February 8, 2010

DEDelivered

Ms. Erica M. Hamilton
Commission Secretary
British Columbia Utilities Commission
Sixth Floor – 900 Howe Street
Vancouver, BC V6Z 2N3

Dear Ms. Hamilton:

Project No. 3698539
British Columbia Utilities Commission (BCUC)
British Columbia Hydro and Power Authority (BC Hydro)
British Columbia Transmission Corporation (BCTC)

Application to Amend the Open Access Transmission Tariff (OATT) and
TransCanada Energy Ltd. (TCE) Complaint Regarding Firm Sales to
Alberta

BC Hydro Application for Reconsideration regarding
BCUC Order No. G-103-09, as Confirmed by Letter No. L-95-09

Pursuant to BCUC Order No. G-6-10, BC Hydro encloses its Phase II
Submissions and Book of Authorities.

As is apparent from the various Phase I submissions, this dispute is essentially
between BC Hydro and Cargill Limited (Cargill) regarding 25 MW of long-term
firm point-to-point (LTF PTP) service on the BC>AB Path, under BCTC’s
OATT; each party submits that it is entitled to the service. In light of that, these
submissions elaborate on those elements of BC Hydro’s Phase I Submissions
(Exhibit B-1) that are most germane to the dispute, and those Phase I Submissions
are included in the Book of Authorities at Tab 15.

BC Hydro has had regard to Exhibit C6-2, the affidavit filed by BCTC pursuant to
Order No. G-6-10 (the BCTC Affidavit). The BCTC Affidavit explains the
circumstances of each Service Agreement noted in Tables 1 and 2 of BC Hydro’s
Phase I Submissions. For the convenience of the Commission and intervenors,
BC Hydro has revised those tables to provide cross-references to the BCTC
Affidavit. The revised tables are set out below.
Table 1: BCTC-AESO Path-Firm PTP Service Agreements

**Original 480 MW of Firm ATC**

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<th>Subject Clause</th>
<th>BCTC Affidavit Cross-Reference</th>
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<td>TCP</td>
<td>No</td>
<td>Para. 14</td>
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<td>No</td>
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<tr>
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**Incremental 305 MW of Firm ATC**

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**180 MW from Expired SA 10**

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BCPS: BC Hydro  
TCP: TransCanada  
NRPT: NorthPoint  
CRGL: Cargill
Table 2: BCTC-AESO Path-Firm PTP Service Agreement

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<tr>
<th>SA</th>
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<th>Expiration Date</th>
<th>Customer</th>
<th>BCTC Affidavit Cross-Reference</th>
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<td>01-2012</td>
<td>BCPS</td>
<td>Para. 28</td>
</tr>
</tbody>
</table>

*Service Agreement #2 contained the “subject condition”, was cancelled in accordance with the Subject Order, and then effectively re-instated, to 45 MW, as the first-in-queue recipient of the freed-up 45 MW.

Yours truly,

Jeff Christiansen

cc. BCUC Project No. 3698539 Registered Intervenor Distribution List
A. History

1. Prior to December 2007, the British Columbia Hydro and Power Authority ("BC Hydro") held 330 MW of the available Long-Term Firm Point-to-Point ("LTF PTP") transmission capacity on the BC>AB path of the British Columbia Transmission Corporation ("BCTC") system, all subject to rollover rights. Cargill Limited ("Cargill") had none.

2. In December 2007, BCTC increased the amount of LTF PTP transmission capacity for sale on the BC>AB path from 480 MW to 785 MW.

3. On June 3, 2008, BCTC applied to the British Columbia Utilities Commission (the "Commission" or the "BCUC") to, among other things, suspend the release of additional Firm Available Transfer Capacity ("Firm ATC") for sale on the BC>AB path.

4. On October 9, 2008, TransCanada Energy Ltd. ("TCE") filed a complaint (the "Complaint") with the Commission with respect to BCTC's decision to release additional LTF PTP transmission capacity for sale on the BC>AB path in December 2007.

