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**BRITISH COLUMBIA  
UTILITIES COMMISSION**

**ORDER  
NUMBER** G-142-06

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**

**An Application by British Columbia Hydro and Power Authority  
Filing of Energy Supply Contracts with Alcan Inc.  
LTEPA Amending Agreement, Amended and  
Restated Long-Term Electricity Purchase Agreement**

**BEFORE:** R.H. Hobbs, Chair  
A.J. Pullman, Commissioner November 10, 2006  
N. Nicholls, Commissioner

**O R D E R**

**WHEREAS:**

- A. On November 1, 2006, British Columbia Hydro and Power Authority ("BC Hydro"), pursuant to Section 71 of the Utilities Commission Act (the "Act") filed the Long-Term Electricity Purchase Agreement ("LTEPA") Amending Agreement dated October 27, 2006 to which was attached the form of Amended and Restated LTEPA between Alcan Inc. ("Alcan") and BC Hydro, and a letter dated October 27, 2006 from Alcan to BC Hydro and the Province; and
- B. In its November 1, 2006 filing, BC Hydro requested that the Commission issue an Order accepting the LTEPA Amending Agreement and the Amended and Restated LTEPA as filed, pursuant to Section 71 of the Act (the "s. 71 Filing"); and
- C. In its Application, BC Hydro requested that the LTEPA Amending Agreement, the Amended and Restated LTEPA and the October 27, 2006 letter from Alcan be kept confidential, for reasons of commercial sensitivity; and
- D. At the November 8, 2006 Third Procedural Conference concerning BC Hydro's 2006 Integrated Electricity Plan ("IEP") and Long-Term Acquisition Plan ("LTAP"), BC Hydro proposed possible review processes for the LTEPA Amending Agreement and the Amended and Restated LTEPA; and
- E. At the Third Procedural Conference, BC Hydro, with the support of Alcan, withdrew its request in the Application that the LTEPA Amending Agreement, and the Amended and Restated LTEPA be kept confidential; and
- F. At the Third Procedural Conference, BC Hydro requested that evidence filed to date in the 2006 IEP/LTAP proceeding with respect to the agreement with Alcan be accepted as evidence in the proceeding to review the s. 71 Filing; and

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G. The LTEPA Amending Agreement is subject to the Commission accepting the agreements by December 31, 2006 on conditions that are acceptable to each of BC Hydro and Alcan; and

H. The Commission considers that an oral hearing is required for the regulatory review of the Application.

**NOW THEREFORE** the Commission orders as follows:

1. An oral public hearing to review the Application will commence at 9:00 a.m. on Wednesday, December 6, 2006 in the Commission Hearing Room on the Twelfth Floor, 1125 Howe Street, Vancouver, B.C. The Regulatory Timetable for the hearing is established as set out in Appendix A to this Order.
2. BC Hydro will publish, as soon as possible, in display ad format, the Notice of Energy Supply Contracts and Oral Public Hearing attached as Appendix B to this Order, in the Vancouver Sun and Province, the Victoria Times Colonist, and such other appropriate local news publications as will properly provide adequate notice to the public in Kitimat and the remainder of its service area.
3. The Evidence filed to date in the 2006 IEP/LTAP proceeding that is identified in Exhibit B-28 that was filed at the Third Procedural Conference, will be included in the evidentiary record for the proceeding that is established by this Order.
4. The Commission will hold confidential at this time the letter dated October 27, 2006 from Alcan to BC Hydro and the Province that was included in the November 1, 2006 filing of BC Hydro.

**DATED** at the City of Vancouver, in the Province of British Columbia, this 10<sup>th</sup> day of November 2006.

BY ORDER

*Original signed by:*

Robert H. Hobbs  
Chair

Attachments

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**APPENDIX A**  
to Order No. G-142-06  
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**An Application by British Columbia Hydro and Power Authority ("BC Hydro")  
Filing of Energy Supply Contract with Alcan Inc.  
LTEPA Amending Agreement, Amended and  
Restated Long-Term Electricity Purchase Agreement**

**REGULATORY TIMETABLE**

<b>ACTION</b>	<b>DATE (2006)</b>
BCUC Information Request	Friday, November 10
BC Hydro Response to BCUC Information Request	Friday, November 17
Intervenor Information Request	Monday, November 20
Intervenor and Interested Party Registration	Friday, November 24
BC Hydro Response to Intervenor Information Request	Monday, November 27
Oral Public Hearing commences	Wednesday, December 6
BC Hydro Written Argument	Wednesday, December 13
Intervenor Written Argument	Tuesday, December 19
BC Hydro Oral Reply and Oral Phase of Argument	Thursday, December 21



