



IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473
and
An Application by the Office & Professional Employees' International Union, Local 378
Regarding British Columbia Hydro and Power Authority Proposed Divestment

BEFORE: P. Ostergaard, Chair)
R.D. Deane, Commissioner) June 5, 2003
R.H. Hobbs, Commissioner)

O R D E R

WHEREAS:

- A. On December 19, 2002, the Commission received an Application from the Office & Professional Employees' International Union, Local 378 ("OPEIU", "Union") pursuant to Sections 72 and 73 of the Utilities Commission Act ("Act") requesting that the Commission examine the divestment of a significant portion of B.C. Hydro and Power Authority's ("B.C. Hydro") enterprise to a privately held company ("Application"); and
- B. Commission Letter No. L-1-03 requested B.C. Hydro to provide a response; and
- C. On January 31, 2003, B.C. Hydro responded; and
- D. On February 26, 2003, the OPEIU replied to the response by B.C. Hydro; and
- E. On February 27, 2003 the Energy and Mines Statutes Amendment Act, 2003 ("EMSAA") was passed. The EMSAA includes amendments to Section 12 of the Hydro and Power Authority Act which give the Lieutenant Governor in Council the power to designate any agreement entered into by B.C. Hydro as being related to the provision of support services [subsection (9)]. Section 25 of the EMSAA also amends the definition of public utility in Section 1 of the Utilities Commission Act.
- F. On March 13, 2003, the Lieutenant Governor in Council by Order in Council No. 0219 designated certain agreements as being related to the provision of support services.
- G. On April 9, 2003 the OPEIU informed the Commission that it would initiate proceedings in the British Columbia Supreme Court seeking a declaration that the legislation and related Order in Council violate the Charter of Rights and requested that its Application be adjourned until a determination by the Court; and

H. The Commission has considered all of the information before it.

NOW THEREFORE the Commission orders as follows:

1. The April 9, 2003 request for adjournment of the Application is denied.
2. The December 19, 2002 Application is denied.

Reasons for Decision are attached as Appendix A to this Order.

DATED at the City of Vancouver, in the Province of British Columbia, this 11th day of June 2003.

BY ORDER

Original signed by:

Peter Ostergaard
Chair

Attachment

REASONS FOR DECISION

1.0 BACKGROUND

On December 21, 2001 the Commission received an Application from the Office & Professional Employees' International Union, Local 378 ("OPEIU", "Union") under Section 72 of the Utilities Commission Act ("Act") requesting that the Commission hold a public hearing into proposals by British Columbia Hydro and Power Authority ("B.C. Hydro") to enter into joint venture/partnership arrangements to provide services, in that such arrangements would violate Sections 52 and 53 of the Act. The Orders sought included an Order which would restrain B.C. Hydro from entering into an agreement with another person as proposed in the Requests For Expressions of Interest ("RFEI") until Sections 52 and 53 of the Act had been complied with. Section 73 of the Act enables the Commission to make restraining Orders.

The OPEIU February 25, 2002 Reply Argument expanded the grounds for review to include the Commission's public interest jurisdiction. The OPEIU recited Sections 21, 23, 24, 25, 26, and 31 of the Act in support of its request that B.C. Hydro's proposal requires review by the Commission as part of its general jurisdiction to regulate public utilities pursuant to Part 3 of the Act.

The Final Reply of the OPEIU on March 22, 2002 referenced Section 84 of the Act to note that the Commission is not limited in exercising its mandate under one section of the Act by other sections of the Act. The Union asserted that the RFEI issued by B.C. Hydro would result in the sale of essential portions of B.C. Hydro which would be highly detrimental to all consumers of electricity in British Columbia.

Commission Order No. G-28-02 denied the December 21, 2001 OPEIU application, finding that Section 52 of the Act does not apply to B.C. Hydro by virtue of Section 32(7)(x) of the Hydro and Power Authority Act and that Section 53 of the Act does not apply to the joint venture/partnership-type arrangements contemplated in the RFEI.