5. On November 21, 2008, BCTC filed its application to amend the Open Access Transmission Tariff (the "OATT Amendment Application") pursuant to sections 58, 59 and 60 of the Utilities Commission Act, R.S.B.C. 1996, c. 473 (the "UCA"). BCTC's response to the Complaint was included in its OATT Amendment Application.

6. As part of the OATT Amendment Application, BCTC sought an interim order pursuant to section 89 of the UCA and section 15 of the Administrative Tribunals Act, S.B.C. 2004, c. 45 (the "ATA") requiring that specified new Service Agreements indicate that they were subject to a further Commission order on the OATT Amendment Application. The requirement
would apply to transmission service rollover requests by BC Hydro on the BC>AB path and any queued requests for Firm ATC coming available on the BC>AB path on January 1, 2009.

7. On November 27, 2008, the Commission issued an interim order (Order No. G-175-08) that required BCTC to indicate on two specified BC Hydro rollovers, and any contracts for Firm ATC coming available on the BC>AB path on January 1, 2009, 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 November 21, 2008.” (the “Subject Condition”)

8. On January 15, 2009, the Commission issued Order No. G-3-09 pursuant to which the Commission established two separate proceedings: one for the OATT Amendment Application (except for that part of the Application that dealt with the Complaint) (the “OATT Proceeding”) and the other for the Complaint (the “Complaint Proceeding”). The Commission decided that both proceedings were to share a common hearing schedule and evidentiary record, but would otherwise remain separate.

9. On September 10, 2009, the Commission rendered its decision and order (Order No. G-102-09) with respect to the OATT Amendment Application. On the same day, the Commission rendered its decision and order (Order No. G-103-09) with respect to the Complaint.

10. In the Complaint, TCE submitted that conditions in Alberta frequently limited the use of the BC>AB path with the result that customers were often unable to make use of the transmission capacity they had purchased. TCE alleged that BCTC had, in effect, “oversold” the BC>AB path when it increased the LTF PTP transmission capacity of that path from 480 MW to 785 MW.

11. Based on the totality of the evidence presented, and without finding any tariff violation by BCTC, the Commission determined that a reasonable limit for LTF PTP transmission capacity on the BC>AB path was the previously-determined 480 MW. That is, the Commission restored the LTF PTP capacity on the BC>AB path to the level it was before December 2007.
12. In Order No. G-103-09, the Commission directed BCTC to amend Attachment C to its OATT to include the following clause:

"Notwithstanding any other provision in this tariff, the Transmission Provider shall limit sales of Firm Point-to-Point Transmission Service on the BC>AB path to 480 MW."

13. On September 17, 2009, BCTC sought clarification from the Commission of the directions in Order No. G-103-09 with respect to how the required reductions in the LTF PTP transmission service on the BC>AB path should be effected.

14. On October 15, 2009, the Commission issued Letter L-95-09, which read, in part, as follows:

"The Commission hereby confirms its intention to limit Long Term Firm Point-to-Point sales to 480 MW, going forward, by amending those service agreements which contain the subject condition in respect of a further order of the Commission.

The Commission therefore confirms that BCTC is, in consultation with its affected customers [NorthPoint and BC Hydro], to cancel the 350 MW of LTF PTP service agreements containing the subject condition ... and allocate 45 MW of LTF PTP service and 305 MW of conditional period-conditional firm or non-firm service to the affected customers in a queue priority consistent with their pre-existing priority rights."

15. The result of this decision was that BC Hydro lost 25 MW of LTF PTP transmission capacity on the BC>AB path. In other words, BC Hydro ended up with 25 MW less LTF PTP transmission capacity than what it would have had if BCTC had never increased the BC>AB path limit from 480 MW to 785 MW in December 2007. Conversely, Cargill gained 25 MW of transmission capacity it never would have had but for the increase by BCTC of the limit on the BC>AB path from 480 MW to 785 MW.


