

SIXTH FLOOR, 900 HOWE STREET, BOX 250
VANCOUVER, BC V6Z 2N3 CANADA
web site: <http://www.bcuc.com>



**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-189-13**

TELEPHONE: (604) 660-4700
BC TOLL FREE: 1-800-663-1385
FACSIMILE: (604) 660-1102

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

and

**a Complaint by Peace Valley Environmental Association
Regarding the BC Hydro Proposed Site C Clean Energy Project**

BEFORE: C.A. Brown, Commissioner
N.E. MacMurchy, Commissioner
B.A. Magnan, Commissioner November 21, 2013
D.M. Morton, Commissioner
R.D. Revel, Commissioner
C. van Wermeskerken, Commissioner

O R D E R

WHEREAS:

- A. On July 15, 2013, West Coast Environmental Law (WCEL) filed a complaint under section 47 of the *Utilities Commission Act* (UCA) on behalf of the Peace Valley Environment Association (PVEA) regarding the British Columbia Hydro and Power Authority (BC Hydro) Site C Clean Energy Project (Complaint);
- B. PVEA alleges that the Site C Project currently proposed by BC Hydro (Proposed Site C) "...significantly exceeds the Site C that is exempt from the requirement to obtain a certificate of public convenience and necessity (CPCN) in section 7 of the *Clean Energy Act*." As a result, PVEA alleges that the Proposed Site C is not captured by the exemption and BC Hydro is required to obtain a CPCN for the Proposed Site C under section 45 of the UCA;
- C. PVEA seeks an order from the Commission under section 47 of the UCA that BC Hydro not begin construction or operation of the Proposed Site C until it has obtained a CPCN under section 45 of the UCA;
- D. On August 1, 2013, the Commission forwarded a copy of the Complaint to both BC Hydro and WECL for written comments. The letter requested BC Hydro respond to the Complaint by Friday, August 31, 2013 and provide a copy of the response to WECL. PVEA was invited to provide reply comments by Monday, September 30, 2013;

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER** G-189-13

2

- E. On August 28, 2013, BC Hydro filed its written comments on the Complaint;
- F. While BC Hydro seeks dismissal of the Complaint, it submits that it is desirable for the Commission to adjudicate the Complaint on a prospective basis so that the Commission's decision can inform the actions of BC Hydro and interested persons going forward and provide certainty to the parties (BC Hydro's Request);
- G. On September 30, 2013, PVEA, filed its written reply;
- H. Under section 83 of the UCA, the Commission has the power to determine whether a hearing or inquiry is to be had, and generally whether any action on its part is or is not to be taken; and
- I. The Commission has reviewed the Complaint, BC Hydro's response and PVEA's reply.

NOW THEREFORE for the reasons set out in the Reasons for Decision attached as Appendix A to this Order, the Commission orders as follows:

1. The Complaint is dismissed.
2. The British Columbia Hydro and Power Authority's Request is denied.

DATED at the City of Vancouver, in the Province of British Columbia, this 26th day of November 2013.

BY ORDER

Original signed by:

D.M. Morton
Commissioner

Attachment

A Complaint by Peace Valley Environmental Association
Regarding the BC Hydro Proposed Site C Clean Energy Project

REASONS FOR DECISION

1.0 INTRODUCTION

Site C is a British Columbia Hydro and Power Authority (BC Hydro) project to build a third dam on the Peace River in northeast British Columbia. Section 7 of the *Clean Energy Act* (CEA) provides a statutory definition of the range of energy and capacity design limits for the Site C Clean Energy Project, and exempts BC Hydro from sections of the *Utilities Commission Act* (UCA) including section 45 which would otherwise require BC Hydro to obtain a certificate of public convenience and necessity (CPCN) for the project.

2.0 THE COMPLAINT

On July 15, 2013, the Peace Valley Environment Association (PVEA) filed a complaint with the Commission under section 47 of the UCA alleging that the Site C Project currently proposed by BC Hydro (Proposed Site C) "...significantly exceeds the Site C that is exempt from the requirement to obtain a certificate of public convenience (CPCN) in section 7 of the *Clean Energy Act*." (Complaint)

PVEA states that the Proposed Site C exceeds the approximate amount of energy and capacity by 11 percent and 22 percent respectively of the Site C for which a CPCN is not required. PVEA submits that the Proposed Site C does not meet the criteria specified in the CEA and accordingly seeks an order from the Commission under section 47 of the UCA that BC Hydro does not begin construction or operation of the Proposed Site C until it has obtained a CPCN under section 45 of the UCA. PVEA also relies upon section 24 of the UCA as a basis for the Commission's jurisdiction to grant the order PVEA seeks.