**An Application by British Columbia Hydro and Power Authority  
Filing of Energy Supply Contract with Alcan Inc.  
LTEPA Amending Agreement, Amended and  
Restated Long-Term Electricity Purchase Agreement**

**NOTICE OF ENERGY SUPPLY CONTRACTS AND ORAL PUBLIC HEARING**

<b>Date:</b>	Wednesday, December 6, 2006
<b>Time:</b>	9:00 a.m.
<b>Location:</b>	Commission Hearing Room Twelfth Floor 1125 Howe Street Vancouver, B.C.

**THE ENERGY SUPPLY CONTRACTS**

On November 1, 2006 BC Hydro submitted the Long-Term Electricity Purchase Agreement ("LTEPA") Amending Agreement, to which was attached the form of the Amended and Restated LTEPA between Alcan Inc. and BC Hydro, and a letter from Alcan to BC Hydro and the Province.

**THE REGULATORY PROCESS**

Order No. G-142-06 established the Regulatory Timetable for an oral hearing process to review the Energy Supply Contracts. The oral public hearing will commence at 9:00 a.m. on Wednesday, December 6, 2006 in the Commission Hearing Room on the Twelfth Floor of 1125 Howe Street in Vancouver.

**PUBLIC INSPECTION OF THE DOCUMENTS**

The Energy Supply Contracts and supporting documents will be made available for inspection at the BC Hydro Head Office on the Seventeenth Floor at 333 Dunsmuir Street, Vancouver, B.C., V6B 5R3, and the British Columbia Utilities Commission office: Sixth Floor, 900 Howe Street, Vancouver, B.C., V6Z 2N3.

The Energy Supply Contracts and supporting documents will be available for viewing on BC Hydro's website at [www.bchydro.com](http://www.bchydro.com).

## **INTERVENTIONS**

Persons who expect to actively participate in the BC Hydro proceeding should register as Intervenor with the Commission, in writing, by Friday, November 24, 2006. Intervenor should identify the issues that they intend to pursue and the nature and extent of their anticipated involvement in the review process. Intervenor will each receive a copy of all non-confidential correspondence and filed documentation and should provide an e-mail address if available.

Persons not expecting to actively participate, but who have an interest in the proceeding should register as Interested Parties with the Commission, in writing, by Friday, November 24, 2006, identifying their interest in the proceeding. Interested Parties will receive a copy of the November 1, 2006 letter from BC Hydro, and all Orders and Decisions issued.

All submissions and/or correspondence received from active participants or the public relating to the Energy Supply Contracts will be placed on the public record and posted to the Commission's web site.

## **FURTHER INFORMATION**

For further information, please contact Mr. Robert J. Pellatt, Commission Secretary, or Mr. Brian Williston, Director, Engineering and Commodity Markets, as follows:

Telephone: (604) 660-4700	E-Mail: <a href="mailto:Commission.Secretary@bcuc.com">Commission.Secretary@bcuc.com</a>
Facsimile: (604) 660-1102	Telephone: (B.C. Toll Free) 1-800-663-1385

**An Application by British Columbia Hydro and Power Authority  
Filing of Energy Supply Contract with Alcan Inc.  
LTEPA Amending Agreement, Amended and  
Restated Long-Term Electricity Purchase Agreement**

**REASONS FOR DECISION**

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**Introduction**

By letter dated November 10, 2006 the Commission advised the parties to the BC Hydro 2006 IEP and LTAP proceeding that the issues for that proceeding and for the BC Hydro Section 71 Filing LTEPA/ALCAN ESC proceeding established by Commission Order No. G-142-06 (which accompanied the Commission letter), should not include the issue of legality of the LTEPA [Long Term Electricity Purchase Agreement between BC Hydro and Alcan Inc. (“Alcan”)] Amending Agreement and the Amended and Restated LTEPA. The Commission further advised that Reasons would follow. These are the Reasons.

