



LETTER L-75-10

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VIA E-MAIL

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September 13, 2010

Mr. Keith Boutcher
Chair, IPPBC Regulatory Committee,
Independent Power Producers Association of British Columbia
1230 – 888 Dunsmuir Street,
Vancouver, BC V6C 3K4

Dear Mr. Boutcher:

Re: British Columbia Hydro and Power Authority
Project No. 3698565 – Order F-16-10
Acquisition from Teck Metals Ltd. of an Undivided One-Third Interest in the
Waneta Dam and Associated Assets (Waneta Transaction)

Application for Reconsideration of Participant Assistance/Cost Award Decision

This letter is in response to your June 10, 2010 request for reconsideration (Application) of Order F-16-10 as it relates to the Participant Assistance/Cost Award (PACA) funding granted to the Independent Power Producers of British Columbia (IPPBC) for its review of British Columbia Hydro and Power Authority's (BC Hydro) Waneta Transaction application. The IPPBC Application seeks reconsideration of its PACA cost award based on 6 days for legal counsel and 6 days for consultants reduced from 15 days for legal counsel and 12 days for consultants, thus restoring it to a full substantial interest for full participation.

Commission Order G-97-09A and Letter L-61-09 established a Regulatory Timetable for a written public hearing to review the Filing and anticipated that an Oral Phase of the hearing might be required. In its letters of comment dated March 23 and April 6, 2010, BC Hydro states that, as Commission Letter L-103-09 determined that an Oral Phase of hearing was not required, staff's estimate of 15 days of funding should be reduced considerably to reflect participation in the written hearing. The Commission Panel determined that the typical ratio set out in the PACA Guidelines of two preparation days for each proceeding day should not apply as the anticipated Oral Phase of the hearing actually became a written public hearing. The Panel considered the number of Workshop, Procedural Conference and written hearing days and determined that up to 12 days each for legal counsel and consultants would be eligible for funding for full participation.

PACA FUNDING DECISION

Order F-16-10 and Reasons for Decision dated May 27, 2010, responded to an application for PACA funding from IPPBC. IPPBC applied for funding of \$45,990.00, and the Commission Panel awarded \$19,971.00. The Commission Panel awarded IPPBC PACA funding for six days of legal counsel and six days of consultant time with the following explanation:

"IPPBC does not represent a ratepayer group as defined in the Guidelines, but it may still be eligible for PACA funding to the extent it demonstrates "a substantial interest in a substantial issue" in the matter under review. The Commission Panel accepts that IPPBC has an interest in several issues in the proceeding, including the reliability of the BC Hydro system, and factors that may affect the comparison of energy acquisition alternatives. While IPPBC has an interest in planning for the integration of future energy resources, this was not a relevant issue in the proceeding.

While the interests of IPPBC were somewhat limited and peripheral, its information requests and submissions contributed to the Commission Panel's understanding of some issues. Therefore, and considering the level of participation of IPPBC relative to that of other Interveners, the Commission Panel concludes that PACA funding should be provided to IPPBC for up to one-half of the maximum number of days that are funded for a full substantial interest and full participation.

As calculated in the following table, the Commission Panel determines that IPPBC is awarded six days of PACA funding in the amount of \$19,971.00."

RECONSIDERATION CRITERIA

A copy of the Reconsideration and Appeals section of the Commission's Participant Guide, which identifies the criteria that the Commission generally applies to determine whether a reasonable basis exists to allow reconsideration, is enclosed.

An application for reconsideration by the Commission proceeds in two phases. In the interest of both regulatory efficiency and fairness, and before the Commission proceeds with a determination on the merits of an application for reconsideration, the application undergoes an initial screening phase.

In this first phase, the applicant must establish a *prima facie* case sufficient to warrant full consideration by the Commission. The Commission usually invites submissions from the other participants in the proceeding that led to the Decision that is the subject of the reconsideration request, or may consider that comments from the parties are not necessary. The Commission generally applies the following criteria to determine whether or not a reasonable basis exists for allowing reconsideration:

- the Commission has made an error in 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.