3.0 THE PROCESS

On August 1, 2013, the Commission forwarded a copy of the Complaint to BC Hydro with a request that it provide its written response to the Complaint by August 31, 2013 and provide a copy of the response to West Coast Environmental Law (WCEL), counsel for PVEA. PVEA was invited to provide its reply comments by September 30, 2013.

BC Hydro filed its written comments on August 28, 2013 and PVEA filed its written reply on September 30, 2013.

4.0 LEGISLATION

In reviewing the Complaint, the Commission has considered the sections of the UCA and the CEA set out below.

4.1 *Utilities Commission Act*

Commission must make examinations and inquiries

24 In its supervision of public utilities, the commission must make examinations and conduct inquiries necessary to keep itself informed about

[...]

(b) compliance by public utilities with this Act, regulations or any other law, and

[...]

Certificate of public convenience and necessity

45 (1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.

[...]

Order to cease Work

47 (1) If a public utility

(a) is engaged, or is about to engage, in the construction or operation of a plant or system, and

(b) has not secured or has not been exempted from the requirement for, or is not deemed to have received a certificate of public convenience and necessity required under this Act, any interested person may file a complaint with the commission.

(2) The commission may, with or without notice, make an order requiring the public utility complained of to cease the construction or operation until the commission makes and files its decision on the complaint, or until further order of the commission.

(3) The commission may, after a hearing, make the order and specify the terms under this Act that it considers advisable.

Action on complaints

- 83 If a complaint is made to the commission, the commission has powers to determine whether a hearing or inquiry is to be had, and generally whether any action on its part is or is not to be taken.

4.2 Clean Energy Act

Exempt projects, programs, contracts and expenditures

- 7 (1) The authority is exempt from sections 45 to 47 and 71 of the Utilities Commission Act to the extent applicable, and from any other sections of that Act that the minister may specify by regulation, with respect to the following projects, programs, contracts and expenditures of the authority, as they may be further described by regulation:
- [...]
- (d) Site C, a project to build a third dam on the Peace River in northeast British Columbia to provide approximately
- (i) 4 600 gigawatt hours of energy each year, and
- (ii) 900 megawatts of capacity;
- [...]
- (3) The commission must not exercise a power under the Utilities Commission Act in a way that would directly or indirectly prevent the authority from doing anything referred to in subsection (1).

The word "authority" in section 7 of the CEA refers to BC Hydro.

5.0 REVIEW OF THE COMPLAINT AND COMMENTS

The Commission has reviewed the Complaint, BC Hydro's response and PVEA's reply. The Complaint and submissions primarily focus on whether, on the proper application of principles of statutory

interpretation, the Proposed Site C falls outside of the statutory exemption from the requirement for a CPCN found in section 7(1)(d) of the CEA. PVEA argues the Proposed Site C falls outside the exemption, while BC Hydro submits that the Proposed Site C is covered by the exemption. BC Hydro further submits that the Complaint should be denied, but also seeks a determination from the Commission on whether the Proposed Site C falls within the exemption granted by section 7(1)(d) of the CEA.

PVEA acknowledges that the Proposed Site C is currently undergoing an environmental assessment by Canada pursuant to the *Canadian Environmental Assessment Act, 2012*, (CEAA) and British Columbia pursuant to the *Environmental Assessment Act* (BCEAA). (Complaint, pp. 1-2)

BC Hydro states: "...BC Hydro's proposed Site C project [is] currently undergoing a harmonized environmental assessment as described in BC Hydro's Environmental Impact Statement (EIS)..." (BC Hydro Response, p. 2 of 25), and "...BC Hydro is not currently 'engaged, or about to engage, in the construction or operation' of Site C." (BC Hydro Response p. 4)

PVEA's reply does not address BC Hydro's statement that BC Hydro is not currently engaged, or about to engage in construction or operation of the project.

The Commission therefore finds that BC Hydro is not currently engaged or about to engage in construction or operation of the Proposed Site C. Further, the Commission also finds that the Proposed Site C remains the subject of an environmental assessment and the outcome of that review is unknown at this time.

The test for the Commission's jurisdiction under section 47(1) of the UCA has two branches. For the Commission to have jurisdiction under that section, a complainant must show that a public utility:

- a) is engaged, or is about to be engaged, in the construction or operation of a plant or system,
and
- b) has not secured or has not been exempted from the requirement for, or is not deemed to have received a certificate of public convenience and necessity required under [the UCA].

Since BC Hydro is not currently engaged, or about to engage in the construction or operation of the Proposed Site C, the first branch of the test has not been met and the Commission does not have the jurisdiction to consider the Complaint under section 47 of the UCA at this time.