**BC Hydro Application**

By letter dated November 3, 2006 (Exhibit B-24), BC Hydro informed the Commission that at the Third Procedural Conference scheduled for November 8, 2006, it intended to request that the Commission rule out of scope the issue of the legality of the Amended and Restated LTEPA raised by the District of Kitimat's (DoK) evidence (Exhibit C37-3). BC Hydro had previously filed the Term Sheet for the Amended and Restated LTEPA as part of its amended LTAP as Appendix N to Exhibit B1-E on August 31, 2006. The DoK evidence, which was filed on October 11, 2006, addresses Appendix N and provides notice that the DoK intends to argue that “...the power deliveries by Alcan contemplated by the amended and restated LTEPA are illegal to the extent that they contravene the *IDA* [*Industrial Development Act*, S.B.C. 1949, c.31] and the various agreements and permits held by Alcan pursuant to the *IDA*. As such, the LTAP should not be approved in its present form as it would “result” in these illegal power sales.” (DoK Evidence, para 3)

On November 1, 2006 BC Hydro filed, pursuant to Section 71 of the *Utilities Commission Act* (“UCA”), the LTEPA Amending Agreement dated October 27, 2007 between BC Hydro and Alcan, which attached the form of Amended and Restated LTEPA between those same parties, together with a letter dated October 27, 2006 from Alcan to BC Hydro and the Province (the “Letter”). The filing was made on a confidential basis. The filing seeks to have the LTEPA Amending Agreement and the resulting Amended and Restated LTEPA filed as an energy supply contract pursuant to Section 71 of the *UCA*. At the Third Procedural Conference, BC Hydro withdrew its claims of confidentiality on the first two documents, but maintained its claim for confidentiality on the Letter pending authorization from the Province.

On November 6, 2006, in response to Exhibit B-24, the Commission established a process which provided for the filing of a written submission by the DoK by 4:30 p.m., November 7, 2006 on why the issue of the legality of the LTEPA raised by Exhibit C37-3 should fall within the scope of the proceeding (Exhibit A-29). The process contemplated that BC Hydro and other participants would respond orally to the submissions at the Third Procedural Conference with a right of reply to the DoK. The DoK filed its written submission on November 7, 2006 (Exhibit C37-6) and those participants who chose to do so responded orally at the Third Procedural Conference with the DoK replying to those oral submissions.

**Positions of the Parties**

The DoK written submission addresses both Section 45 and Section 71 of the *UCA*. It argues that the issue of legality of the Amended and Restated LTEPA is directly relevant and material to the Commission's determinations under Section 45(6.2)(b) and, more specifically to whether the expenditures relating to the 2007

and 2009 Call[s for Tender] are “in the interests of persons within BC who receive or may receive service from BC Hydro within the meaning of section 45 of the *UCA*.(Exhibit C37-6, paras 5-9)[emphasis in original].

In addition, it submits that the Amended and Restated LTEPA is an “energy supply contract” within the meaning of the *UCA* and that Section 71 of the *UCA* and the “Energy Supply Contracts – Rules” contemplate that the Commission will review the Amended and Restated LTEPA and determine whether it is in the public interest. It further submits that of necessity such a determination requires consideration of the legality of the Amended and Restated LTEPA and that for the Commission to approve an illegal contract cannot be in the public interest. It submits that in any review of the Amended and Restated LTEPA under Section 71 of the *UCA*, the Commission will need to consider the broader legal regime established under the *IDA* and the potential impact(s) of the Amended and Restated LTEPA on the District and the surrounding area (Exhibit C37-6, paras.10-12).

In concluding its written submission, the DoK acknowledges that the British Columbia Supreme Court (“BC Supreme Court”) has reserved judgment on the DoK petition which challenges portions of two Orders of the Provincial government on grounds that the Orders are *ultra vires* to the extent that they authorize power sales by Alcan which are contrary to the requirements of the *IDA*. Despite the pending decision of the BC Supreme Court, the DoK submits that the issue of the legality of the Amended and Restated is a relevant and material issue to this proceeding and that this proceeding and any Section 71 review “...must be structured to accommodate the inclusion of this issue and must have appropriate regard to the existing BC Supreme Court proceeding.” (Exhibit C37-6, paras 14-15).

The British Columbia Old Age Pensioners Organization et al. (“BCOAPO”), the only intervenor to speak in favour of the DoK position, submits that the legal issue is not really one of admissibility, but that the potential socio economic impacts which arise if the Commission accepts the Amended and Restated LTEPA are relevant matters for the Commission to consider in exercising its jurisdiction under Section 71 (T:347-348).

