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**BRITISH COLUMBIA  
UTILITIES COMMISSION**

**ORDER  
NUMBER G-40-12**

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

and

A Filing by British Columbia Hydro and Power Authority  
of the  
Electricity Purchase Agreement between BC Hydro and Conifex Power Inc.

**BEFORE:** N.E. MacMurchy, Commissioner  
D.M. Morton, Commissioner

March 29, 2012

### **O R D E R**

#### **WHEREAS:**

- A. Pursuant to section 71 of the *Utilities Commission Act* (Act) British Columbia Hydro and Power Authority (BC Hydro) filed with the British Columbia Utilities Commission (Commission) on January 9, 2012, the Electricity Purchase Agreement (EPA) between BC Hydro and Conifex Power Inc. (Conifex) made as of June 10, 2011, the Amendment Agreement No. 1 (Amendment) made as of October 5, 2011, and a copy of the Load Displacement Agreement (LDA) between BC Hydro, Conifex, Conifex Mackenzie Forest Products Inc. and Conifex Timber Inc. made as of June 10, 2011 (the Filing);
- B. BC Hydro also filed a public copy of the Filing that redacts certain confidential information and requested that the non-redacted Filing be kept confidential due to the commercially sensitive nature of certain information in the Filing;
- C. BC Hydro requests that the Commission accept the EPA for filing under section 71 of the Act and grant the requested Order without holding a hearing, but submitted that if the Commission decides to hold a hearing, the hearing process should be written;
- D. On January 13, 2012, the Commission issued Letter L-3-12 seeking submissions from interested parties regarding the review process for the Filing;
- E. On January 19, 2012, BC Hydro filed four additional letters of support, included as Attachments 5 through 8 of Appendix G, to the Filing;
- F. BC Hydro responded to Letter L-3-12 on January 20, 2012;
- G. Conifex responded to Letter L-3-12 on January 25, 2012, and expressed concerns that potential delays might negatively affect the Conifex biomass electricity plant in Mackenzie, which had high local support but did not make a submission on the format of the hearing;

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- H. On January 31, 2012, Zellstoff Celgar Limited Partnership (Celgar) submitted its response to Letter L-3-12;
- I. On February 2, 2012, the Province of British Columbia issued Order-in-Council (OIC) 035;
- J. On February 3, 2012, BC Hydro filed its response to Celgar's submission;
- K. On February 3, 2012, BC Hydro filed a further letter of support from the Kwadacha Nation to be included as Attachment 9 of Appendix G to the Filing;
- L. On February 6, 2012, Celgar requested leave to address BC Hydro's comments on the LDA;
- M. On February 7, 2012, BC Hydro submitted Celgar's request for leave to file a further reply to BC Hydro's submission of February 3, 2012, should be denied and challenged Celgar's standing in the review of the Filing;
- N. On February 10, 2012, the Commission issued Letter L-8-12 requesting comments on Celgar's standing in this Filing and on February 14, 2012, both Celgar and Conifex responded. On February 15, 2012, BC Hydro filed its response;
- O. On February 15, 2012, BC Hydro filed additional letters regarding Celgar's standing and Celgar sought leave to respond to the BC Hydro and Conifex submissions on Celgar's standing;
- P. On February 21, 2012, BC Hydro filed the Conifex Energy Supply Contract Filing Attachment 1 - Bioenergy Phase 2 Report and provided submissions on the Filing regarding the effect of recent amendments to the Electricity Self-Sufficiency Regulation issued under the *Clean Energy Act*, provided as Attachment 1, and Special Direction No. 10 issued under the Act, provided as Attachment 2;
- Q. On February 28, 2012, the Commission issued Letter L-10-12 holding that Celgar lacked standing in this Filing;
- R. On March 1, 2012, the Commission issued confidential Information Request No. 1 (IR 1), which BC Hydro responded to on March 9, 2012, with a copy to Conifex only;
- S. On March 13, 2012, the Commission issued confidential Information Request No. 2 (IR 2) to BC Hydro and BC Hydro responded on March 20, 2012;
- T. BC Hydro identified three First Nations requiring consultation on the Project: Kwadacha Nation, Tsay Keh Dene Band and McLeod Lake Indian Band. BC Hydro identified Kwadacha and Tsay Keh Dene as having claims to the land from which fibre supply for the Conifex sawmill would be obtained while the community of Mackenzie, in which the sawmill is located, is within the territory claimed by McLeod Lake;
- U. Conifex carried out the consultation on the Project and BC Hydro notified the First Nations of the Filing with the Commission;
- V. The Commission has considered the Filing, additional filings by BC Hydro, comments received in response to Letters L-3-12 and L-8-12, BC Hydro's responses to the Commission's information requests, and OIC 035.

