



LETTER No. L-83-07

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VIA E-MAIL

October 10, 2007

**BCH 2007 EPA – ALCAN
S.71 ENERGY SUPPLY CONTRACT EXHIBIT A-9**

TO: British Columbia Hydro and Power Authority
Registered Intervenor

Re: British Columbia Hydro and Power Authority
Filing of Electricity Purchase Agreement with Alcan Inc.
as an Energy Supply Contract Pursuant to Section 71

Scope of Proceeding and Oral Hearing

During the Procedural Conference on October 5, 2007, the Chair and Commissioner Nicholls heard submissions regarding the scope of both the proceeding and the oral hearing.

The Commission accepts that the scope of the oral hearing should include issues that can reasonably be expected to benefit from the oral hearing process. The written process may include all matters that concern interests to be considered within the public interest. As stated by the Commission in the LTEPA+ Decision:

“The Commission Panel should not exclude from consideration in determining the public interest any class or category of interests which form part of the totality of the general public interest. In particular, the Commission Panel is of the view that evidence dealing with probably economic effects flowing from the approval of LTEPA+ on the surrounding community is a relevant consideration in determining the public interest” (p. 29).

However, the Commission concludes that the LTEPA+ record should not be duplicated in this proceeding, and that definition of the scope of the oral hearing is necessary to ensure an efficient process. The remainder of this letter defines the scope of only the oral hearing.

The Commission notes the concerns expressed by BCOAPO (T2:188) and other intervenors (T2:195-196; T2:216-217) regarding the fairness of establishing a process that includes an oral hearing, but one that is limited in scope. In this regard, the Commission accepts the submissions of counsel for BC Hydro that the Commission has the procedural flexibility to define the scope of the oral hearing. In part, the procedural flexibility arises from the mandate of the Commission regarding section 71 filings. The Commission has concluded that it should exercise this discretion early in this proceeding, both as a matter of fairness to participants and to ensure an efficient process (T2:257-258).

Counsel for BC Hydro submits that the process need not be designed for BC Hydro to meet some “burden or get over some hurdle or lead a body of evidence which meets some statutory standard or requirement” (T2:257). Although the Commission has decided to define the scope of the oral hearing in a manner that is similar to submissions of BC Hydro, the Commission has not accepted BC Hydro’s submissions regarding the burden to be met. The Commission will make that determination at the end of the proceeding and then will consider whether or not the burden has been met based on all matters that are relevant to this proceeding, not just cost-effectiveness issues. The Commission has decided to define the scope of the oral hearing in a manner that is similar to submissions of BC Hydro, and the consequences of an insufficient record may be borne by BC Hydro.

In recent decisions, the Commission has established and defined a cost-effectiveness test as a means to consider public interests. The Commission concludes that issues within the scope of the oral hearing should be limited to factors that fall within the cost-effectiveness test, subject to one exception discussed below. The cost-effectiveness test was established in the Vancouver Island Generation Project decision (Order No. G-55-03, dated September 8, 2003, p. 77) and then refined in the VITR Decision (Order No. C-4-06, dated July 7, 2006, pp. 12-15). The cost-effectiveness test includes consideration of reliability, safety, schedule, financing arrangements and other factors itemized in those decisions. The factors to be considered have ratepayer impacts. For the purposes of defining the scope of the oral hearing, the cost-effectiveness test will include consideration of the opportunity costs of Alcan. A final determination of whether or not the opportunity costs of Alcan are an appropriate consideration in this section 71 review will be made at the conclusion of the proceeding.

Changes made by Alcan to the Kitimat Smelter can reasonably be expected to have consequences for the local communities. Those consequences were the subject of evidence of the LTEPA+ proceeding, and in most cases, were identified as consequences of changes that Alcan might make in response to incentives and disincentives in LTEPA+. However, the magnitude of the consequences that would accompany any particular change by Alcan is speculative at best. The contractual differences between LTEPA+ and the 2007 EPA may result in a different response by Alcan. However, just as the magnitude of the consequences was speculative during the LTEPA+ proceeding, the magnitude of the consequences arising from the 2007 EPA will be speculative.