The Sierra Club of Canada British Columbia et al (“SCCBC”) appears to adopt a neutral position in the matter, supporting neither the DoK nor the BC Hydro positions. For the SCCBC, the fundamental issue is whether the BC Supreme Court jurisdiction and the Commission's jurisdiction should be in play at the same time (T:349-351).

The remaining intervenors who made oral submissions, support the BC Hydro application. The Joint Industry Electricity Steering Committee (“JIESC”) expresses the view that the issue of the legal validity of a contract is a matter that should be determined by the courts, not the Commission. It submits that the Commission has a history of leaving contractual disputes to the courts. The JIESC further submits that the issues raised by the DoK are more complex than matters involving tariff interpretation and that it is the JIESC's understanding that very similar issues if not exactly the same issues are before the court at present (T:351-352).

The Commercial Energy Consumers Association of British Columbia (“CEC”) supports the submissions of the JIESC (T:352-353).

In its submissions, Alcan provides the Commission with the historical context leading up to the Amended and Restated LTEPA together with some background on the proceedings in the BC Supreme Court, advising the Commission that the DoK's petition was heard by Chief Justice Brenner over 5 days between October 16 to 20, 2006 and that judgment has been reserved. Alcan agrees with the JIESC position and submits that the DoK is attempting to reargue its case. It further submits that the very issues that the DoK wants to argue now, either in the LTAP proceeding or in the Section 71 proceeding are presently before the BC Supreme Court, where they properly belong. Alcan summarizes the issue before the court as being not whether Alcan can sell power, but whether there is a limitation on Alcan's right to sell power.

Alcan also submits that if the BC Supreme Court decision is adverse to Alcan or affects the Amended [and Restated] LTEPA, BC Hydro will have plenty of time “to adjust its plans and acquisition plans accordingly.” Alcan submits that the DoK has enlarged the definition of “public interest” in Section 71. Alcan relies upon

*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* (“ATCO”), [2006] 1 S.C.R. 140, 2006 SCC4 (Can LII) for the proposition that “public interest” or “public interest jurisdiction” should be assessed in the context of the statute (T:362).

Finally, Alcan submits that there would be a *force majeure* if the BC Supreme Court determines that the contract is illegal or issues a decision that affected the legality of the contract. At such time, according to Alcan, the parties will either amend the LTEPA to ensure it is in compliance with the court's decision, or terminate the contract if they are unable to correct the problem.

BC Hydro's position is expressed in the alternative. It submits that the Commission does not have the jurisdiction to decide upon the legality of the Amended and Restated LTEPA, but if it does, it should decline to exercise such jurisdiction. It further submits that the Commission's consideration of the DoK's litigation with respect to Alcan's capacity to enter the Amended and Restated LTEPA is only relevant to the extent that the litigation “may constitute a material risk to one potential resource.” BC Hydro submits that the Commission needs to consider whether the underlying plan is “robust enough to manage such a risk” and such consideration does not require the Commission to make a determination on the legality of the Amended and Restated LTEPA (T:367-368). BC Hydro agrees with the JIESC and Alcan that the issue of legality is best left to the courts.

On the issue of whether or not the Commission has jurisdiction, BC Hydro refers the Commission to *Owners Strata Plan LMS 1816 v. B.C. Hydro* 2002 BCSC 485 (“*LMS 1816*”) at paragraph 72 where the Court states that it is first necessary to define the essential character of a dispute and then to determine whether the *UCA* sets out a means of resolving the dispute. BC Hydro describes the essential character of the dispute to be whether Alcan has the legal capacity to enter into and perform the obligations under the Amended and Restated LTEPA. BC Hydro submits that the rights and obligations between a private corporation and the government of British Columbia under the *IDA* fall outside the established regulatory regime under the *UCA* and cannot be considered to be included as a regulatory function of the Commission. It further submits that the ability of Alcan to enter into such a contract is a private law matter for the courts. It also points to page 105 of the on the Vancouver Island Transmission Reinforcement Project Decision (“*VITR*”) where the Commission commented that the issue of Rights of Way agreements were contractual matters for the courts.