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**NOW THEREFORE** the Commission orders that:

1. The Energy Purchase Agreement dated June 10, 2011, and Amendment Agreement No. 1 dated October 5, 2011, between Conifex and BC Hydro is in the public interest and accepts it for filing pursuant to section 71 of the Act for the reasons expressed in the Reasons for Decision attached as Appendix A to this Order.
2. The Commission will hold confidential the Commission's Information Requests, BC Hydro's responses and the confidential copy of the Filing as requested by BC Hydro.
3. The Crown's duty to consult with the First Nations has been adequate to the date of this Order.

**DATED** at the City of Vancouver, in the Province of British Columbia, this 17<sup>th</sup> day of April 2012.

BY ORDER

*Original signed by:*

D.M. Morton  
Commissioner

Attachment

British Columbia Hydro and Power Authority  
of the  
Electricity Purchase Agreement between BC Hydro and Conifex Power Inc.

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**REASONS FOR DECISION**

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**1.0 INTRODUCTION**

On January 9, 2012, British Columbia Hydro and Power Authority (BC Hydro) filed the Conifex Electricity Purchase Agreement (EPA), the Amendment Agreement No. 1 and the Load Displacement Agreement (LDA) (the Filing) and requested that the British Columbia Utilities Commission (Commission) accept the EPA pursuant to section 71 of the *Utilities Commission Act* (Act). BC Hydro requested that the Commission accept the EPA without the necessity of holding a hearing.

**2.0 REGULATORY PROCESS**

On January 13, 2012, the Commission issued Letter L-3-12 requesting additional information and submissions from BC Hydro, Zellstoff Celgar Limited Partnership (Celgar), BC Hydro F12/F14 Revenue Requirement Application Interveners, the BC Ministry of Energy and Mines and the First Nations identified in Appendix I of the Filing. Comments were received from Conifex, Celgar and BC Hydro.

Celgar then requested leave to make a further reply to BC Hydro's submissions. BC Hydro then replied to Celgar's request for leave. In its reply to Celgar's request for leave, BC Hydro requested that the Commission deny the request for leave. Further, BC Hydro challenged Celgar's standing in this Filing and submitted that it opposes a hearing because no ratepayers had raised any concerns about the Filing and none had asked for a hearing.

On February 2, 2012, the Province of British Columbia (Province) by Order of the Lieutenant Governor in Council issued Order in Council 035 (OIC 035) providing that the Commission must assume that BC Hydro requires the 200 GWh from the Conifex Mackenzie Power Project by 2013.

On February 21, 2012, BC Hydro filed the Conifex Energy Supply Contract Filing Attachment 1 - Bioenergy Phase 2 Report and provided submissions on the Filing regarding the effect of recent amendments to the Electricity Self-Sufficiency Regulation issued under the *Clean Energy Act*, provided as Attachment 1, and Special Direction No. 10 issued under the Act, provided as Attachment 2.

On February 10, 2012, the Commission issued Letter L-8-12 requesting additional information and comments from BC Hydro and others on Celgar's standing in the Filing. On February 14, 2012, Conifex and Celgar provided their response to Letter L-8-12 and on February 15, 2012, BC Hydro provided its response to Letter L-8-12. On February 28, 2012, the Commission issued Letter L-10-12 denying Celgar's standing.

