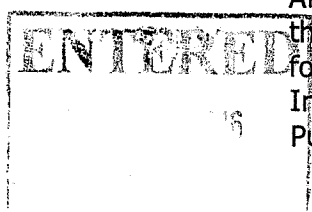


COURT FILE NUMBER 1601-01689
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
MATTER IN THE MATTER OF Article 19.3 of the Power Purchase Arrangement Thermal for Battle River, promulgated pursuant to Section 45.95(1) of the *Electric Utilities Act*, RSA 2000, c E-5, and the *Power Purchase Arrangements Determinations Regulations*, AR 175/2000



AND IN THE MATTER OF the termination of the Power Purchase Arrangement Thermal for Battle River by ENMAX PPA Management Inc. pursuant to Article 4.3(j) of the Power Purchase Arrangement

APPLICANT **ENMAX PPA MANAGEMENT INC.**
RESPONDENTS **BALANCING POOL**
DOCUMENT **ORIGINATING APPLICATION**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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NOTICE

This application will be heard as shown below:

DATE: Friday, August 19, 2016
TIME: 2:00 P.M.
WHERE: Calgary Courts Centre
BEFORE: A Justice of the Court or Queen's Bench in a Special Chambers Application

Remedy claimed or sought:

1. The Applicant, ENMAX PPA Management Inc. ("**ENMAX**"), seeks a declaration that:
 - (a) ENMAX's termination of the Power Purchase Arrangement Thermal for Battle River (the "**PPA**"), under Article 4.3(j) of the PPA was effective January 1, 2016 at 12:01 a.m., in accordance with the termination notice ENMAX provided to the Balancing Pool.
 - (b) the rights, duties and obligations of the Buyer under the PPA were assumed by the Balancing Pool, effective January 1, 2016 at 12:01 a.m., at which time ENMAX was no longer responsible for performance of the Buyer's duties and obligations under the PPA; and
 - (c) after January 1, 2016 at 12:01 a.m., to ENMAX was performing and exercising the Buyer's rights, duties and obligations as agent for, and on behalf of, the Balancing Pool.

Grounds for making this application:

2. The Battle River Generating Station is a coal-fired thermal electrical generating facility owned and operated by ATCO Power located in Forestburg, Alberta, approximately 200 kilometres southeast of Edmonton. The Battle River Generating Station consisted of five generating units, Units 1 – 5, until Units 1 and 2 were retired and dismantled in 2000.
3. Between January 1, 2001, and December 31, 2013, Units 3 – 5 of the Battle River Generating Station were subject to the PPA. In accordance with the Effective Term of the PPA, Units 3 and 4 ceased to be subject to the PPA on December 31, 2013. Unit 5 of the Battle River Generating Station continues to be subject to the PPA.
4. The PPA is a regulatory instrument made under the *Power Purchase Arrangements Determination Regulation*, AR 175/2000 and continued by section 96(1) of the *Electric Utilities Act*, SA 2003, c E-5.1 (the "**EUA**"). The Purpose of the PPA (along with the other PPAs promulgated under the *Power Purchase Arrangements Determination Regulation*, the "**PPAs**") was to provide for a virtual divestiture of regulated generation facilities in order to assist in the creation of a competitive deregulated generation market

in Alberta. The PPAs accomplished this goal by separating the operational and marketing components of electricity generation for the affected generating units, by inserting a marketer, or Buyer, between the Owner of the generating units and the market in which electricity is sold in Alberta (the Power Pool).

5. Although a form of regulation, the PPAs were drafted to look like, and designed to function in a manner similar to, a commercial contract. The Parties to the PPAs are the "Owner" (being ATCO Power), and the "Buyer". Additionally, in certain circumstances, the Balancing Pool has certain rights and obligations under the PPA. The Balancing Pool is a statutory body established under section 75 of the *EUA* to administer the funds raised by the auction of the PPAs on behalf of Alberta's power consumers and assume certain risks under the PPAs, among other things. The Balancing Pool also serves a 'backstop' role in certain circumstances under the PPAs. This role includes the obligation to assume the role of Buyer, if a Buyer terminates a PPA.
6. Until recently, ENMAX was the Buyer under the PPA in relation to Battle River Unit 5.
7. The PPA provides that, in certain circumstances, the Buyer is entitled to terminate the arrangement. One such circumstance is a Change in Law that serves to render the PPA unprofitable, or more unprofitable, for the Buyer for the remainder of the term of the PPA. Article 4.3(j) of the PPA states:
 - 4.3(j) Notwithstanding any of the foregoing, to the extent that a Change in Law, after giving effect thereto and to this Section 4.3, could reasonably be expected to render continued performance by the Parties to this Arrangement for the balance of the Effective Term unprofitable to the Buyer in respect of a Unit, having taken account of any compensation entitlement under section 4.3(i) or any amount due from the Balancing Pool, **then the Buyer may terminate this arrangement** and shall not be liable for, nor entitled to any Termination Payment. [Emphasis added.]
8. On August 1, 2000, Article 4.3(j) was amended by way of Errata issued by the Alberta Energy and Utilities Board. The Errata clarified that under Article 4.3(j):