In the alternative, BC Hydro provides five reasons why the Commission should decline jurisdiction if it determines that it has jurisdiction. First, BC Hydro submits that the Commission does not have the expertise in general statutory and contractual interpretation, particularly with statutes such as the *IDA*, which the Commission does not deal with on a regular basis, if at all. Second, any decision by the Commission concerning the issue of legality could lead to duplicative and potentially conflicting determinations on the issue by the BC Supreme Court and the Commission. Third, the Commission should not allow the DoK to “forum shop”. Fourth, the best evidence on the issue of legality is before the court, not the Commission which only has a small portion of the factual record. And, finally, BC Hydro and Alcan are parties to an existing agreement which remains in effect. The arguments raised by the DoK in respect of the Amended and Restated LTEPA are not based on new developments, but rather on the *IDA* and the 1950 or 1997 agreements.

BC Hydro also addresses the possible effects of the Commission accepting the Amended and Restated LTEPA for filing under Section 71 and the DoK thereafter achieving success in its court challenge. If such an outcome takes place, BC Hydro states that the parties will either amend and refile the Amended and Restated LTEPA or the agreement will be rendered null and void and that only in the former case will further Commission determination be required. BC Hydro submits there will be no prejudice to anyone in either scenario. Additionally, according to BC Hydro if the court determines that Alcan does not have the legal capacity to enter into the Amended and Restated LTEPA, the Amended and Restated LTEPA will no longer be available to BC Hydro as a potential resource. BC Hydro considers this result to be a form of attrition, not dissimilar to permitting, financing, and other risks faced by successful IPP bidders in the F2006 call, which the Commission accepted despite the



continuing existence of such risks. BC Hydro also submits that such risks can be tested through the Commission's examination of the LTAP and in particular the contingencies without a ruling on the legality of the Amended and Restated LTEPA.

Finally, in response to paragraph 6 of the DoK written submission and its assertion that the legality of the Amended and Restated LTEPA is "clearly material" to the Commission's determinations regarding the upcoming 2007 and 2009 calls, BC Hydro submits that its requests under Section 45(6.2)(b) of the *UCA* relate to definition phase expenditures which are relatively independent of the amount of energy that will be ultimately acquired. Further it refers the Commission to Exhibit B-17-8, DoK IR 3.1.7 which confirms the only short term realistic alternative to the Amended and Restated LTEPA is the spot market. BC Hydro views the Amended and Restated LTEPA as a bridging product.

In reply, the DoK provides some further information on the petition in the BC Supreme Court. The DoK states that what remains before the court is a judicial review application of a 1997 Order in Council and a 2002 Ministerial Order which the DoK challenged on the basis that the Orders authorized sales of power which the DoK submitted were precluded by the *IDA* and the legal regime relating thereto. The Amended and Restated LTEPA is not before the court.

The DoK states that it was not aware until the Third Procedural Conference that it would have access to the Amended and Restated LTEPA so that it could assess its position. It does acknowledge, however, that the declaratory relief sought in the BC Supreme Court proceedings may have an impact on the question of whether or not the Amended and Restated LTEPA is legal (T:382;386).

The DoK reiterates its written submission that the Commission has jurisdiction to determine the legality of the Amended and Restated LTEPA under both Section 45 and Section 71 of the *UCA*. In the case of Section 71, it submits the jurisdiction is founded in Section 71(2)(e) (T:384;391).

The DoK also submits that the issue of legality should be held in abeyance until the court ruled on the matter, since there is no prejudice in so doing to either Alcan or BC Hydro (T:385;387).

The DoK replies to each of the reasons BC Hydro argued in support of its submission that the Commission should decline jurisdiction. On the issue of expertise, it submits that, while the courts have overriding jurisdiction with respect to statutory interpretation, such overriding jurisdiction does not limit the Commission's jurisdiction to interpret contracts and statutes. On the issue of the risk of conflicting decisions, it relies upon its earlier submissions. On the choice of forum, the DoK submits that the petition was initiated before the Commission's proceedings and that the amended and Restated LTEPA is not before the court. On the best evidence issue, the DoK submits that it has produced the material elements of the evidence that it has placed before the court. On the issue of the existing LTEPA, the DoK relies upon its earlier submissions.

## **Analysis**

The relevant sections of the *UCA* for the purposes of the Commission's analysis are Sections 45(6), 45(6.1), 45(6.2) and 71 of the *UCA*. The sections provide as follows:

### **Certificate of public convenience and necessity**

**45 (6)** A public utility must file with the commission at least once each year a statement in a form prescribed by the commission of the extensions to its facilities that it plans to construct.