**3.0 ISSUES**

Pursuant to subsection 71(2.21) of the Act, the Commission must consider certain specified factors to determine whether an energy supply contract filed by the authority (BC Hydro) is in the public interest. Further, and also pursuant to the provisions of section 71 of the Act, the Commission may accept an energy supply contract for filing without holding a hearing. If the Commission is concerned that an energy supply contract may not be in the public interest, it must hold a hearing before declaring the energy supply contract to be unenforceable in whole or part.

One of the issues for the Commission Panel is whether it is necessary to hold a hearing before making a determination that the EPA is in the public interest. For the reasons which follow, the Panel is satisfied that it has sufficient information before it to make a determination on the public interest without the necessity of holding a hearing.

#### **4.0 RESPONSES TO L-3-12**

In its response Conifex expressed concerns that potential delays flowing from a hearing might negatively affect the Conifex biomass electricity plant in Mackenzie which had high local support; however, Conifex did not make a submission on the format of hearing if one were to be held.

#### **5.0 THE IMPACT OF OIC 035**

On February 2, 2012, OIC 035 was issued and provides as follows:

“In determining under section 71 of the Act whether the authority’s energy supply contract in respect of the Conifex Mackenzie Power Project is in the public interest, the commission must assume that the authority requires, by 2013, in order to meet its electricity supply obligations, the 200 gigawatt hours per year of firm energy that would be provided under the contract.”

As a result of OIC 035, the Commission concludes it must assume that BC Hydro requires, by 2013, in order to meet its electricity supply obligations, the 200 GWh/year that would be provided under the EPA.

#### **6.0 ENERGY SUPPLY CONTRACTS**

In determining whether an energy supply contract filed by the BC Hydro is in the public interest, the Commission must consider the provisions of subsection 71(2.21) of the Act.

After considering the OIC 035 requirement to assume the need for 200 GWh with a delivery date of 2013 from the Conifex Mackenzie Power Project the Commission concludes that the provisions of subsection 71(2.21) of the Act have been satisfied for the following reasons:

- (a) British Columbia’s energy objectives are defined under section 1 of the Act as having the same meaning as in subsection 1(1) of the *Clean Energy Act*. Subsection 1(1) of the *Clean Energy Act* defines the objectives as those set out in section 2 of the *Clean Energy Act*. The Commission is satisfied that the relevant objectives have been met because the EPA will contribute to: the firm energy required in Amended Special Direction No. 10 to the Commission, the goal of 93 percent of the electricity in British Columbia from clean or renewable resources, the use of clean or renewable resources, the reduction of waste by the use of biomass, the economic development and the creation and retention of jobs, the development of first nation and rural communities through the use and development of clean or renewable resources, and the incremental value of the resources being clean or renewable resources;
- (b) an applicable integrated resource plan approved under section 4 of the *Clean Energy Act* does not apply as the Lieutenant Governor in Council has not issued an order approving BC Hydro’s integrated resource plan;

- (c) the extent to which the energy supply contract is consistent with the requirements under section 19 of the *Clean Energy Act* is satisfied as the EPA will facilitate the achievement of British Columbia's energy objective set out in section 2(c) of obtaining the goal of 93 percent of the electricity in British Columbia from clean or renewable resources;
- (d) the quantity of the energy to be supplied under the contract is satisfied as it is specified in the OIC 035 at 200 GWh;
- (e) the availability of supplies of the energy referred to in paragraph (d) is satisfied as OIC 035 specified the Project as the available source of supply and the Commission Panel is satisfied that Conifex can supply the energy;
- (f) the price and availability of any other form of energy that could be used instead of the energy referred to in paragraph (d) is satisfied, because the Commission concludes that the price and quantity of this form of energy is comparable or better than the other alternatives. The Commission Panel agrees with BC Hydro's position that the Project's costs and rates of return were properly assessed to determine whether or not BC Hydro had negotiated the lowest price possible, below which Conifex would be unlikely to proceed with the Project investment. [Filing, Chapter 4, 4.2 Cost-Effectiveness, p. 4] In addition, the Commission Panel accepts BC Hydro's position that the price of the energy from the Project is comparable to the competitive pricing obtained in Bioenergy Phase 2 Call. [Conifex Energy Supply Contract Filing Attachment 1 - Bioenergy Phase 2 Report]

