



BOUGHTON

FILE NUMBER 45026.100

DIRECT LINE 604.647.4102

eMAIL pmiller@boughton.ca

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British Columbia Utilities Commission
 Box 250
 Sixth Floor
 900 Howe Street
 Vancouver, BC V6Z 2N3

Attention: Robert J. Pellatt, Commission Secretary

Dear Mr. Pellatt:

Re: British Columbia Hydro and Power Authority (“BC Hydro”) and the
 BC Hydro 2005 Resource Expenditure and Acquisition Plan (“2005 REAP”)

Commission Letter No. L-69-05 dated August 29, 2005 (Exhibit A-9) requested submissions on the question of the Commission’s jurisdiction to direct the filing of a pro forma EPA. Please accept this letter as the submissions of Commission counsel on this issue.

The Commission’s jurisdiction to order the filing of a pro forma EPA at this stage of the proceeding, if it exists, must be found in the provisions of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473 (the “*Act*”). The Commission derives its jurisdiction solely from the provisions of the *Act*.

The only provisions of the *Act* which could afford the jurisdiction to order the filing of pro forma EPA are sections 45(6.1) and (6.2). The conclusion is supported by the British Columbia Court of Appeal decision in *British Columbia Hydro and Power Authority v. British Columbia Utilities Commission* (1996), 20 B.C.L.R. (3d) 106 which has already been referred to by BC Hydro in its submission dated August 29, 2005 (Exhibit B-14). At issue in that case was whether the Commission had jurisdiction to order BC Hydro, punishable upon default by sanctions, to carry out its planning processes in a particular manner. The court held that the Commission did not have such jurisdiction. Mr. Justice Goldie made the following statement (page 116):

I am of the view no section of the Utilities Act expressly enables the Commission to impose by order its chosen form of controlling planning at the stage selected by it.

Mr. Justice Goldie also stated (page 119):

Taken as a whole the Utilities Act, viewed in the purposive sense required, does not reflect any intention on the part of the legislature to confer upon the Commission a jurisdiction so to determine, punishable on default by sanctions, the manner in which the directors of a public utility manages its affairs.

Sections 45(6.1) and (6.2) of *Act* were promulgated after the decision from the Court of Appeal arguably in response to the determination of the lack of jurisdiction of the Commission to control planning. Therefore, as stated above, the necessary jurisdiction to make the order sought in this proceeding must be found within those provisions.

Sections 45(6.1) and (6.2) of the *Act* are as follows:

- 6.1 A public utility must file the following plans with the commission in the form and at the times required by the commission:
 - (a) a plan of the capital expenditures the public utility anticipates making over the period specified by the commission;
 - (b) a plan of how the public utility intends to meet the demand for energy by acquiring energy from other persons, and the expenditures required for that purpose;
 - (c) a plan of how the public utility intends to reduce the demand for energy, and the expenditures required for that purpose.
- 6.2 After receipt of a plan filed under subsection 6.1, the commission may
 - (a) establish a process to review all or part of the plan and to consider the proposed expenditures referred to in that plan,
 - (b) determine that any expenditure referred to in the plan is, or is not at that time, in the interests of persons within British Columbia who receive, or who may receive, service from the public utility, and

- (c) determine the manner in which any expenditures is referred to in the plan can be recovered in rates.

As has already been noted by BC Hydro in its submissions, section 45(6.1) speaks to what the plan to be filed by the utility must contain. In contrast, section 45(6.2) describes what the commission may do after it receives the plan.

Section 45(6.1) first provides that the plan to be filed with the commission must be in the form required by the commission. To my knowledge, at the time of filing of this plan, the Commission had not specified that the form of the plan must include a pro forma EPA. Therefore, there was no requirement at the time of filing for BC Hydro to include a pro forma EPA.

Whether the Commission could order the filing of a plan to include a formal EPA is beyond the scope of the submissions requested and will not be addressed in this letter.

We are also in substantial agreement with BC Hydro that the provisions of section 45(6.2) do not provide the Commission with jurisdiction to order the filing of a pro forma EPA. Under these provisions, the Commission can review and consider the proposed expenditures, determine the expenditures to either be or not be in the interests of persons within British Columbia and determine the manner in which the expenditures can be recovered in rates. There is no express jurisdiction to allow the Commission to order a change in the plan.

This lack of express jurisdiction in the above provisions is particularly important in the context of the Court of Appeal's decision in the case referred to above and which has already been cited by BC Hydro. Mr. Justice Goldie stated (at page 119):

It is only under s. 112 of the Utilities Act that the Commission is authorized to assume the management of a public utility. Otherwise the management of a public utility remains the responsibility of those who by statute or the incorporating instruments are charged with that responsibility.

One of the primary responsibilities and functions of the directors of a corporation is the formulation of plans for its future. In the case of a public utility these plans must of necessity extend many years into the future and be constantly revised to meet changing conditions ...

BC Hydro has also raised the point that based on past Commission practice, the Commission does not order an applicant to amend its application. In this regard, it is our opinion that an applicant bears the burden of proof for approval of its application. It is up to the management of the particular utility, absent prior directions, to prepare the application and supporting evidence in the manner it determines to be appropriate. If the application and supporting evidence are insufficient for the Commission to make a

determination, then the applicant is at risk of having the Commission rule against the application.

In conclusion for the reasons stated above, it is the opinion of Commission counsel that the Commission does not have jurisdiction to order BC Hydro to file the pro forma EPA in this proceeding at this time.

Yours truly,

BOUGHTON LAW CORPORATION
by Paul R. Miller Law Corporation

Per: 
Paul R. Miller

PRM/jw