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BRITISH COLUMBIA UTILITIES COMMISSION

ORDER NUMBER G-110-13

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

and

an Application for Reconsideration of Order G-52-13
in the Matter of British Columbia Hydro and Power Authority
Northwest Transmission Line Application
Tariff Supplement No. 37 to BC Hydro Electric Tariff

BEFORE: L.F. Kelsey, Commissioner July 25, 2013

O R D E R

WHEREAS:

A. The British Columbia Hydro and Power Authority (BC Hydro) is planning the construction of the Northwest Transmission Line (NTL). Under section 7(1) of the *Clean Energy Act* (CEA), the NTL is exempt from sections 45 to 47 and 71 of the *Utilities Commission Act* (UCA);

B. On December 11, 2012, BC Hydro filed with the British Columbia Utilities Commission (Commission) a proposed Tariff Supplement No. 37 (TS 37) with respect to the NTL and requested that the Commission set TS 37 as a rate under section 8(2) of the CEA and section 61 of the UCA (Application);

C. TS 37 sets out the proposed supplemental terms and conditions applicable to certain BC Hydro customers receiving electricity service or generator interconnection service by means of the NTL;

D. In the Application BC Hydro proposed that the Commission approve TS 37 without a hearing on the basis that the NTL is an exempt project under section 7(1)(a) of the CEA and falls under sections 8(1) and (2) of the CEA;

E. On December 12, 2012, the Commission issued a letter inviting submissions on the scope of the Commission's jurisdiction in relation to TS 37 from any interested parties and allowing for a reply submission from BC Hydro. The letter was circulated to all Registered Interveners in the BC Hydro F2012-F2014 Revenue Requirements Application and the BC Hydro Large General Service Rate Application;

F. The Commission received submissions from the Canadian Office and Professional Employees' Union, Local 378 (COPE), the BC Sustainable Energy Association (BCSEA), the BC Pensioners' and Seniors' Organization *et al.* and the Ministry of Energy, Mines and Natural Gas;

.../2

G. On April 10, 2013, by Order G-52-13, the Commission determined that a hearing was not warranted and approved TS 37 as filed pursuant to sections 59-61 of the UCA;

H. On April 12, 2013, COPE applied to the Commission for a reconsideration of Order G-52-13 (Reconsideration Application) on the basis that the Commission made two errors of law;

I. By letter dated April 19, 2013, the Commission established the first phase of reconsideration as a written comment process to determine whether COPE's Reconsideration Application provided a reasonable basis to allow a reconsideration;

J. On or before the deadlines established in the April 19, 2013 letter, the Commission received comments from BC Hydro and BCSEA and response comments from COPE.

NOW THEREFORE pursuant to section 99 of the *Utilities Commission Act*, for the attached Reasons for Decision, the Application for Reconsideration from the Canadian Office and Professional Employees' Union, Local 378 is denied.

DATED at the City of Vancouver, in the Province of British Columbia, this 25th day of July 2013.

BY ORDER

Original signed by

L.F. Kelsey
Commissioner

Attachment

An Application for Reconsideration of Order G-52-13
in the Matter of
British Columbia Hydro and Power Authority Northwest Transmission Line Application
Tariff Supplement No. 37 to BC Hydro Electric Tariff

REASONS FOR DECISION

1.0 INTRODUCTION

On December 11, 2012, BC Hydro filed with the British Columbia Utilities Commission (Commission) a proposed Tariff Supplement No. 37 (TS 37) for the Northwest Transmission Line (NTL) and requested that the Commission set TS 37 as a rate under section 8(2) of the *Clean Energy* Act (CEA) and section 61 of the *Utilities Commission Act* (UCA). In that Application BC Hydro proposed that the Commission approve TS 37 without a hearing on the basis that the NTL is an exempt project under section 7(1)(a) of the CEA and falls under sections 8(1) and (2) of the CEA.

The Commission invited submissions on the scope of the Commission's jurisdiction in relation to TS 37 from any interested party and allowed for a reply submission from BC Hydro. Submissions were received from the Canadian Office and Professional Employees Union Local 378 (COPE), BC Sustainable Energy Association and Sierra Club BC (BCSEA), the BC Pensioners' and Seniors' Organization *et al.* and the Ministry of Energy, Mines and Natural Gas. The comments focused on the interpretation of section 8 of the CEA and the applicability of sections 59-61 of the UCA.

