

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-6-10**

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**IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473**

and

**British Columbia Hydro and Power Authority
Application for Reconsideration Regarding Order G-103-09, as Confirmed by Letter L-95-09,
Concerning British Columbia Transmission Corporation Firm Transmission Sales to Alberta**

BEFORE: A.A. Rhodes, Panel Chair/Commissioner
L.A. O'Hara, Commissioner January 8, 2010
P.E. Vivian, Commissioner

O R D E R

WHEREAS:

- A. On September 10, 2009, the British Columbia Utilities Commission (the "Commission") issued Order G-103-09 and Reasons for Decision, ruling on a complaint by TransCanada Energy Ltd. (the "TCE Complaint") concerning transmission sales by the British Columbia Transmission Corporation ("BCTC") on the British Columbia to Alberta path (the "BC>AB Path"); and
- B. By letter dated September 17, 2009, BCTC submitted a request for Commission clarification of the directions in Order G-103-09. The clarifications were with respect to how the required reductions in Long-Term Firm Point-to-Point transmission service on the BC>AB Path should be accomplished. BCTC offered two interpretations of how the reductions might be implemented. BCTC also requested confirmation concerning the identity of the "affected customers," referred to in the Decision; and
- C. In response to BCTC, the Commission issued Letter L-95-09, dated October 15, 2009, confirming that BCTC should, in consultation with affected customers, arrive at a means of executing the required reductions. The Commission also confirmed that "affected customers" referred to NorthPoint Energy Solutions Inc. ("NorthPoint") and the British Columbia Hydro and Power Authority ("BC Hydro"); and
- D. By letter dated November 26, 2009, BC Hydro submitted an Application for Reconsideration to the Commission in respect of Order G-103-09 and Letter L-95-09; and
- E. On November 27, 2009, the Commission issued Letter L-107-09, requesting registered Intervenor in the TCE Complaint proceeding to comment on the BC Hydro Application for Reconsideration; and
- F. Comments on the Application for Reconsideration were received from BCTC, Cargill Limited, TransCanada Energy Ltd., the BC Old Age Pensioners' Organization *et al* ("BCOAPO"), the Commercial Energy Consumers Association of British Columbia, and the Joint Industry Electricity Steering Committee; and

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- G. The Commission Panel has reviewed the Application for Reconsideration, the comments received from the registered Intervenor and BC Hydro's reply submissions.

NOW THEREFORE for the reasons stated in the Decision issued concurrently with this Order, the Commission orders as follows:

1. The Reconsideration Application will proceed to the second phase of the reconsideration process.
2. BTC is to file, by way of Affidavit, the additional evidence described in Section 7 of the Decision.
3. The Regulatory Timetable is attached as Appendix "A" to this Order.

DATED at the City of Vancouver, in the Province of British Columbia, this 8th day of January 2010.

BY ORDER

Original signed by:

Alison A. Rhodes
Panel Chair/Commissioner

Attachments

British Columbia Hydro and Power Authority

Application for Reconsideration Regarding
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Concerning British Columbia Transmission Corporation Firm Transmission Sales to Alberta

REGULATORY TIMETABLE

Action	Date
BCTC Additional Evidence	Monday, February 01, 2010
Submissions from BC Hydro and Supporting Intervenor	Monday, February 08, 2010
Submissions from Cargill Limited	Monday, March 01, 2010
Reply Submissions	Monday, March 08, 2010
Oral Argument Phase (If Required)	Tuesday, March 16, 2010

British Columbia Hydro and Power Authority
Application for Reconsideration Regarding Order G-103-09, as Confirmed by Letter L-95-09,
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REASONS FOR DECISION

1.0 BACKGROUND

On November 26, 2009, BC Hydro applied for a reconsideration of the Commission's clarification of its order relating to the implementation of its earlier decision that the long term firm point-to-point transmission capacity offered for sale on the BC to Alberta path be reduced from 785 MW to 480 MW.

The background to this request is fairly lengthy.

Shortly prior to December 1, 2007, the British Columbia Transmission Corporation ("BCTC") made the decision to increase the long term firm point-to-point ("LTF PTP") transmission service available for sale on the BC to Alberta path ("BC>AB path") from 480 MW to 785 MW, over the comments/objections of some of its customers, including TransCanada Energy Ltd. The increase was effected over December, 2007 and January, 2008 and resulted in the curtailment of the transmission service available to existing customers (as of December 1, 2007) due to the inability of the Alberta system to accept the increased energy flow.