Where an error is alleged to have been made, in order to advance to the second phase of the reconsideration process, the application must meet the following criteria:

- the claim of error is substantiated on a *prima facie* basis; and
- the error has significant material implications.

If the Commission determines the reconsideration is warranted, the reconsideration proceeds to the second phase where the Commission hears full arguments on the merits of the application.

APPLICATION FOR RECONSIDERATION

The Application identifies areas it considers affected the award it received:

1. The budget was within the staff estimate of 15 days for each of legal counsel and consultants ;
2. IPPBC's position that it gave the Commission more information and insight into these issues than any other intervenor; and
3. The IPPBC's participation may have been focused on the specific areas of economic evaluation and risk, but it was no less intense or involved than any other intervenor's – and these areas were indicated by staff as "important considerations."

As the IPPBC Application makes several references to the Commission staff estimate, the Commission Panel notes the Commission staff letter of October 21, 2009 stated "...that several of the issues that IPPBC intends to examine appear to be of limited interest to IPPBC or appear to have limited relevance to the proceeding, staff believe that IPPBC is at serious risk

that its cost award may be significantly less than the amount set out in your Budget Estimate...” and advised that “...Commission staff advice is not binding on the Participant or the Commission Panel, and the determination on any cost award will be made by the Commission Panel upon application after the proceeding.” Furthermore, the Commission Panel finds the IPPBC Application puts forward arguments that would be more appropriate if the Commission determines the reconsideration is warranted and proceeds to the second phase where the Commission hears full arguments on the merits of the application. For these reasons, the Commission Panel will not address these arguments further in this Application.

SUBMISSIONS ON THE RECONSIDERATION APPLICATION

With respect to the IPPBC’s Application the Commission, by letter dated June 23, 2010, requested comments from BC Hydro. BC Hydro responded on July 9, 2010. On July 19, 2010, the Commission received reply comments from IPPBC.

BC Hydro’s Submission

By letter dated July 9, 2010, BC Hydro submits IPPBC’s principal submission is that because it adhered to the BCUC’s original estimate of 15 days (made prior to the decision not to hold an oral hearing), and requested reimbursement for precisely the same amount submitted in its PACA budget in October 2009, it should receive the entirety of the amount claimed. BC Hydro states, “Nowhere in its submissions does IPPBC allege that the Commission has committed an error of fact or law, nor does IPPBC allege that there has been a fundamental change in circumstances or facts since the release of the Decision. Further, IPPBC is not claiming that a basic principle was omitted in the original proceeding or that a new principle has arisen as a result of the Decision. Simple disagreement with the outcome of a decision by the BCUC is not sufficient to warrant reconsideration. None of the requisite criteria for Phase 1 reconsideration has been met in this instance. Instead, IPPBC seeks to reargue its case based on supplemental evidence it could have but failed to provide in support of its original application. Permitting reconsideration in these circumstances would undermine the value of proceeding before the BCUC. Accordingly, BC Hydro respectfully requests that IPPBC’s application for reconsideration be denied.”

IPPBC’s Submission

By its letter dated July 19, 2010, IPPBC responded that the IPPBC Application might not have been as clear as it should in this respect (“Nowhere in its submissions does IPPBC allege that the Commission has committed an error of fact or law, nor does IPPBC allege that there has been a fundamental change in circumstances or facts since the release of the Decision”)¹ and wishes to rectify this matter by now asserting that the Commission Panel has made a mistake of fact and a mistake of law.

IPPBC states the mistake of law occurred when the Commission did not provide reasons as to why the IPPBC did not represent a “full substantial interest” or why there was not “full participation.”