The Commission concludes that further evidence regarding the economic consequences on the local communities of the 2007 EPA is not necessary. It follows that the Commission believes that the LTEPA+ record provides a sufficient record regarding the impacts on the local communities of the 2007 EPA, and the Commission finds that the economic consequences on the local communities of the 2007 EPA should not be within the scope of the oral hearing although they will be relevant for the proceeding.

Similarly, the Commission concludes that the LTEPA+ record provides a sufficient basis for concluding that there are linkages between the modernization project and the environmental impacts of the Kitimat Smelter. The Commission concludes that the magnitude of the incremental environmental impacts is, like the economic consequences of the 2007 EPA, of a speculative nature, and that the LTEPA+ record provides a sufficient record regarding environmental impacts.

The Commission also concludes that the contractual incentives and disincentives related to the Modernization Project can be expected to have changed from LTEPA+ to the 2007 EPA. As a result, the LTEPA+ record cannot be expected to provide sufficient evidence of the 2007 EPA contractual incentives and disincentives for Alcan regarding the Modernization Project. Therefore, the incentives

and disincentives in the 2007 EPA are within the scope of the oral hearing. The Commission anticipates that all consequences of the incentives and disincentives in the 2007 EPA will have consequences for ratepayers and therefore fall within the cost-effectiveness analysis. However, because some consequences of the incentives and disincentives in the 2007 EPA may not have consequences for ratepayers, the scope of the oral hearing is not limited to cost-effectiveness in this instance, and may include consideration of the consequences of the incentives and disincentives in the 2007 EPA on the Kitimat Smelter that do not have ratepayer impacts.

In an effort to assist the Commission in defining the scope of the oral hearing at an early stage, intervenors provided lists of issues. In an effort to provide clarity regarding the application of the cost-effectiveness test, the Commission will now comment on certain specific issues that have been selected for comment because it may not be clear whether or not the issues are within the scope of the oral hearing.

The issue described in paragraph 14(a) of the District of Kitimat (“DoK”) submission regarding the Scope of the Proceeding (Exhibit C10-3) is:

“The impact of the 2007 EPA on the District that may arise because of provisions and incentives or disincentives in the contract that could affect the investment and operating decisions of the owners and operators of the aluminium industry in the District; ...”

The Commission notes the submissions of BC Hydro that this issue is outside of the scope of the cost-effectiveness test (T2:156). The Commission agrees. However, by deleting the words “on the District” the Commission believes that this issue may be within the scope of the oral hearing.

Issue 3.1 of the DoK list of issues (Exhibit C10-3) states:

“3.1 What are the potential economic impacts of the 2007 EPA on the District and the surrounding area, including but not limited to the potential impacts of the 2007 EPA on Alcan’s Modernization Project and its future operations?”

Again, the issue as generally stated by DoK is not within the scope of the oral hearing. However, the specific example that is provided is within the scope of the oral hearing so far as it relates to incentives and disincentives provided for in the 2007 EPA.

Issue 3.3(a)(i) of the DoK list of issues (Exhibit C10-3) states:

“Does the 2007 EPA set precedents detrimental to the public interest to the extent that: it provides incentives for other industrial producers to redirect existing power generation from industrial uses to BC Hydro; ...”

And issue 3.4 of the DoK list of issues (Exhibit C10-3) states:

“Ought BC Hydro to be entering into arrangements such as the 2007 EPA without a formal policy regarding diversion of power from industrial to public uses?”

The Commission notes comments made in the LTEPA+ Decision:

“The Commission Panel does not agree that as a matter of good public policy it should not approve long-term firm energy contracts from industrial producers who have built generation facilities to support their industrial operations” (LTEPA+ Decision, p. 30).

Counsel for the DoK accepts the above finding; however, he further submits that the policy considerations that underlie this issue ought to be considered by the Commission (T2:200). The Commission accepts that the DoK issues 3.3(a)(i) and 3.4 may be within scope of the oral hearing as defined by cost-effectiveness; however, the Commission during the oral hearing may conclude that these issues ought not to be included within the scope of the oral hearing. The Commission does note the submissions of DoK that the proper focus of this proceeding should not be whether or not Alcan has the right to sell power or reduce its production (T2:201). The connection to the cost-effectiveness test of issues 3.3(a)(i) and 3.4 has not yet been established and will need to be during the oral hearing if these two issues are pursued by DoK. In this regard, the DoK should consider the mandate of the Commission regarding consideration of government policy, and the formulation of broad policy.