After reviewing the submissions, on April 10, 2013, by Order G-52-13, the Commission determined that a hearing was not warranted and approved TS 37 as filed, pursuant to sections 59-61 of the UCA.

2.0 COPE'S RECONSIDERATION APPLICATION

On April 12, 2013, COPE applied to the Commission for reconsideration of Commission Order G-52-13 (Reconsideration Application). COPE states its reconsideration is based upon a pure question of law and statutory interpretation and that the Commission made two errors of law in Order G-52-13.

By letter dated April 19, 2013, the Commission established the first phase of reconsideration as a written comment process to determine whether COPE's Reconsideration Application provided a reasonable basis to advance to the second phase of reconsideration.

Generally where an error of fact or law is alleged to have been made, the application must meet the following criteria to advance to the second phase of reconsideration:

- the claim of error is substantiated on a *prima facie* basis; and
- the error has significant material implications[1].

[1] The Commission's *Participants' Guide to the B.C. Utilities Commission*, page 37

On or before the deadlines established, the Commission received comments from BC Hydro and BCSEA and response comments from COPE.

BC Hydro, for the reasons summarized below, believes that COPE has not substantiated either error of law on a *prima facie* basis and that the Reconsideration Application should not proceed to the second phase of reconsideration (BC Hydro Submission, April 29, 2013, pp. 2, 4). BCSEA supports COPE's Reconsideration Application for the reasons articulated by COPE but provided no additional support for their position (BCSEA Submission, April 29, 2013, p. 1).

Based on the reasons provided below, COPE's application for reconsideration of Commission Order G-52-13 is denied and will not advance to the second phase.

2.1 COPE's Alleged Error of Law One

Alleged Error One: **In holding that 'the Commission must set a rate as proposed by BC Hydro for the NTL as long are there is no double recovery of costs'**

COPE submits in its Reconsideration Application "the satisfaction of section 8(1) being a precondition of the operation of section 8(2) [2], and the approval of the rate, is clear and obvious in the words of the statute." (COPE Submission, April 12, 2013, p. 2)

COPE also submits that the Commission's interpretation of sections 8(1) and (2) of the CEA is "not supported by the clear words of the statute". COPE submits that the Commission has interpreted the words of section 8(1), "allow the authority [BC Hydro] to collect sufficient revenue" to mean "prohibit [BC Hydro] from collecting excessive revenue". COPE suggests that the words of section 8(1) address sufficiency of rates (that they are not excessively low), while the Commission has interpreted them to address excessively high rates by referring to double recovery. (COPE Submission, April 12, 2013, pp. 1-2)

In response, BC Hydro submits that COPE's argument is based on a misunderstanding of the Commission's decision and that "[t]he Commission interpreted section 8(1) to mean that 'in setting rates for BC Hydro, the Commission must allow BC Hydro to collect sufficient revenue…' (emphasis added) which is precisely what COPE says section 8(1) means." BC Hydro further states that the Commission did not interpret section 8(1) to prohibit BC Hydro from collecting excessive revenue. (BC Hydro Submission, April 29, 2013, p. 2)

[2] Sections 8(1) and (2) of the CEA read:

> **8** (1) In setting rates under the *Utilities Commission Act* for the authority, the commission must ensure that the rates allow the authority to collect sufficient revenue in each fiscal year to enable it to recover its costs incurred with respect to
>
> (a) the achievement of electricity self-sufficiency, and
> (b) a project, program, contract or expenditure referred to in section 7 (1), except
> (i) to the extent the expenditure is accounted for in paragraph (a), and
> (ii) for costs, prescribed for the purposes of this section, respecting the feed-in tariff program.
>
> (2) Subject to subsection (1) of this section, the commission must set under the *Utilities Commission Act* a rate proposed by the authority with respect to the project referred to in section 7 (1) (a) of this Act.

In reply, COPE submits:

> "…section 8(2) (as we have already demonstrated) is explicitly subject to 8(1). The burden on the Commission with respect to 8(2) is found in 8(1). The reference to the adequacy of the tariff to recover the costs of the project (and the only relevant reference to the substantive requirements of the tariff) is in 8(1)... the Act requires that the Commission be satisfied that 8(1) is satisfied when dealing with the tariff under 8(2). The line of reasoning simply cannot escape the plain wording of 8(1). The words construed by the Commission with respect to the question of sufficiency (or, somehow, the avoidance of double recovery) lie in section 8(1), not 8(2)." (COPE Submission, May 1, 2013, p. 1)