The Order also noted that, on general issues of public interest, the Commission has received direction from the Court of Appeal on the applicability of its general supervisory powers. In *British Columbia Hydro and Power Authority v. British Columbia (Utilities Commission)*(1996)B.C.L.R. (3d) 106, the Court of Appeal made determinations about the responsibilities of the Commission to keep itself informed about the conduct of public utility business while not unreasonably impinging on the responsibilities and functions of the

directors of a corporation to formulate plans for a utility's future. Goldie, J.A. speaking for the Court, at paragraph 58 of the Judgement stated:

“58 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 manage its affairs.”

In considering the December 21, 2001 application, the Commission found that:

“it does not have adequate jurisdiction to hold public hearings on the disposition of assets which are not covered by the Utilities Commission Act, because of the exemption to Section 52 of the Act. Even if the disposition was reviewable under Section 52 of the Act, the Commission recognizes that many of the public utilities under its jurisdiction have taken actions to outsource significant components of technology, services and customer information services. None of the public policy considerations raised by the OPEIU are considered to be within the jurisdiction of the Commission for review in a public hearing pursuant to the general supervisory responsibilities of the Commission. **The Commission, therefore, denies the Application for a public hearing of B.C. Hydro's initiatives under public interest requirements.**”

The OPEIU then filed an application pursuant to Section 99 of the Act for reconsideration of Commission Order No. G-28-02 and Reasons for Decision. After considering the reconsideration application and supporting material, the Commission, by Order No G-48-02, denied the application, with Reasons.

On April 29, 2002 the OPEIU applied to the British Columbia Court of Appeal for leave to appeal Order No. G-28-02. The leave to appeal application was withdrawn on September 30, 2002 and formally abandoned on January 24, 2003 when the OPEIU filed a Notice of Abandonment in the Court of Appeal Registry.

2.0 DECEMBER 19, 2002 APPLICATION

On December 19, 2002 the Commission received another Application from the OPEIU under Sections 72 and 73 of the Act (“the Application”). The OPEIU now submits that B.C. Hydro's privatization plans have changed in substance since the OPEIU's December 21, 2001 application, having evolved into transactions that fall outside B.C. Hydro's exemption to Sections 52 and 53 of the Act, and within the Commission's jurisdiction pursuant to Part 3 of the Act. The Union states that a Memorandum of Understanding with Accenture Inc. (“Accenture MOU”) enables the establishment of a new corporate entity that would assume and contract back B.C. Hydro's core assets such as Customer Services, Information Technology, Network Computing, Human Resources, Financial Systems, Purchasing, Disbursement, Property, Business and Office services. The Union also refers to an announcement by B.C. Hydro that it will set up the transmission portion of its enterprise as a regulated business, independent of B.C. Hydro, within six months. The OPEIU submits that the Commission's jurisdiction is to be interpreted expansively, particularly in cases such as this,

where the public interest is at stake. The OPEIU Application requests that the Commission exercise its jurisdiction to examine and conduct a public hearing on the Accenture MOU and any plan by B.C. Hydro to sever its transmission division. The Application also seeks document disclosure and Commission Orders to restrain B.C. Hydro from entering into further agreements or complying with any existing agreements.

It is the OPEIU's position that Section 52 applies to the proposed Accenture and transmission division transactions because the exemption cannot be interpreted as being so broad as to include disposition of entire service divisions of its enterprise. The OPEIU submits that Section 53 of the Act is applicable to the proposed Accenture transaction because it creates a partial consolidation, amalgamation or merger of the two companies and because these terms have been defined broadly enough elsewhere so as to encompass the structure proposed by B.C. Hydro.

In its January 31, 2003 response, B.C. Hydro submitted that the entire Application should be denied for two fundamental reasons. First, it is entirely based on speculation as to what B.C. Hydro might do and second, the Commission has already considered and disposed of these matters. B.C. Hydro submits that the speculation is based on a non-binding Memorandum of Understanding between B.C. Hydro and Accenture Inc. dated July 18, 2002 that is not fundamentally different from the arrangement contemplated in the October 15, 2001 RFEI dealt with by Commission Order No.G-28-02. B.C. Hydro also submits that should its transmission system be operated by a separate transmission company, the new company will be regulated by the Commission and the transmission assets remaining with B.C. Hydro will continue to be regulated. B.C. Hydro asks the Commission to decline to consider arguments in the Application that the OPEIU previously made, and the Commission rejected, in connection with the December 21, 2001 application.

