

Attorney General Argues That Backdoor Amendment to PPAs was Unlawful

By: Nigel Bankes

Matter Commented On: Originating Application for Declaratory Relief and Judicial Review, filed by the Attorney General, July 25, 2016

The origins of the Power Purchase Arrangements (PPAs) “termination” saga are discussed in detail in a previous [post](#) and readers may wish to refer to that post for the necessary background. In an interesting development the Attorney General has commenced an application seeking a declaration that the amendments that were made to the PPAs after the public review process conducted by the then Alberta Energy and Utilities Board (AEUB) had concluded are unlawful. The crucial amendment was to a clause in the PPA which allows the buyer to transfer responsibility for the PPA to the Balancing Pool when a change of law makes the PPA not just unprofitable but “more unprofitable”. In my previous post I suggested that

It is evident that this clarification which was “attached to and forming part of each PPA” considerably enhances the power of the buyer to terminate without liability. On its face it seems to suggest that even if market conditions are the principal cause for the unprofitability of the PPA from the buyer’s perspective, then any change of law, however small, which makes the PPA just that bit more unprofitable allows the buyer to terminate. This hardly seems to be a commercially reasonable conclusion – let alone the “obvious” intent of all of those interested in the structure of the PPAs. Nevertheless, the AEUB under the terms of [Order U2000-190](#) did endorse the IAT’s conclusions.

The Attorney General has now taken the extra step and alleges that the AEUB exceeded its authority in approving the amendment and also followed an incorrect procedure; and that therefore the amendments are unlawful. Although late in the day this is a powerful argument since if the province can kick-out the amendment, PPA buyers will have a much harder time establishing that it is the province’s price on carbon that renders the PPAs unprofitable – rather than market conditions more generally. The Attorney General is also taking the view that the Regulations approving the PPAs were unlawful – perhaps because she is concerned that if she only attacks the AEUB decision then she will be found to be out of time because of the limitation period in the AEUB’s statute (see *Alberta Energy and Utilities Board Act*, RSA 2000, c. A-17, s.26, [now repealed](#)). However, if the Regulations are void *ab initio* (as the application argues) then it would seem that the PPAs themselves are also unlawful - which perhaps proves too much, and will, to say the least, require a lot of unravelling!

The Attorney General is also taking a run at the Balancing Pool’s (BP) decision to accept Enmax’s notice to terminate. The BP made that decision on January 27, 2016 (and it is the only PPA the termination of which the BP has to date accepted) so the AG has filed this application just within the time limits established by the Rules of Court. In essence the AG argues that the BP wrongly proceeded on the basis of the PPA arrangements as amended (as above); but in the

alternative argues that the BP unreasonably looked at profitability only over the remaining term of the PPA, unreasonably based its decision on prices at a single point in time, and unreasonably failed to inquire as to whether unprofitability was self-induced (the argument here is that Enmax is in part responsible for low power prices by commissioning the 800 MW Shepard facility). The precise basis on which the BP proceeded may not be completely known, but to address that the AG is demanding that the BP produce the record. A “win” on these latter arguments will not be a complete victory because it will merely require that the BP makes its decision afresh. For this reason alone the much more significant claim made in these proceedings is the claim that the amendment was unlawful.

This will no doubt be one of the more complex and high profile judicial review proceedings ever heard in the province - and the stakes are high. The province has selected Joe Arvay from Vancouver\Victoria as its lead lawyer for its application, one of the best constitutional and administrative lawyers in the country. That is no doubt a very good choice, but I suspect that there would have been few major law firms in Alberta with expertise in this area who would not already have been conflicted out. The respondents listed in the application (in addition to Enmax and the BP) include various ATCO companies, TransCanada Energy, Capital Power, Alberta Power, and the Utilities Commission (as the successor to the AEUB).

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