In its Reasons for Decision for Order G-52-13 the Commission interpreted section 8(1) and (2) to mean:

> "…the Commission Panel interprets section 8(1) of the CEA to require the Commission, in setting rates generally for BC Hydro, to ensure that those rates allow BC Hydro to collect sufficient revenue to recover its costs for the NTL." (emphasis added) (Appendix A to Order G-52-13, pp. 5-6)

> "The Panel interprets section 8(2) of the CEA to mean that the Commission must set a rate as proposed by BC Hydro for the NTL as long as there is no double recovery of costs. In the case of the TS 37 Application, the Commission Panel determines that it must set the rate as proposed by BC Hydro because the rate proposed does not result in the double recovery of costs." (Appendix A to Order G-52-13, pp. 5)

The Panel interprets section 8 of the CEA as a direction to the Commission to approve a rate proposed by BC Hydro under section 8(2) subject only to the assurance that the costs are not already recovered under the rates referred to in section 8(1). The Panel considers this interpretation is consistent with the scheme and object of the CEA. When considering the CEA as a whole, the Commission takes the position that section 8 was written to ensure that the Commission does not have the ability to deny BC Hydro recovery of costs on any projects listed in section 7(1) [3] of the CEA which are exempt from the Commission's review in regards to sections 45, 46, 47 and 71 of the UCA.

Section 8(1) directs the Commission to ensure that costs of section 7(1) projects are recovered when setting rates for BC Hydro generally, which includes, but is not limited to, a rate set with respect to the NTL; while, section 8(2) directs the Commission to set a specific rate with respect to the NTL. As a result the Commission is directed in both sections 8(1) and (2) to setting rates that recover costs incurred with respect to the NTL. In the Panel's view the "subject to" clause in 8(2) ensures that the Commission does not set a rate that would allow BC Hydro to recover costs already recovered in rates set generally under section 8(1).

In Order G-52-13 the Panel stated: "This interpretation…do[es] not preclude BC Hydro from recovering any costs above those recovered from the direct customers [under the rate proposed in section 8(2), TS 37] from the general ratepayer." (Appendix A to Order G-52-13, pp. 5-6)

[3] Section 7(1) of the CEA includes a list of projects, programs, expenditures and contracts, including the dams Mica Units 5 and 6, Revelstoke Unit 6 and Site C.

COPE submits that: "With respect to projects which do not have their own unique associated tariff, clearly section 8(1) will come into play in the usual course of Hydro's periodic revenue requirement." (COPE reply submission, May 1, 2013) This demonstrates that COPE agrees section 8(1) establishes BC Hydro's ability to recover costs from the general ratepayer.

However, COPE takes the position that the general provision to recover costs through the revenue requirement as established by section 8(1) does not apply to the NTL because section 8(2) establishes a specific rate for the NTL. COPE takes the position that a cross-subsidy of costs can not take place. COPE reads sections 8(1) and (2) to require all costs of the NTL to be recovered from customers of the NTL through TS 37 and none of the costs can be recovered from the general ratepayer.

COPE states:

> "If the structure of the tariff is such that it generates a very substantial and unlawful cross-subsidy of the project by other Hydro ratepayers, grossing up the utility's entire revenue in the course of a future revenue requirement proceeding cannot remedy the error – the rules of arithmetic prevent that outcome." (COPE reply submission, May 1, 2013)

BC Hydro submitted that "COPE's 'no cross-subsidisation' interpretation would essentially mean that the rate proposed by BC Hydro under section 8(2) must be sufficient to enable BC Hydro to recover its NTL costs fro m NTL customers, with no recovery (or cross-subsidisation) of such costs from other (non-NTL) customers… [this] is without merit because it would require the Commission to ignore the requirement of section 8(1) of the *CEA* that the rates set for BC Hydro must allow it to collect sufficient revenue to enable it to recover its costs incurred with respect to the NTL. Section 8(1)(b) applies to all of the projects, programs, contracts and expenditures referred to in section 7(1)4 including the NTL...Clearly, NTL costs may be recovered through both the general rates set in accordance with section 8(1) of the *CEA,* and through the rate set in accordance with section 8(2). On that basis alone, COPE's 'no cross-subsidisation' interpretation is refuted." (BC Hydro Submission, April 29, 2013, pp. 2-3)

The Commission Panel concurs with BC Hydro's submission that section 8(1) applies equally to the NTL, and therefore costs may be recovered through both the general rates set in accordance w ith section 8(1) and through the a more specific rate (TS 37), set in accordance with section 8(2). Therefore, the Panel does not agree with COPE's 'no cross-subsidisation' interpretation of section 8 of the CEA.

