- (i) Approval is hereby granted to GEC under section 47 of the Public Utilities Commission Act 1990 (No. 26 of 1990) to execute two mortgages in favour of Blue and White Power Financing - one, a first mortgage as undertaken by the Lease Agreement relating to the second 11MW Wartsila Diesel Plant at the Garden of Eden and the second, a first mortgage as undertaken by the Lease Agreement relating to the 22MW Wartsila Diesel Plant at Kingston.
- (ii) The principal sum of the mortgage relating to the second 11MW Wartsila Diesel Plant at Garden of Eden shall be U.S.\$9,260,000 and in regard to the 22MW Wartsila Diesel Plant at Kingston shall be U.S.\$13,870,000. But since the two mortgages are being executed as required by the two Lease Agreements to secure all the obligations of GEC under the respective Lease Agreement, subject to a maximum of the amounts mentioned above, the liability of GEC under the two mortgages shall be restricted to the value or amount of the default by GEC of its obligations under the respective Lease Agreement.
- (iii) Interest on the amounts payable under the two mortgages shall be 12% per annum. However, such interest shall accrue due and become payable only if GEC commits a default of any of its obligations under the respective Lease Agreement and from the date of the default. Interest shall be calculated only on the value or amount of the default.
- (iv) The two draft mortgage documents, Exhibits 15 and 27, execution of which has been approved by this Commission shall be revised, before their execution, to make their terms and conditions consistent with this paragraph as well as the conclusions in the preceding paragraphs of this Decision.
- (iv) Approval is refused for the execution of -
  - (a) a second mortgage, as proposed in draft Second Mortgage document Exhibit 28, in respect of some of the properties and interests of GEC at Garden of Eden to secure its obligations under the Lease



Agreement relating to the 22MW Wartsila Diesel Plant at Kingston;  
and

- (b) two debentures, as proposed in draft Debenture documents Exhibits 16 and 29, one to secure GEC's obligations relating to the second 11MW Wartsila Diesel Plant at Garden of Eden and the second relating to the 22MW Wartsila Diesel Plant at Kingston.

50. GEC shall pay to the Consumers Advisory Bureau G\$200,000 as costs, which shall be paid within one month from the date of this Order.

51. We would like to place on record our appreciation of the co-operation extended to us in this matter by the then Prime Minister, and now President, Hon'ble Samuel Hinds, the Chairman and officers of GEC, and its Legal Counsel, the Chief Executive Officer of the Guyana National Energy Authority, the representatives of the two consumers organisations, and a large number of people who actively participated in the hearings

Dated this 12<sup>th</sup> day of December, 1997



PAMADATH J. MENON, A.A.

- Chairman



HUGH GEORGE

- Member

(Dissent)


.....  
JOHN WILLEMS, A.A.

- Member



CHANDRABALLI BISHESWAR

- Member



BADRIE PERSAUD

- Member