17. On January 8, 2010, the Commission ordered (Order No. G-6-10), in part, that BC Hydro’s reconsideration application would proceed to the second phase of the reconsideration process.
B. Submissions

(i) The Subject Condition and the BCUC Alternative

18. As a result of the implementation by BCTC of the BCUC Alternative (defined below), BC Hydro submits it has been deprived of 25 MW of LTF PTP transmission capacity through no fault of its own while Cargill has gained 25 MW of capacity through no creditable action on its part.

Exhibit B-1 at pages 4-5, Tables 1 and 2 [Tab 15] (revised in cover letter).

19. BC Hydro respectfully submits that the Commission erred when it ordered BCTC to amend [cancel] those Service Agreements for the BC>AB path that contained the Subject Condition and reallocate the remaining LTF PTP capacity on a queue-priority basis (the “BCUC Alternative”) in so far as it resulted in BC Hydro’s loss of 25 MW of LTF PTP transmission capacity on the BC>AB path.

Order No. G-175-08 [Tab 8]; Order No. G-103-09 [Tab 9]; and Letter L-95-09 [Tab 10].

20. BC Hydro submits such a result is both unfair and unwarranted and could not have been the intended result of the BCUC.

21. BC Hydro respectfully submits that it is wrong in law that the Commission’s authority to amend or cancel service agreements is limited to those Service Agreements to which the Subject Condition pertains. The Subject Condition did not give the BCUC any jurisdiction over the Service Agreements that it did not already have, nor did it limit the BCUC’s jurisdiction.

22. BC Hydro submits that it is the UCA and not the Subject Condition that provides the Commission with the authority to amend or cancel the Service Agreements.

23. BCTC’s OATT includes the rates, terms, and conditions (including tariff supplements) of the non-discriminatory, open access transmission service offered by BCTC.

24. Section 58 of the UCA gives the Commission the authority to amend the “rates” of a public utility. Section 58 provides, in part, as follows:
“(1) The commission may,

(a) on its own motion, or

(b) on complaint by a public utility or other interested person that the existing rates in effect and collected or any rates charged or attempted to be charged for service by a public utility are unjust, unreasonable, insufficient, unduly discriminatory or in contravention of this Act, the regulations or any other law, after a hearing, determine the just, reasonable and sufficient rates to be observed and in force.

(2) If the commission makes a determination under subsection (1), it must, by order, set the rates.”

Subsections 58(1) and (2), UCA [Tab 7].

25. The term “rate” is defined broadly in the UCA as follows:

““Rate” includes

(a) general, individual or joint rate, fare, toll, charge, rental or other compensation of a public utility,

(b) a rule, practice, measurement, classification or contract of a public utility or corporation relating to a rate, and

(c) a schedule or tariff respecting a rate.”

Section 1, UCA [Tab 7].

26. As such, the Commission has the authority to amend or cancel any or all of the Service Agreements at issue and not just those to which the Subject Condition pertains.

27. Further, BC Hydro submits that the Subject Condition was and is of no legal or practical effect as the terms and conditions of service between a regulated public utility and its customers are always subject to further Commission order.

28. Subsection 58(2) of the UCA states that if, after a public hearing, the BCUC makes a determination to amend the “rates” of a public utility, the Commission must, by order, set the rates. Pursuant to subsection 58(3), the public utility affected by such an order must amend its schedules in conformity with the order and file amended schedules with the
Commission. That order remains in force and is to be observed only until another order is issued by the Commission in amending those rates.

Subsections 58(1), (2) and (3), UCA [Tab 7].

29. Alternatively, the Subject Condition does not support the cancellation of the Service Agreements issued after January 1, 2009 as the Subject Condition speaks to further BCUC orders in the OATT Proceeding, while Order No. G-103-09 (confirmed in part by Commission Letter L-95-09) was issued in the Complaint Proceeding. In other words, the Commission has not, to date, rendered an order cancelling the Service Agreements as contemplated by the Subject Condition. Thus, even if the Subject Condition could have affected the Commission’s jurisdiction, it did not.