2.2 COPE's Alleged Error of Law Two

Alleged Error Two: **'In order for COPE's 'no cross-subsidisation' interpretation to apply to the NTL it would also have to apply to all section 7(1) projects, programs, contracts and expenditures…"**

COPE argues that the Commission made an error in law because it misconstrued the words and scheme of the CEA because, as section 8(2) only applies to one project, the NTL, there is no comparable provision in the CEA or

elsewhere that requires the Commission to ensure sufficiency of any rate specific to any other project. (COPE Submission, April 12, 2013, pp. 2-3)

COPE submits that "[t]here is absolutely nothing in the wording of the statute which suggests that the exceptional treatment of this project's unique rate could apply to any other rate or any other project. The words draw a straight line between the applied-for rate and the pre-condition of sufficiency." (COPE Submission, April 12, 2013, p. 3)

In its Reasons, the Commission addressed COPE's argument directly as follows:

> "...the Commission Panel does not agree with COPE that section 8(1) requires that NTL customers should not be cross-subsidized by other ratepayers and that BC Hydro must not under-recover its costs. In order for COPE's 'no cross-subsidization' interpretation to apply to the NTL it would also have to apply to all section 7(1) projects..." (Appendix A to Order G-52-13, p. 5)

The Commission then elaborated on why "absolute cost recovery" from the section 7(1) projects other than the NTL would not be possible or practical.

Unlike COPE, the Commission Panel considers that the general rate recovery provision established in section 8(1) applies to the NTL equally as it does to the other projects listed in section 7(1) of the CEA. Therefore, the Panel made a valid comparison when saying that COPE's nocross-subsidisation interpretation should apply to all the projects listed in section 7(1) of the CEA. Although this argument was discussed in some detail in Order G-52-13, Appendix A, it was only a peripheral argument and the outcome of the decisions made would not have changed without it.

BC Hydro submits that although COPE might quarrel with the Commission's reasons for disagreeing with their "no cross-subsidisation" interpretation, BC Hydro submits that the Commission was clearly correct to reject that COPE interpretation. (BC Hydro Submission, April 29, 2013, pp. 2-3)

2.3 Significant Material Implications

BC Hydro submits that the Commission typically requires that an application for reconsideration alleging an error meet the criterion that the error has a significant material implication and submits that COPE's Reconsideration Application does not provide argument about the significance and materiality of the implications of the alleged errors. (BC Hydro Submission, April 29, 2013, p. 3)

COPE replies, stating that the errors have material implications because it believes the tariff as proposed "clearly generates an unlawful cross-subsidy of the Project to the extent of approximately $150,000,000" and submit that the Commission is required by law to inquire into that issue and make a determination. (COPE Submission, May 1, 2013, p. 2)

The Panel disagrees with COPE's interpretation of what a significant material implication is. A significant material implication does not relate to the materiality of the dollar value of the issue at hand, but rather the significance of the implication of the error in law, usually meaning that the outcome of the decision would likely be different had this error not occurred.

Commission Panel Determinations

COPE states its reconsideration is based upon a pure question of law and statutory interpretation. The Panel agrees and interpreted the statute differently than COPE, despite being aware of COPE's argument.

In regards to COPE's first alleged error of law, COPE restates the argument provided to the Commission during the proceeding, which resulted in Order G-52-13. Thus the Commission has considered these arguments previously and still does not agree with COPE's interpretation of section 8 of the CEA.

In regards to COPE's second alleged error of law, the Panel's findings regarding COPE's no cross-subsidisation argument in Order G-52-13 would be no different with or without the Panel's argument that COPE alleges is an error of law. Further, the Panel considered COPE's arguments regarding cross-subsidisation previously and continues to disagree with their position for the additional reason provided in these Reasons.

Upon review of the evidence, the Commission Panel determines that COPE has not met the criteria to advance to the second phase of reconsideration, as it has not substantiated the claims of error on a *prima facie* basis, nor has it demonstrated that the alleged errors have significant material implication on the decisions made in Order G-52-13. COPE's Reconsideration Application of Order G-52-13 is therefore denied.

The Commission Panel thus maintains the interpretation of section 8(1) and (2) as put forward in Appendix A to Order G-52-13 and these reasons provide further clarification.