B.C. Hydro notes that the OPEIU does not explain the meaning of "partial consolidation, amalgamation or merger". B.C. Hydro submits that the decisions cited by the OPEIU confirm that the proposed transaction is not a consolidation, amalgamation or merger, and states that it would come forward to the Commission to seek Section 53 approval if it did.

The OPEIU replied that the Commission is not constrained to wait until B.C. Hydro privatization plans are *faits accomplis* and that it is not clear that the new transmission company will be regulated by the Commission. The OPEIU takes little comfort from B.C. Hydro's confirmation that it will seek Section 53 approval, if necessary, and submits that it is the Commission's jurisdiction to decide what constitutes a consolidation, amalgamation or merger.

3.0 ACCENTURE AGREEMENTS

The Accenture MOU discussed above has been superceded by a series of signed agreements filed with the Commission in connection with the provision of outsourcing services by Accenture to B.C. Hydro (“Accenture Agreements”). The Asset Conveyance Agreement transfers the assets of certain internal business units from B.C. Hydro and Westech Information Systems Inc. (“Westech”) to BCH Services Asset Corp. The Amended and Restated Limited Partnership Agreement provides for the organization and operation of a limited partnership among Accenture Business Services General Partner Inc. (“ABSGP”), Accenture Inc., and BCH Services Asset Corp., with B.C. Hydro as guarantor of BCH Services Asset Corp. obligations (“ABS Partnership”). The Master Services Agreement provides for the performance by ABS Partnership of the services previously carried out by the internal business units. The Master Transfer Agreement among B.C. Hydro, Westech, ABS Partnership, and ABSGP sets out the terms and conditions under which the employment and related employee obligations will be assumed by ABS Partnership. The BCH Support Services Agreement between B.C. Hydro, ABS Partnership, and ABSGP provides for ongoing support services from B.C. Hydro. The Marketing Alliance Agreement among B.C. Hydro, ABS Partnership, ABSGP, and Accenture Inc. provides for assistance in marketing customer care, information technology and business process services to prospective clients. The Master Consulting Services Agreement between B.C. Hydro and Accenture Inc. provides for the joint development and implementation of an expanded customer information system. The redacted version of the Accenture Agreements were made available to the public on B.C. Hydro’s website.

4.0 ENERGY AND MINES STATUTES AMENDMENT ACT, 2003

On February 27, 2003 the Energy and Mines Statutes Amendment Act, 2003 (“EMSAA”) was passed. The EMSAA includes amendments to Section 12 of the Hydro and Power Authority Act which give the Lieutenant Governor in Council the power to designate any agreement entered into by B.C. Hydro as being related to the provision of support services [subsection (9)]. Section 25 of the EMSAA also amends the definition of public utility in Section 1 of the Utilities Commission Act.

By Order in Council 0219 dated March 13, 2003, the Lieutenant Governor in Council designated the Accenture Agreements as relating to the provision of support services pursuant to section 12(9) of the Hydro and Power Authority Act. According to subsection 11(e) of section 12, subject to subsection (12), B.C. Hydro is not required to obtain any approval, authorization, permit or order under the Utilities Commission Act in connection with the agreements or any actions taken in accordance with the terms of the agreements, and the Commission must not prohibit B.C. Hydro from taking any action that it is entitled or required to take under the terms of the agreements. Subsection (12) provides that nothing in

subsection (11)(e) precludes the Commission from considering the costs incurred, or to be incurred, in relation to these agreements when establishing the revenue requirements and setting the rates of B.C. Hydro.

On April 9, 2003 the OPEIU informed the Commission that it would initiate proceedings in the British Columbia Supreme Court seeking a declaration that the legislation and related Order in Council violate the Charter of Rights and requested that its Application be adjourned until the Court has made its determination.