On June 2, 2008 BCTC applied to the Commission for an Order suspending the sale of any further transmission capacity (beyond the 785 MW up to the Western Electricity Coordinating Committee path rating) on the BC>AB path and any related facilities studies. The Commission granted the suspension by Order G-110-08 dated July 3, 2008 ("the Suspension Order").

TransCanada Energy filed a formal Complaint with the Commission on October 9, 2008.

BCTC's answer to the TransCanada Complaint was contained within its application to amend the Open Access Transmission Tariff ("OATT"), filed on November 21, 2008. As part of that Application, BCTC also sought an interim order that,

"in processing the rollover requests on BC Hydro Service Agreements dated 24 May 2007 [FN 238: OASIS Transmission request No. 71361957 for 50 MW] and 17 October 2007 [FN 239: BC Hydro Service Agreement dated 17 October 2007. OASIS Transmission request No. 71630197 for 120 MW], and also queued requests for Firm ATC coming available on the BC>AB Path on 1 January 2009, indicate on the new Service Agreements that:

"This Service Agreement is subject to a further order of the British Columbia Utilities Commission in the matter of the 'British Columbia Transmission Corporation Application to Amend the Open Access Transmission tariff filed on 21 November 2008.'"

BCTC explained:

"The Suspension Order had the effect of limiting the Firm capacity available for sale on the BC>AB Path at 785 MWAll of that capacity has been sold to existing customers. There are two LTF PTP transmission Service Agreements held by BC Hydro (for 120 MW [FN 240: BC Hydro Service Agreement dated 17 October 2007. OASIS Transmission Request No. 71630197] and 50 MW [FN 241: BC Hydro Service Agreement dated May 2007. OASIS Transmission Request No. 1361957]) that expire on 31 December 2008, with rollover rights. [FN 242: ...] A third BC Hydro Service Agreement expiring 31 December 2008, for 180 MW, has no rollover rights. [FN 243: BC Hydro Service Agreement dated 28 December 2007. OASIS Transmission Request No. 71088297].

Applying BCTC's Tariff and Business Practices in the normal course, BCTC will roll over the 120 MW and 50 MW Service Agreements per BC Hydro's requests, and release 180 MW Firm ATC for sale, as of 1 January 2009. In other words, BCTC will continue to offer for sale Firm transmission up to the 785 MW specified in the Suspension Order."

BCTC further explained:

"[h]owever, BCTC recognizes that, while it is proposing to limit Firm sales on the BC>AB Path to 785 MW, some of its customers may want to argue that a lower limit should apply. Should the Commission conclude in its final order in this Application that the limit on Firm transmission sales on the BC>AB Path should be less than 785 MW, this would have potential ramifications for the rolled over 120 MW and 50 MW Service Agreements, as well as Service Agreement(s) in respect of Firm capacity released on 1 January 2009." ...

"The interim order sought will permit BCTC to proceed in the ordinary course with processing the 50 MW and 120 MW rollover requests, allow the Commission to consider the above issues in the context of the Application, and require BCTC to highlight on the rolled-over Service Agreements and any new Service Agreements in respect of the BC>AB Path that the Commission may make further orders with respect to the Service Agreements as part of its final disposition of this Application. BCTC recognizes that the Commission has the power under the Act to change Service Agreements even without granting the interim relief, but BCTC believes that the order requested will assist in making the potential for that outcome as transparent as possible." (BCTC Application to Amend the Open Access Transmission Tariff dated November 21, 2008 including amendments of November 25, 2008, pp. 149 - 151)

The Commission granted BCTC's request for the interim order referencing the subject clause concerning a further order of the Commission, as outlined above, by Order G-175-08 dated November 27, 2008.

A Procedural Conference was held on Thursday, January 8th, 2009 to address the regulatory review process for the hearing of the TransCanada Complaint and the BCTC OATT Amendment Application. Following the Procedural Conference, the Commission issued Order G-3-09 dated January 15, 2009 whereby it determined, *inter alia*, that the OATT Amendment Application, other than the part which constituted BCTC's response to the TransCanada Complaint, would be heard by way of a written hearing process, whereas the TransCanada Complaint, and the part of BCTC's OATT Amendment Application which related to it, would be heard by way of an oral hearing process. There was also to be a common evidentiary record for both proceedings.