30. In the further alternative, the Subject Condition was imposed by an “interim” order pursuant to section 15 of the ATA. BC Hydro submits that the nature of an interim order is that it can be re-visited, with retroactive effect. Thus, for example, “interim” rate increases are subject to refund. Similarly, any legal effect the Subject Condition may have had is subject to reversal. Thus, even if the Subject Condition did affect the Commission’s jurisdiction, it need not continue to do so.

Section 15, ATA [Tab 6].

31. As noted by the author of Administrative Law in Canada in discussing “Retroactive Orders”:

“Where there is authority to make interim rate orders, the final order may fix the rates as at the date of the interim order or application. Where there is authority to review a decision fixing rates, the review decision may adjust the rates effective the date of the earlier order.”

Sara Blake, Administrative Law in Canada, 4th ed. (Markham, Ont.: LexisNexis Canada Inc., 2006) at 127 [Tab 14].
(ii) Notice Requirements

32. BC Hydro submits that a party’s notification rights are those that are set out in the UCA. Subsection 58(1) of the UCA states that “rates” can be amended by the Commission “after a hearing”.

Subsection 58(1), UCA [Tab 7].

33. Once the Commission determines the fair, just and reasonable rates at the conclusion of the hearing, it has the statutory obligation to set them. The Commission’s rate setting obligation is unconditional; that is, it is not conditional on any further process or notice.

Subsection 58(1), UCA [Tab 7].

34. BC Hydro submits that while parties have a legitimate expectation that the stated procedure will be followed, they cannot expect more. Further, in order to be legitimate, the expected procedure must not conflict with the tribunal’s statutory duty.

Administrative Law in Canada, supra at 22 [Tab 14].

35. While there is no obligation on the part of BCTC to notify its customers of a rate change, section 5.2 of the OATT advises BCTC’s customers that BCTC’s Tariff is subject to amendment by the Commission from time to time. Section 5.2 reads as follows:

“The rates, terms and conditions of this Tariff are subject to decisions, orders, rules and regulations of the Commission and may be amended from time to time.”

Section 5.2, OATT [Tab 17].

36. In addition, Clause 9(b) of the “Form of Service Agreement for Long-Term Firm Point-To-Point Transmission Service”, which is Attachment B to the OATT, states that “BCTC and the Transmission Customer will promptly comply with all the law and regulations and the relevant orders, rules and requirements of all authorities having jurisdiction.” (emphasis added)

Form of Service Agreement for LTF PTP Transmission Service [Tab 18].

37. BC Hydro submits that, in any event, Cargill did receive specific notice that its Service Agreement was subject to further Commission orders:
"As you are aware, the ATC on the BCTC-AESO path is being considered by the British Columbia Utilities Commission. Your [Cargill’s] Service Agreement may be subject to Orders of the Commission arising out of that proceeding."

Exhibit C6-2, Affidavit of Stephen Tran #1 (BCTC), February 1, 2010 (“BCTC Affidavit”) at para. 27 [Tab 16].

(iii) **Exclusive Jurisdiction of the Commission**

38. The OATT is statutory, not contractual, in nature. The *pro forma* service agreement for LTF PTP transmission service is an attachment to the OATT. Such an agreement falls within the definition of the term “rate” set out in section 1 of the UCA, *i.e.*, “a contract of a public utility or corporation relating to a rate”. As such, service agreements are subject to amendment or cancellation by Commission order regardless of whether the counterparties to the service agreements are *consensus ad idem* to such changes and whether or not the service agreement expressly contemplates such by Commission order.

Section 1 and subsection 58(1), UCA [Tab 7].

39. The powers of the Commission are granted by and defined in its enabling legislation, *i.e.*, the UCA.

*Administrative Law in Canada, supra* at 4 [Tab 14].

40. The Commission’s rate setting powers are set out in sections 58-62 of the UCA.

Sections 58-62, UCA [Tab 7].

41. Section 105 of the UCA states that the Commission has “exclusive jurisdiction in all cases and for all matters which the jurisdiction is conferred on it by this or any other Act”.