5.0 COMMISSION FINDING

The designations made by Order in Council 0219 limit the Commission's jurisdiction to a review of the costs incurred, or to be incurred, in relation to the Accenture Agreements by reason of the effect of the EMSAA amendments to Section 12 of the Hydro and Power Authority Act. The Commission will review costs arising from the Accenture Agreements in the next B.C. Hydro revenue requirements proceeding. Neither the Accenture Agreements nor the transactions contemplated therein need to be approved because the EMSAA amendments to Section 12 of the Hydro and Power Authority Act and Section 1 of the Utilities Commission Act, which are in force effective February 27, 2003, explicitly exempt B.C. Hydro from any requirement to obtain such approvals.

In Order No. G-28-02, at page 3 of 4, the Commission found that "Section 53 of the Act does not apply to the joint venture/partnership type arrangements in the Request for Expressions of Interest issued by B.C. Hydro." This Decision was reconsidered in Order No. G-48-02. The Commission finds no material difference between the joint venture/partnership type arrangements contemplated in the RFEI and the arrangements contemplated in the Accenture Agreements. The Commission also finds that there has been no material change in circumstances since it issued Order No. G-48-02. Therefore, the Commission finds Section 53 of the Act does not apply to the arrangements contemplated in the Accenture Agreements. Even if OIC 0219 had not been issued, the Commission would not have had jurisdiction to review the Accenture Agreements, except as to the extent that those agreements impact revenue requirements and the setting of the rates of B.C. Hydro.

The Commission finds that none of the issues raised by OPEIU related to transmission are within the jurisdiction found in Section 53 of the Act. The Commission also determines that its findings in the Reasons for Decision attached to Order G-28-02 and the Reasons for Decision attached to Order G-48-02 also apply to the arrangements to separate the transmission function. British Columbia's November 2002 Energy Plan states that the establishment of the B.C. Hydro Transmission Corporation as a separate entity will be implemented through legislation, and Policy Action #16 states that the Commission will determine the terms and the rates for this new transmission entity.

Although this Decision on the OPEIU Application does not hinge on Bill 39, the Transmission Corporation Act (“TCA”), the Commission’s jurisdiction to review issues arising from the separation of the transmission function is further clarified by the TCA. The TCA authorizes the Lieutenant Governor in Council to designate any agreement between B.C. Hydro and the British Columbia Transmission Corporation relating to the transfer of assets, and states that the Commission must not prohibit B.C. Hydro or the Transmission Corporation from entering into a designated agreement. In other words, the provisions related to the Commission’s jurisdiction to prohibit B.C. Hydro from entering into designated agreements are similar under the EMSAA and the TCA. The TCA received Third Reading and Royal Assent on May 29, 2003, and is to be proclaimed in force by regulation.

The OPEIU Application is also based on Section 52. In Order No. G-28-02, the Commission found that Section 52 does not apply by virtue of Section 32(7)(x) of the Hydro and Power Authority Act. The Commission confirms that Section 52 does not apply, as argued by OPEIU in its December 19, 2002 Application.

The Commission finds that none of the public policy considerations raised by the OPEIU are considered to be within the jurisdiction of the Commission for review in a public hearing pursuant to Part 3 of the Act.

As was explained in the Reasons attached to Commission Order No. G-48-02, with respect to the OPEIU’s concern that the sale of divisions of B.C. Hydro will no longer allow the Commission to require B.C. Hydro to establish rates pursuant to the Act or to provide adequate, safe, efficient, just and reasonable service to the public at non-discriminatory rates and without undue delay, the Commission requires all public utilities to meet the obligations of the Act whether the services are provided from within the utility or contracted out to a third party.

The Commission, therefore, denies the OPEIU Application made pursuant to Sections 72 and 73 of the Utilities Commission Act requesting that the Commission further examine the divestment of assets and B.C. Hydro’s plan for transmission. As a result, the Commission finds that the Application does not need to be adjourned and that the request for document disclosure is denied.