The Commission Panel issued companion Decisions for the OATT Amendment Application and the TransCanada Complaint on September 10, 2009. By Order G-103-09 of the same date, the Commission Panel ordered that the LTF PTP transmission service available for sale on the BC>AB path be limited to 480 MW on a prospective basis until such time as the Alberta Electric System Operator could accept additional energy flowing from British Columbia. The Commission Panel also ordered that the contracts bearing the subject condition respecting a further order of the British Columbia Utilities Commission, up to the 305 MW necessary to reduce the transmission capacity offered for sale to 480 MW, be cancelled or amended to effect this result and that BCTC and its affected customers could determine the allocation of the 350 MW to be removed, with affected customers having the right to be placed in the queue in accordance with their pre-existing priority rights.

By letter dated September 17, 2009, BCTC sought clarification of Order G-103-09 and the accompanying Decision. Comments were also received from TransCanada Energy, NorthPoint Energy Solutions Inc. ("NorthPoint") and BC Hydro.

On October 15th, 2009, the Commission issued Letter No. L-95-09 wherein it affirmed its direction that BCTC, in consultation with its affected customers, BC Hydro and NorthPoint, cancel the contracts bearing the subject condition (350 MW) and re-allocate 45 MW to LTF PTP service and allocate 305 MW to some form of conditional or non-firm service.

On November 26, 2009 BC Hydro applied for a reconsideration of BCUC Order G-103-09 and the clarification provided in Letter No. L-95-09 on the basis that the result of the implementation approach taken by the Commission was to wrongfully deprive it of 25 MW of LTF PTP transmission capacity on the BC > AB Path to the benefit of Cargill Limited ("Cargill"). On November 27, 2009 the Commission invited comments on the BC Hydro Reconsideration Request from Registered Intervenor and a further Reply from BC Hydro.

2.0 REQUIREMENTS FOR RECONSIDERATION – PHASE ONE

As noted in the Commission's publication "Understanding Utility Regulation – A Participants' Guide to the British Columbia Utilities Commission (Originally published in October, 1996, and Revised July 11, 2002) the process to be followed when a party seeks a reconsideration is made up of two phases.

The first phase is an initial screening phase where the application must show a *prima facie* case sufficient to warrant full consideration by the Commission. This involves a preliminary examination of the application with a view to determining:

1. Should there be a reconsideration by the Commission?
2. If there is to be a reconsideration, should the Commission hear new evidence and should new parties be given the opportunity to present evidence?
3. If there is to be a reconsideration, should it focus on the items from the application for reconsideration, a subset of these items or additional items?

The following criteria are relevant to the determination of whether a reasonable basis exists for allowing the reconsideration application:

- the Commission has made an error of fact or law;
- there has been a fundamental change in circumstances or facts since the Decision;
- a basic principle had not been raised in the original proceedings; or
- a new principle has arisen as a result of the Decision.

BC Hydro's application must satisfy the requirement that there is a reasonable basis to allow the application to proceed to Phase 2.

3.0 BC HYDRO'S APPLICATION

As noted above, BC Hydro argues that the effect of the Commission's decision on implementation of its order to reduce the LTF PTP transmission capacity on the BC>AB path wrongfully deprived it of 25 MW of LTF PTP capacity and unjustly enriched another party, Cargill, to the same extent.

BC Hydro says that, had the Commission required the situation existing at the time of BCTC's sale of additional transmission capacity to be preserved, it would not have lost 25 MW of capacity. BC Hydro argues that the substance of the subject condition referred to in the Commission Panel's decision "was and is gratuitous" and "does not justify, even in a formal way, the cancellation of [the Service Agreements which were subject to the condition]". (BC Hydro Application for Reconsideration p. 7)

BC Hydro argues that the outcome is an unfair result which could be characterized as a "basic principle not raised in the original proceedings"; a "new principle having arisen as a result of the impugned decision" or as otherwise unjust.

BC Hydro is of the view that there is no need for additional evidence, with the possible exception of evidence relating to the likelihood that it would have been able to maintain its capacity through the roll over process in relation to two service agreements, for 50 MW and 120 MW, respectively (Service Agreements 2, 4). (BC Hydro Application for Reconsideration, p. 4)

BC Hydro suggests that the scope of the reconsideration be limited to a reconsideration of the two implementation alternatives suggested by BCTC in its request for clarification.