Section 105, UCA [Tab 7].

42. BC Hydro submits that the Commission’s powers are not limited or constrained by the commercial expectations of the customers of a public utility. The Commission stated the following in *Re British Columbia Hydro and Power Authority 2007 Rate Design Application, Phase 1* (“2007 RDA Decision”), in response to the submission of BC Hydro’s E-Plus customers that the Commission could not lawfully terminate a discounted electric heat rate on account of it being a commercial arrangement:
"Pursuant to its statutory powers given to it under the UCA, it is for the Commission, and not for a public utility and its customers, to determine rates that are just, fair and not unduly discriminatory."

(26 October 2007), (BCUC) at 134 [Tab 4].

43. The following comments of the B.C. Court of Appeal underscore the Commission’s reasons in the 2007 RDA Decision:

“In the normal performance of its regulatory function the commission would in my view clearly be entitled to direct such change in a supply agreement between utility and customer, whether on initial filing as a “rate” or on later review.

I say this because the Utilities Commission Act provides the Commission with authority over a very wide range of contractual and other matters relating to the utilities within its jurisdiction, including the terms of supply and price provided for in agreements entered into with its customers. The Act gives to the Commission the power to make rules governing such agreements and to review and reject agreed rates at any time in carrying out its duty of establishing and maintaining rates which are neither “unjust, unreasonable, insufficient” nor “unduly discriminatory”...

The regulatory power of the Commission in these matters is necessarily broad in order that it be able to discharge its duty to ensure that the monopoly undertakings under its supervision operate according to the best interests of the consuming public, under established principles of utility regulation.”


(iv) Rollover Rights and Importance of Long Term Firm Rights

Rollover rights to transmission service arose out of FERC’s landmark Order No. 888 issued in 1996.

45. The "codification"\(^1\) of these rights in Order No. 888, their lengthy history and the
fact that they have survived several amendments on rehearing in respect of Order No. 888 and
Order No. 890 is evidence of the importance of rollover rights to both the transmission provider
and to the transmission provider’s customers.

Order on reh’g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048,
order on reh’g, Order No. 888-B, 81 FERC ¶ 61,248 (1997),
order on reh’g, Order No. 888-C, 82 FERC ¶ 61046 (1998); and
Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72
order on reh’g, Order No. 890-A, 73 Reg. 2984 (Jan. 16, 2008),
FERC Stats. & Regs. ¶ 31,261 (2007), order on reh’g,

46. BC Hydro submits that for both the transmission provider and the transmission
customer, rollover rights are significant in terms of planning. As to the transmission provider’s
system planning considerations, rollover rights are key as a transmission provider is expected to
plan its system to accommodate the rollover rights of its transmission customers. Rollover rights
also facilitate planning on the part of the customer and provide flexibility to the customer in
meeting its needs.

Exelon Generation Company, LLC v. Southwest Power Pool, Inc.,
2002 FERC LEXIS 2422 (order Denying Rehearing) [Tab 3]; and
Commonwealth Edison Company, 2001 FERC LEXIS 1138 [Tab 2].

47. BC Hydro submits that while having the right to continue to take transmission
service is important in most circumstances it is most important in circumstances where
transmission capacity is scarce. In Order No. 888-A, FERC stated that its policy rationale for
giving an existing long term firm transmission customer a reservation priority (right of first
refusal) when its contract expires is that “it provides a mechanism for allocating transmission
capacity when there is insufficient capacity to accommodate all requestors”. FERC went on to

\(^1\) In Order No. 888, the Commission created what it called a “right of first refusal” that vested in certain of the
utilities that were purchasing some or all of their service from neighbouring utilities. Order No. 888 stated that “all
firm transmission customers (requirements and transmission-only), upon expiration of their contracts or at the time
their contracts become subject to renewal or rollover, should have the right to continue to take transmission service
from their existing transmission provider.” The right to “continue to take transmission service” upon the expiration
(or on the evergreen date) of a contract has become known in the parlance of the trade as a “rollover right”; see,
state that “If there are capacity limitations and both customers (existing and potential) are willing to apply for firm transmission service of the same duration, the right of first refusal provides a tie-breaking mechanism that gives priority to existing customers so that they may continue to receive transmission service.” (emphasis added)

Order No. 888-A at 72-73 [Tab 11].