As a mistake of fact, IPPBC submits that this impression, “IPPBC provided no good reason for its claim of 15 days, and indicated that the request was unreasonable when compared to requests by other interveners in the area of five days”, if it came from BC Hydro, is inaccurate and unjustified by the facts. The effort put forward by IPPBC to understand BC Hydro’s financial model for the Waneta Project is a complex mathematical representation of the terms and conditions of a number of intertwined agreements relating to this project. The agreements and their relationships to each other had to be thoroughly understood in order to understand the financial model. The IPPBC’s review also indicated there are omissions in the agreements and the model as set out in the IPPBC’s letter.

Commission Panel Finding

IPPBC alleges the Commission Panel adopted the BC Hydro’s position, that IPPBC had no good reason for its claim and the request was unreasonable compared to requests by other Interveners in the proceeding. This is inaccurate. The Reasons for F-16-10 do not signify that the Commission Panel adopted the BC Hydro position, or otherwise believed that IPPBC did not devote the time indicated on an analysis of the evidence. Hence, the Commission Panel finds there was no error in fact.

¹ BC Hydro’s response of July 9, 2010

Order G-72-07 states, “the Commission Panel will determine the entitlement to a full or partial award taking into account the criteria established in Section 1 of the Guidelines, the information provided by the Participant with respect to any variances from the participant’s Budget Estimate and any variances from the initial staff estimate of proceeding and preparation days.”

The Commission Panel notes the Oral Phase of the hearing was not required, hence necessitating reducing the Commission staff estimate of 15 days to reflect a written hearing process that should have limited legal counsel requirements and would have expected the legal counsel days to have been less than the consultant’s days. Furthermore, the Commission Panel finds the reasons given in Order F-16-10, while concise, are sufficient in that they identify that IPPBC is not a ratepayer group and the IPPBC interests were somewhat limited and peripheral, and noted that the integration of future energy resources was not a relevant issue in this proceeding. Nevertheless, because IPPBC contributed to the Commission Panel’s understanding of some issues, it concluded that a certain level of funding should be provided to IPPBC in this instance.

Considering its findings, the Commission Panel concludes that no mistake in fact or law was made and finds IPPBC did not establish a *prima facie* case sufficient to warrant full consideration by the Commission in its Decision.

COMMISSION DETERMINATION

The Commission believes that the process and criteria that it generally applies to determine if circumstances warrant reconsideration of a Commission decision, should apply for a PACA funding decision. Moreover, the Commission believes that Participant Assistance properly describes the role of cost awards granted under section 118 and the PACA Guidelines. Such PACA funding is to assist participation in a proceeding before the Commission and may not provide full reimbursement of costs.

In the Application, IPPBC does not explicitly address the four criteria that the Commission generally applies to determine whether a reconsideration should be allowed. The Application does not indicate that the Commission made an error in fact or law, as it does not question that the Commission correctly applied the PACA Guidelines in its determination of the number of legal counsel days that would be funded, or take issue in a factual sense with the other Findings; rather it chose to address the volume and complexity of the issues. Similarly, the Application does not identify a fundamental change since the Decision, a basic principle that had not been raised in the proceeding, or a new principle that has arisen as a result of the Decision. Instead, the Application largely makes arguments why the Commission should have given different weight to several considerations and Findings, and as a result reached a different conclusion about the number of days to be funded. Since IPPBC addressed the Phase 1 criteria for reconsideration in its July 19, 2010 submission, the Commission has generally relied on the positions set out by IPPBC in its review of the application for reconsideration.

Therefore, the Commission determines that the request for reconsideration has not satisfied the criteria that it generally applies in the initial screening phase when considering if the reconsideration is warranted, nor has it provided other reasons that justify a reconsideration of Order F-16-10. The Commission concludes that IPPBC has not established that a reasonable basis exists for allowing a reconsideration of Order F-16-10, and denies the IPPBC request for reconsideration.

Yours truly,

Erica M. Hamilton

DJF/cms

Enclosure

cc: BC Hydro
Registered Interveners (BC Hydro - Waneta Transaction)
Interested Parties (FBC- Waneta Transaction)