4.0 INTERVENORS' POSITIONS

The British Columbia Old Age Pensioners' Organization et al., the Commercial Energy Consumers, BCTC and the Joint Industry Electricity Steering Committee all support BC Hydro's application. The BCOAPO states that "[i]t would be unfair and contrary to the public interest if ratepayers should suffer the consequence of an implementation direction which gratuitously harms BC Hydro and its customers through a mechanism which was not adequately canvassed either in evidence or argument in the original proceeding". The JIESC submits that BC Hydro has met the appropriate threshold for a reconsideration by the Commission.

Cargill, on the other hand, argues that the decision rendered by the Commission was "fair, appropriate and fully supported by the records of these proceedings". It submits that the two implementation alternatives put forward by BCTC in its request for clarification were appropriately canvassed during that process, including the implications of each. Cargill submits that the Decision indicates that the Panel considered the issues and the implications of its decision and determined that the conditional nature of certain agreements was a material matter going to fairness. Cargill submits there is no "basic principle not raised in the original proceedings", no "new principle having arisen as a result of the impugned decision" and there is nothing "otherwise unjust". It further submits that there has been no fundamental change in fact or circumstance since the decision and there is no error of fact or law.

Cargill argues that it purchased its 25 MW of capacity when offered. Its Service Agreement contained no subject clause and that it would be fundamentally unfair to deprive it of its transmission capacity when it all times "behaved in a bona fide manner and without any notice that its agreement with the BCTC was subject to possible termination." Cargill states that its Service Agreement was not a matter of "luck", but a rather a normal course business practice of the parties and that "[t]o retroactively terminate an agreement that was entered into in good faith and without notice of the risk of termination undermines common law principles of certainty of contract and the ability to rely on contracts entered" and that it would be "fundamentally unfair for Cargill to be deprived of its agreement."

5.0 BC HYDRO REPLY

In Reply, BC Hydro disagrees with Cargill that the implications of the two implementation alternatives suggested by BCTC were fully canvassed. BC Hydro notes that the key "detail" that it would lose 25 MW of capacity to the benefit of Cargill was not the subject of submissions prior to this Reconsideration Application.

BC Hydro submits that it is not seeking retroactive relief but relief on a "go-forward" basis. BC Hydro submits that the subject clause in some agreements does not change the fact that all service agreements are subject to variation by Commission order, regardless of whether the parties agree and regardless of whether this fact is expressly contemplated on the face of the agreement. BC Hydro further submits that it also acted at all times in good faith such that that argument "is a wash".

6.0 COMMISSION DETERMINATION

The Commission Panel has considered the submissions of the parties and will allow the Reconsideration Application to proceed to the second phase. The Commission Panel is of the view that the requisite threshold has been met. The Commission Panel agrees with BC Hydro and the BCOAPO that the implementation mechanism was not adequately canvassed in the original proceeding and that the result of the implementation was never addressed prior to this Application. The Commission Panel is of the view that this may be viewed as constituting a "principle not raised in the original proceedings" or a "new principle having arisen as a result of the impugned decision."

7.0 ADDITIONAL EVIDENCE

As noted above, BC Hydro sees no need for additional evidence with one possible exception relating to its ability to have succeeded in rolling over two service agreements. No other party has suggested the need for additional evidence.

The Commission Panel, however, is of the view that additional evidence is necessary for it to have a complete record before it concerning the status of each Service Agreement as it existed immediately prior to December 1, 2007 through to the date of the Reconsideration Application. The Commission Panel therefore requests that BCTC file additional evidence, by way of Affidavit, explaining in detail:

1. The complete process relating to the rollover, renewal, termination or suspension of each Service Agreement on the BC >AB Path from November 30, 2007 to November 26, 2009. The evidence should fully identify each contract by Customer, Capacity (MW), Date – including Commencement of Service Date, Request for Service Date, Date of Termination of Service, OASIS No., Existence of Subject Clause and Queue Priority and explain the process relating to the disposition of each. Please ensure a detailed explanation as to the disposition of Cargill's contract for "partial service under study" with a Service End date of July 31, 2009 as shown in Table 6-1 of Exhibit B1-1 is included; and
2. The rollover process as it relates to contracts with rollover rights and contracts with no rollover rights; and
3. The rollover process as it relates to each contract held by BC Hydro at November 30, 2007.

8.0 REGULATORY TIMETABLE

The Regulatory Timetable is attached as Appendix A to the Order accompanying these Reasons.