48. Order No. 888-A stated that the objective of a right of first refusal is to allow an existing firm transmission customer to continue to receive transmission service under terms that are just, reasonable, not unduly discriminatory, or preferential. FERC stated the following in Order No. 888-A:

“Absent the requirement that the customer match the contract term of a competing request, utilities could be forced to enter into shorter-term arrangements that could be detrimental from both an operational standpoint (system planning) and a financial standpoint.”

Order No. 888-A at 73 [Tab 11]; Order No. 890 at para. 1255 (citing Order No. 888-A) [Tab 12]; and Order No. 890-A at para. 665 [Tab 13].

49. BC Hydro submits that the BCTC Affidavit shows that in not one single instance have transmission customers failed to exercise their rollover rights, consistent with the policy reasons for their existence, namely the continuation of service to existing customers.

Exhibit C6-2, BCTC Affidavit [Tab 16].

C. Merits

50. BC Hydro respectfully submits, on the basis of the foregoing, that the merits favour its position over Cargill’s:

(i) BC Hydro has 25 MW less LTF PTP transmission capacity on the BC>AB path through no fault of its own contrary to a policy objective of the OATT to continue service to existing customers;

(ii) BC Hydro would continue to have the 25 MW of LTF PTP transmission capacity on the BC>AB path but for the increase in capacity on that path in December 2007 and the imposition of the Subject Condition on some but not all Service Agreements issued after December 2007. Conversely, Cargill would not have the 25 MW of capacity it now enjoys;
(iii) With the benefit of hindsight, the Commission has made it clear that the increase of LTF PTP transmission capacity on the BC>AB path in December 2007 was not the only or preferred course of action available to BCTC; and

(iv) The Subject Condition had no legal effect and at most provided additional notice to BC Hydro that its Service Agreements were subject to future Commission order. Cargill had substantially the same notice.

D. Relief Sought

51. Paragraph 3 of Order No. G-103-09 reads as follows:

“Contracts for Firm Service on the BC>AB path bearing the subject condition concerning a further order of the British Columbia Utilities Commission, up to the 305 MW necessary to reduce the capacity offered for sale to 480 MW, shall be cancelled or amended to a form of conditional period-conditional firm or non-firm service. BCTC and its affected customers may determine the allocation of the 305 MW to be removed. Affected customers shall have the right to be placed at the top of the existing queue in an order which is consistent with their pre-existing priority rights.”

Order No. G-103-09 [Tab 9].

52. BC Hydro seeks variance of Order No. G-103-09 pursuant to section 99 of the UCA to add the following after paragraph 3:

“The foregoing is subject to all customers with LTF PTP service on the BC>AB path retaining the same total amount of service (MW) that they had prior to the increase in capacity from 480 MW to 785 MW in December 2007. To the extent customers do not have the same amount of service (MW) after implementation of the foregoing, Service Agreements of those customers whose service (MW) has increased shall be modified or cancelled, as required, effective April 1, 2010. Those customers whose service (MW) has decreased shall have the opportunity to take the released capacity effective April 1, 2010, so long as they match the duration of the highest service request in the queue, consistent with BCTC’s OATT and Business Practices.”

Section 99, UCA [Tab 7].

53. The foregoing relief would provide for an orderly transition; retain the obligation on BC Hydro to compete for the transmission capacity on the basis it would have if it was
exercising its rollover rights; and, on the facts, require BCTC to cancel only one Service Agreement (Cargill’s) and issue only one new one (BC Hydro’s).

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver, British Columbia, this 8th day of February 2010.

Jeff Christian, Counsel for BC Hydro

Heather Cane, Counsel for BC Hydro