Issue 1.5 of the BCOAPO list of issues (Exhibit C1-3) refers to the “Impact of Special Direction 10”. As stated by counsel for BC Hydro (T2:160), the Commission agrees that issues arising from Special Direction 10 may be more appropriate for a proceeding regarding BC Hydro planning function than this proceeding. However, as stated by counsel for BCOAPO (T2:189-190), this issue was identified for the primary purpose of including it in “legal argument”. This issue may very well be within the scope of argument, and the Chair will permit questions regarding Special Direction 10 that are necessary for the purposes of arguing questions of law.

Issue 5 of the BCOAPO list of issues (Exhibit C1-3) refers to the “Cumulative Rate Impact”. Counsel for BC Hydro (T2:161) expressed concerns regarding the implications of the word “cumulative”. It may be that cost-effectiveness limits this issue to a consideration of alternative sources of power, however, rate impacts are considered to be within cost-effectiveness considerations so further consideration of whether or not cross-examination on this issue is within scope will need to wait until the oral hearing.

The Commission notes the categorization of the IPPBC issues as provided by counsel for BC Hydro (T2:162-164). The Commission accepts the submissions of BC Hydro that the IPPBC issues that require a comparison of the terms and conditions of IPP contracts and the 2007 EPA are not within the scope of the oral hearing. The Commission has heard extensive cross-examination of the differences between the terms and conditions of LTEPA+ and the terms and conditions of the 2006 Call agreements and does not believe that further cross-examination on terms and conditions will benefit the decision. Further, BC Hydro’s justification of the prices in the 2007 EPA does not rely on the 2006 Call in the same manner as did the LTEPA+ pricing.

By letter dated September 26, 2007 (Exhibit A-3), the Commission Panel established a process regarding whether or not the Commission needs to consider whether the duty to consult and, if necessary, accommodate First Nations has been discharged. By letter dated October 3, 2007 (Exhibit C3-4), the Haisla Nation advises that “it does not ask the Commission to assess the adequacy and accommodation afforded to the Haisla Nation by BC Hydro on the 2007 EPA in these proceedings.”

By letter dated October 2, 2007 (Exhibit C12-3), the Hereditary Chiefs withdrew their request for intervernor status, and stated that the Haisla Nation elected government is the one voice that should speak for the Haisla Nation in this proceeding. By letter filed as Exhibit C12-2, further written submissions were made regarding the Haisla Nation. During the procedural conference, a member of the Beaver Clan of the Haisla Nation and the elected Indian Act chief made submissions (T2:222-237), and stated that the Haisla Nation will continue to be involved in the “rest of these hearings” (T2:226).

The representative of the Haisla Nation submits that “BC and BC Hydro have failed to act on their legal obligation to us.” (T2:228) Given the oral submissions of the Haisla Nation and their stated intention to continue to participate in this proceeding, the Haisla Nation’s requests of the Commission are not clear. However, in the circumstances, the Commission concludes that it may rely on the written submissions of the Haisla Nation quoted above regarding the duty of the Crown to consult and, if necessary, accommodate. Therefore, the duty of the Crown to consult and, if necessary, accommodate is not within the scope of this proceeding because it is not relevant to the proceeding.

As stated in the Reasons for Decision provided with Order No. C-8-07 dated July 12, 2007 (“Rev. 5 Decision”):

“The Commission must ensure procedural fairness for participants, including First Nations, in Commission processes. First Nations may be active participants in Commission processes; however, it is not necessary for the Commission to consider whether or not the duty of the Crown to consult and, if necessary, accommodate has been met. Another certificate must be obtained before the project proceeds ...” (p. 40).

As further stated in the Rev. 5 Decision:

“Evidence relevant to First Nations consultation may be relevant for the same purpose that the Commission often considers evidence of consultation with other stakeholders. Generally, insufficient evidence of consultation, including with First Nations is not determinative of matters before the Commission” (p. 41).

The Commission will continue to hear from the Haisla Nation during this proceeding, provided that such participation is subject to this decision to limit the scope of the oral hearing to cost-effectiveness.

Yours truly,

Original signed by:

Erica M. Hamilton

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