## **7.0 PUBLIC CONSULTATION**

The Project has extensive local public support as demonstrated in the materials in the Filing and the various letters of support received. [Filing, Appendix G, Attachments 5, 6, 7, and 8]

## **8.0 FIRST NATIONS CONSULTATION**

BC Hydro identified three First Nations with whom to consult on the Project: Kwadacha Nation, Tsay Keh Dene Band, and McLeod Lake Indian Band. BC Hydro identified Kwadacha and Tsay Keh Dene as having claims to the land from which fibre supply for the Conifex sawmill would be obtained while the community of Mackenzie, in which the sawmill is located, is within the territory claimed by McLeod Lake. [Filing, pp. 5-1, 5-2]

BC Hydro assesses the impacts of the Project on Aboriginal rights and title as minimal because the Project will be located on a privately owned, fenced, pre-existing industrial site which makes it highly unlikely that Aboriginal or treaty rights could be exercised on the site. BC Hydro submits that the only potential adverse impact of the EPA is air emissions from burning biomass but that burning to generate power is an improvement over burning salvage in logging areas. An amendment to the existing Ministry of Environment air permit is required to remove pulp and paper emissions and identify only emissions related to power generation but BC Hydro submits the Ministry of Environment will determine First Nations consultation on these permits. BC Hydro also submits that wood waste and non-merchantable fibre taken under Conifex's existing forestry licences and permits will be used to generate power and that no new forestry licences are required. [Filing, pp. 5-2, 5-3]

Conifex carried out the consultation on the Project while BC Hydro notified the First Nations of the Filing with the Commission.

Conifex made telephone calls to the three First Nations in early May 2010. It met with the three in mid-September 2010 at which time each First Nation expressed interest in employment and economic opportunities from the Project. Conifex continued to meet with the Tsay Keh Dene three more times, McLeod Lake two more times and Kwadacha one additional time over 2011.

BC Hydro submits that due to the minimal adverse impacts of the Project, if there is a duty to consult at all, it is at the low end of the spectrum. It further submits that Conifex has notified all three potentially impacted First Nations about the Project and has met with them multiple times.

On January 9, 2012, BC Hydro sent the Filing via e-mail to the three First Nations. [IR 1.5.1] By March 1, 2012, the only feedback received was a letter from Kwadacha to Conifex, dated January 16, 2012, stating support for the Project. [Attachment 9 to Appendix G of the Filing]

BC Hydro submits that no First Nation has raised any specific concerns about the Project and that the consultation with First Nations in respect of the Filing has been adequate to this stage.

On the evidence presented, the Commission finds the potential adverse impacts of the Project on aboriginal rights or title is low. Therefore, the duty to consult is determined to be at the low end of the spectrum.

Conifex performed the actual consultation on the Project on behalf of BC Hydro while BC Hydro notified the First Nations of the Filing. This approach is supported in the case law which holds that the Crown holds the ultimate legal responsibility for consultation and possible accommodation but may delegate procedural aspects of consultation to industry proponents. [Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, para. 53]

Conifex has met with the potentially impacted First Nations and has written support from one. Conifex continues to meet with the First Nations and it reports that no First Nation has expressed opposition to the Project. The Commission Panel is satisfied based on the evidence presented that the Crown's duty to consult has been adequate to accept the EPA for filing.

## **9.0 CONFIDENTIALITY**

**The Commission Panel determines that pursuant to subsection 71(5) of the Act, disclosure of the Filing in its non-redacted form is not in the public interest. The Commission Panel is satisfied that disclosure of the commercially sensitive information in the Filing would have significant potential to cause harm to the competitive and negotiating positions of both BC Hydro and Conifex.**

### **Commission Determinations**

**The Commission has considered the Filing, additional filings by BC Hydro, comments received in response to Letters L-3-12 and L-8-12, BC Hydro's responses to the Commission's information requests, and OIC035. The Commission Panel determines that a written hearing is not required before it can make a determination that the EPA is in the public interest. For the reasons expressed above, the Commission Panel concludes that the EPA and Amendment between Conifex and BC Hydro are in the public interest and are accepted for filing under section 71 of the Act.**