(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 referred to in the plan can be recovered in rates.

### **Energy supply contracts**

**71** (1) Subject to subsection (1.1), a person who, after this section comes into force, enters into an energy supply contract must

- (a) file a copy of the contract with the commission under rules and within the time it specifies, and
- (b) provide to the commission any information it considers necessary to determine whether the contract is in the public interest.

(1.1) Subsection (1) does not apply to an energy supply contract for the sale of natural gas unless the sale is to a public utility.

(2) The commission may make an order under subsection (3) if the commission, after a hearing, finds that a contract to which subsection (1) applies is not in the public interest by reason of

- (a) the quantity of the energy to be supplied under the contract,
- (b) the availability of supplies of the energy referred to in paragraph (a),
- (c) the price and availability of any other form of energy, including but not limited to petroleum products, coal or biomass, that could be used instead of the energy referred to in paragraph (a),
- (d) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (a), or
- (e) any other factor that the commission considers relevant to the public interest.

(3) If subsection (2) applies, the commission may

(a) by order, declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or

(b) make any other order it considers advisable in the circumstances.

(4) If an energy supply contract is, under subsection (3) (a), declared unenforceable either wholly or in part, the commission may order that rights accrued before the date of the order under that subsection be preserved, and those rights may then be enforced as fully as if no proceedings had been taken under this section.

(5) An energy supply contract or other information filed with the commission under this section must be made available to the public unless the commission considers that disclosure is not in the public interest.

The Commission has the jurisdiction to interpret contracts in the course of performing its regulatory function. In *BC Gas Utility Ltd. v. British Columbia Hydro and Power Authority* (“*BC Gas*”), [1995] B.C.J. No. 1194 (B.C.C.A.), an appeal involving the assertion that the Commission had no jurisdiction to deal with contract law issues under the *UCA*, Mr. Justice Taylor on behalf of a unanimous court stated at paragraph 8 the following:

8 It was in my view proper for the Commission to determine for rate-making purposes how the agreement should properly be applied--that is to say what it meant in terms of the price to be paid per unit of gas purchased. I cannot accept the contention of the authority that the Commission had no jurisdiction to interpret contracts in the course of performing its regulatory function. To the contrary, it would be impossible for the Commission to perform its function if it could not do so. There is, of course, opportunity for an aggrieved party to have recourse to the courts in the event the Commission should err in law in its interpretation of a contract, but, as I have said, I do not understand the authority to assert any such error in this case. The decision of this court in *Crestbrook Pulp and Paper Co. v. Columbia Natural Gas Ltd.* (1978), 87 D.L.R. (3d) 248, on which the authority relies, deals with the right of a customer to sue a utility for damages for breach of a gas supply contract by over-charging. That decision says nothing that I can find which would limit the jurisdiction of the Commission to interpret and give proper effect to relevant contractual provisions affecting a utility in the course of carrying out its ordinary regulatory functions.

The statement was adopted by Mr. Justice Macaulay in *LMS 1816* at paragraph 60:

[60] Common sense and authority support the conclusion that the BCUC must be able to interpret its own tariff whether in the process of setting rates, conducting inquiries or addressing complaints. Any doubt on this point was laid to rest in a unanimous decision of the Court of Appeal, *B.C. Gas Utility Ltd. v. British Columbia Hydro and Power Authority*, [1995] B.C.J. No. 1194 (B.C.C.A.), respecting the jurisdiction of the Commission, at para. 8: [paragraph 8 cited in part].

As noted previously in these Reasons, BC Hydro refers the Commission Panel to page 105 of *VITR* where the Commission Panel in that proceeding expressed its view that whether or not the Right of Way (“ROW”) agreements before it provided BCTC with the right to build Option 1 was a contractual matter for the Courts. The Commission considers the views expressed by the Commission Panel at page 105 in *VITR* to be consistent with the views of the Court of Appeal in *BC Gas*. Right of Way agreements are not filed with the Commission and they are unlike tariffs or energy supply contracts which the Commission must interpret on a regular basis during the course of carrying out its regulatory function.