Nor does reliance on section 24(b) of the UCA assist PVEA. Whether the Commission must take the course of action contemplated by section 24(b) will depend upon a number of factors, including the outcome of the environmental assessment review, the energy and capacity characteristics of the project that is ultimately approved by BC Hydro's Board of Directors and the BC Government and whether the project that is ultimately approved meets the legislative criteria in section 7(1)(d) of the CEA on a proper application of the rules of statutory interpretation. The approvals may or may not be for the Proposed Site C. Accordingly, the Commission considers PVEA's reliance on section 24(b) to be premature.

For all these reasons, the Commission is also of the view that it is not required to undertake a statutory analysis to determine whether the Proposed Site C falls outside of the statutory exemption from the requirement for a CPCN found in section 7(1)(d) of the CEA at this time.

Commission Determination

The Complaint is therefore dismissed.

6.0 BC HYDRO REQUEST FOR ADDITIONAL RULING

BC Hydro observes that the Complaint is framed on a prospective basis. It points to PVEA's request for relief which seeks an order under section 47 of the UCA that BC Hydro

“‘not begin’ construction or operation of the Proposed Site C until it has obtained a CPCN...” [Italics and emphasis added by BC Hydro]. BC Hydro submits that it is desirable for the BCUC to adjudicate the Complaint on this basis — that is, the BCUC ought to render a decision on the Complaint so that the BCUC decision can inform BC Hydro and interested person actions going forward. A decision on the merits of subsection 47(1)(b) of the Utilities Commission Act and subsection 7(1)(d) of the CEA is required to provide certainty to the parties.” (BC Hydro’s Response, p. 5)

Further, BC Hydro states:

*“...Site C is undergoing a harmonized environmental assessment pursuant to the BCEAA [BC Environmental Assessment Act] and the CEAA 2012 [Canadian Environmental Assessment Act, 2012]. Subsection 8(1)(b) of the BCEAA provides that BC Hydro ‘must not ... construct [or] operate ... all or part of the facilities of a reviewable project’ prior to obtaining an Environmental Assessment Certificate (**EAC**). Site C is a reviewable project. Issuance of an EAC for Site C by the two responsible British Columbia (**B.C.**)*

Ministers pursuant to section 17 of BCEAA is one of several requirements prior to proceeding to the Site C construction phase. Another requirement is the federal Minister of Environment's environmental assessment decision statement under 54 of the CEAA 2012. BC Hydro's Integrated Resource Plan (IRP) states that '[b]ased on the schedule provided by the environmental assessment agencies, the [harmonized environmental assessment] process is expected to be completed in the fall of 2014'. The harmonized environmental assessment is Stage 3 of BC Hydro's five-staged approach for the planning and evaluation of Site C described in section 8.2.6.2 of the IRP. Should BC Hydro receive an EAC and a favourable environmental assessment decision statement, and if the Crown's duty to consult and if appropriate accommodate First Nations has been fulfilled to the end of Stage 3, stage 4 'would include a decision by the BC Hydro Board of Directors and the BC Government to proceed to full project construction'. Thus B.C. Government approval is required to proceed with the construction of Site C." (BC Hydro Response, pp. 4-5) [Footnotes omitted]

PVEA's reply does not address BC Hydro's request for the Commission to adjudicate the Complaint on the basis proposed by BC Hydro. Rather, PVEA states:

"BC Hydro has not demonstrated that subsection 7(1)(d) of the CEA applies to the Proposed Site C. For the reasons set out in the Complaint and in its reply, PVEA respectfully requests that the BCUC find that the Proposed Site C exceeds the Site C that is contemplated by subsection 7(1)(d) of the CEA and accordingly order that it is not exempt from the requirement to obtain a CPCN under the UCA." (PVEA Reply, p. 6)

The Commission has considered BC Hydro's request for a decision on the application of section 47(1)(b) of the UCA and section 7(1)(d) of the CEA to the Proposed Site C. The Commission has previously found that it does not have the jurisdiction to consider the Complaint under section 47 of the UCA at this time for the reasons set out in Section 5.

Further, the Commission is not prepared to make what is, in essence, an advance ruling on whether or not the Proposed Site C falls within definition of the Site C project described in section 7 (1)(d) of the CEA in circumstances where the outcome of the environmental assessment review is unknown and the BC Hydro Board of Directors and the Government have not approved the Proposed Site C.

Commission Determination

Therefore, BC Hydro's request that the Commission determine whether section 7 (1)(d) of the CEA exempts BC Hydro from the requirement of obtain a CPCN for the Proposed Site C under section 45 of the UCA is denied.