...the Buyer shall be entitled to terminate the PPA and shall not be liable for, nor entitled to any Termination Payment if a Change in Law renders the PPA unprofitable, **or more unprofitable**. [Emphasis in original.]

9. In such circumstances, under section 96(3) of the *EUA*, the PPA is deemed to have been sold to the Balancing Pool and the Balancing Pool assumes the rights and obligations of the Buyer. Section 96(3) of the *EUA* states:

96(3) A power purchase arrangement, other than a power purchase arrangement held by the Balancing Pool, that is terminated other than under section 15.2 of the power purchase arrangement

- (a) is deemed to have been sold to the Balancing Pool, and
- (b) is to be held by the Balancing Pool in the capacity of a buyer for all purposes of this Act, the regulations and the power purchase arrangement.

10. As a result of recent changes to the *Specified Gas Emitters Regulation*, AR 139/2007, and the Climate Change and Emissions Management Fund established under the *Climate Change and Emissions Management Act*, SA 2003, c C-16.7, in or around December 2015, ENMAX determined that it is reasonably expected that continued performance of its obligations as Buyer under the PPA was rendered unprofitable for the remainder of the term of the PPA. On this basis, on December 11, 2015, ENMAX issued a notice of termination under Article 4.3(j) to ATCO Power and the Balancing Pool, in which it gave express notice to the Balancing Pool that it was terminating the PPA effective January 1, 2016 at 12:01 a.m.

11. On January 27, 2016 the Balancing Pool issued a letter to ENMAX indicating that it had investigated, assessed and verified ENMAX's determination of future unprofitability, and confirmed that ENMAX was entitled to terminate the PPA in accordance with Article 4.3(j). Although the Balancing Pool accepted ENMAX's termination, it disputed the timing of the termination on the basis that:

termination of the PPA cannot be effective until all requirements of law have been satisfied to allow Balancing Pool to hold the PPA in the capacity of buyer as required by, and in the manner stipulated in, Section 96(3) of the *EUA*.

12. ENMAX disagrees with the position taken by the Balancing Pool with respect to the timing of the termination. ENMAX states that the language of Article 4.3(j) is unequivocal and unconditional, and provides that the Buyer is entitled to elect to

terminate the PPA, at its sole discretion, upon its determination that the “unprofitable to the Buyer” test set out in Article 4.3(j) has been met.

13. Article 19.3 of the PPA provides that where a dispute arises with regards to a question of law under the PPA, a party may refer such question to the court for resolution. Article 19.3 states:

19.3 Litigation

Either party may commence litigation with respect to any question of law or the recovery of any liquidated damages arising in relation to this Arrangement, within the limitation periods set out in the *Limitations of Actions Act* (Alberta), and any successor or replacement legislation.

14. In accordance with Article 19.3 of the PPA, ENMAX seeks the assistance of this court to resolve the dispute regarding the proper interpretation of the PPA and the *EUA* regarding the effective timing of ENMAX’s termination of the PPA under Article 4.3(j), and seeks a declaration that: (i) ENMAX’s termination of the PPA, under Article 4.3(j) of the PPA was effective January 1, 2016 at 12:01 a.m., in accordance with the termination notice ENMAX provided to the Balancing Pool; (ii) the rights, duties and obligations of the Buyer under the PPA were assumed by the Balancing Pool, effective January 1, 2016 at 12:01 a.m., at which time ENMAX was no longer responsible for performance of the Buyer’s duties and obligations under the PPA; and (iii) from and after January 1, 2016 at 12:01 a.m., ENMAX was performing and exercising the Buyer’s rights, duties and obligations as agent for, and on behalf of, the Balancing Pool.

Materials or evidence to be relied on:

15. This Application;
16. An agreed Statement of Facts
17. Such further and other material or evidence as counsel may advise.

Applicable Acts and Regulations:

18. The *Electric Utilities Act*, SA 2003, c E-5.1;

19. the Power Purchase Arrangement Thermal for Battle River and related errata;

How the application is proposed to be heard or considered:

20. With notice, by a justice of the Court or Queen's Bench in a Special Chambers Application.