The Commission also points out that the Commission Panel in *VITR* relied upon paragraph 8 of *BC Gas* at page 111 of *VITR* when it concluded that “...it may interpret the ROW agreements so as to distinguish between conforming and non-conforming improvements, and then exercise its jurisdiction to make an order regarding restoration costs for conforming and non-conforming improvements.” Ultimately, however, the Commission Panel in *VITR* decided it should not exercise its jurisdiction to order compensation and expressly declined to exercise the jurisdiction at that time due to the uncertainty regarding restoration costs and the limited investigation by BCTC regarding distinctions between conforming and non-conforming improvements.

The question of whether the Commission's jurisdiction to interpret contracts in the course of performing its regulatory function extends to the issue of determining the legal capacity of parties to enter into contracts that are filed with the Commission either as part of an LTAP proceeding under Section 45(6.1) or filed as an energy supply contract under Section 71 of the *UCA* is not discussed in either *BC Gas* or *LMS 1816*.

Furthermore the statutory tests of public interest under Sections 45(6.2)(b) and 71(2) do not provide much guidance. The test under Section 45(6.2)(b) is very broad. It allows the Commission to determine whether any expenditure in the plan is or is not at the time “...in the interests of persons within British Columbia who receive, or who may receive, service from the public utility...”. Section 71(2) provides more guidance to the Commission in determining the public interest for matters involving energy supply contracts. Sections 71(2)(a)-(d) all provide factual grounds which engage the Commission's expertise. The Commission notes that the interpretation that the DoK urges the Commission to give to Section 71(2)(e) would result in the Commission determining a legal rather than a purely factual issue of the nature found in Sections 71(2)(a)-(d).

While the wording of Sections 45(6.2)(b) and 71(2)(e) arguably provide the Commission with the jurisdiction to consider the legality of contracts in arriving at any determination it may make under Section 45(6.2) or Section 71(3) respectively, the Commission concludes that it need not determine the issue of legality of the Amended and Restated LTEPA in arriving at its determinations in the BC Hydro LTAP and Section 71 proceedings and declines any jurisdiction it may have to do so.

First, although there appears to be disagreement as to the precise matters before the BC Supreme Court, the DoK has acknowledged that the declaratory relief sought in the BC Supreme Court, if granted, may have an impact on the issue of whether the Amended and Restated LTEPA is legal. For the Commission to determine an issue presently before the courts unnecessarily risks both duplication of process and inconsistency in outcomes. Second, the Commission agrees with BC Hydro that the issue of legality of contracts is just one of the many risks in the resources that make up the load resource balance. Third, the Commission is of the view that the Amended and Restated LTEPA is not material for the reasons expressed by BC Hydro. If Alcan does not have the capacity to enter into the contract, then BC Hydro will need to change its plan, but that is the inherent nature of plans. Finally, if the Commission accepts the Amended and Restated LTEPA for filing and the court determines that the contract is illegal, then the Commission can revisit the LTAP and consider alternative resources though the Commission's reconsideration process pursuant to Section 99 of the *UCA*.

The Commission is not prepared to accede to the DoK submissions that the issue of legality of the Amended and Restated LTEPA be held in abeyance pending the judgment of the Chief Justice. Contrary to the DoK submissions, prejudice to BC Hydro will occur if the issue is held in abeyance since the Amended and Restated LTEPA will expire if the Commission does not issue a Section 71 Order by December 31, 2006.

Subsequent to the Third Procedural Conference, counsel for DoK provided the Commission with a copy of *United Fishermen and Allied Workers' Union v. British Columbia (Ministry of Energy)* (“*UFAW*”), [1194] B.C.J. No. 2839, a case he referred to in his oral reply. The Commission does not consider *UFAW* helpful on the issue of jurisdiction before it. While the case relates to the priority of the *IDA* over the *UCA* in circumstances where agreements have been made under the *IDA*, its application to the issue of legality has apparently already been relied upon by the DoK in the court proceedings before the Chief Justice (T:394). Any determination by the Commission of *UFAW*'s applicability to the matters before the Commission once again creates a risk of

conflicting results. In the Commission's view, such risk is best managed by ruling the issue of legality of the LTEPA Amending Agreement and the Amended and Restated LTEPA out of scope and awaiting the outcome of the Supreme Court decision.

### **Conclusion**

For the foregoing reasons, the Commission determines that the issues for the BC Hydro 2006 IEP and LTAP proceeding and the issues for the BC Hydro Section 71 Filing LTEPA/ALCAN ESC proceeding should not include the issue of legality of the LTEPA Amending Agreement and the Amended and Restated LTEPA.