Form 7
Alberta Rules of Court
Rule 3.8

COURT FILE NUMBER	1603 13041
COURT	Court of Queen's Bench of Alberta
JUDICIAL CENTRE	Edmonton
APPLICANT	The Attorney General of Alberta
RESPONDENTS	**Alberta Power (2000) Ltd.** **ASTC Power Partnership** **ATCO Power (2000) Ltd.** **ATCO Power (2010) Ltd.** **ATCO Power Canada Ltd.** **Capital Power PPA Management Inc.** **ENMAX PPA Management Inc.** **TransCanada Energy Ltd.** **Balancing Pool** **Alberta Utilities Commission**
DOCUMENT	**Originating Application for Declaratory Relief** **AND** **Originating Application for Judicial Review**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Liam C. Kelly** **Witten LLP** **2500 Canadian Western Bank Place** **10303 Jasper Avenue** **Edmonton AB T5J 3N6** **Tel: 780.428.0501 / Fax: 780.429.2559** **Email: lkelly@wittenlaw.com** **AS AGENT FOR:** **Joseph J. Arvay, Q.C.** **Farris Vaughan Wills & Murphy LLP** **PO Box 10026, Pacific Centre South** **25th Floor, 700 West Georgia Street** **Vancouver BC V7Y 1B3** **Tel: 604.681.9151 / Fax: 604.661.9349** **Email: jarvay@farris.com**

NOTICE TO THE RESPONDENTS

This application is made against you. You are a Respondent.

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date:	**November 2, 2016**
Time:	**10:00 am**
Where:	**Edmonton – Law Courts, 1A Sir Winston Churchill Square, Edmonton AB, T5J 0R2**
Before Whom:	**Justice in Chambers**

Go to the end of this document to see what you can do and when you must do it.

Basis for this claim:

1. The Applicant, the Attorney General of Alberta, seeks a declaration as to the proper interpretation of Power Purchase Arrangements (the "**PPAs**"), a declaration as to the validity of certain regulations and various orders, as further set out below, to prevent the Respondent, the Balancing Pool, from allowing the Respondent, ENMAX PPA Management Inc. ("**ENMAX**") to terminate the Power Purchase Arrangement Thermal for Battle River (the "**Battle River PPA**").

Background

2. The PPAs result from the restructuring of the Alberta electricity sector commencing in the mid-1990s. In order to transition from a regulated, vertically-integrated electricity industry to a deregulated environment, the legislature imposed PPAs as a mechanism to introduce competition into the supply of thermal electric power from regulated generating units. The PPAs were intended to allow the Owners of the power generating facilities a reasonable opportunity to recover their fixed and variable costs while transferring the right to offer the output of the plants into the Power Pool to buyers determined through an auction process.

3. The PPAs govern the relationship between the Owner and the Buyer in a manner similar to a contract, although they purported to be statutory instruments made pursuant to legislation.

4. ENMAX now seeks to abandon its obligations under the Battle River PPA by relying on an *ultra vires* and void amendment. The present application seeks judicial review of the Balancing Pool's decision to accept ENMAX's termination of the Battle River PPA, as well as declarations as to the proper construction of the PPAs. The review and declaration are important to five other PPAs, the

Buyers of which have also written to the Balancing Pool seeking termination of their obligations, but which have not been accepted by the Balancing Pool.

The Parties

5. The Applicant, the Attorney General of Alberta, is the chief law officer of the Executive Council and has a responsibility to see that the administration of public affairs is conducted in accordance with the law. Additionally, the Government of Alberta is a significant consumer of electricity, is the primary funder of numerous taxpayer-supported entities that consume electricity, and has an economic and policy interest in a properly functioning electricity market.

6. The Respondents, ATCO Power (2000) Ltd., Alberta Power (2000) Ltd., ATCO Power (2010) Ltd. and ATCO Power Canada Ltd. (collectively "**ATCO Power**"), are the owner and operator of the Battle River Generating Station, a coal-fired thermal electrical generating facility located in Forestburg, Alberta, approximately 200 kilometres southeast of Edmonton. It is the Owner of the Battle River PPA.

7. The Respondent, ENMAX, is the Buyer of the Battle River PPA as well as the Keephills 1 & 2 PPA.

8. The Respondent, TransCanada Energy Ltd., is the Buyer of the Sheerness PPA and the Sundance A Units 1 & 2 PPA.

9. The Respondent, ASTC Power Partnership, a partnership between TransCanada Energy Ltd. and AltaGas Pipeline Partnership, is the Buyer of the Sundance B Units 3 & 4 PPA.

10. The Respondent, Capital Power PPA Management Inc., is the Buyer of the Sundance Units 5 & 6 PPA.

11. The Respondent, the Balancing Pool, is a statutory corporation established by s. 75 of the *Electric Utilities Act*, S.A. 2003, c. E-5.1. It is not an agent of the Crown. The Balancing Pool's mandate is to manage the financial accounts arising from the transition to a competitive generation market on behalf of electricity consumers. The Balancing Pool is responsible for, among other things, determining whether a Buyer purporting to terminate a PPA may validly do so, assuming the role of Buyer upon the valid termination of a PPA, and managing generation assets in cases where the Balancing Pool holds a PPA. Ultimately, any surplus or deficiency of the Balancing Pool is allocated to consumers through, respectively, a Consumer Allocation payment or a surcharge.

12. The Respondent, Alberta Utilities Commission, is the successor to the Alberta Energy and Utilities Board (the "**AEUB**"). The AEUB was established by the *Alberta Energy and Utilities Board Act*, S.A. 1994, c. A-19.5, and empowered to exercise the powers of two pre-existing boards, the Energy Resources Conservation Board and the Public Utilities Board. The AEUB was given

specific powers in respect of PPAs, as discussed in greater detail below, by the *Electric Utilities Amendment Act, 1998*, S.A. 1998, c. 13. These provisions were largely spent by 2001 and were repealed and replaced by the *Electric Utilities Act*, S.A. 2003, c. E-5.1. The AEUB itself was replaced, in respect of electrical utilities, by the Alberta Utilities Commission by operation of the *Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2.

The PPAs

13. The Battle River PPA is one of several PPAs made pursuant to the *Electric Utilities Amendment Act, 1998*, S.A. 1998, c. 13 (the "***1998 Act***"), and continued by s. 96(1) of the *Electric Utilities Act*, S.A. 2003, c. E-5.1 (the "***2003 Act***").

14. The PPAs provided for a virtual divestiture of power generated by regulated generation facilities. This was done in order to create more "sellers" of power in the Alberta power market, with the goal of increasing competition in Alberta's wholesale electricity market. The PPAs sought to accomplish 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**"). Under the terms of each PPA, the Buyer has an obligation to pay the Owner of the power plant its fixed and variable costs, including a reasonable return on assets. The Owner continues to own and operate its plant.

15. The Balancing Pool operates as a kind of "backstop" to the PPAs, in which certain risks can be transferred to the Balancing Pool under certain circumstances – a matter discussed in greater detail below. The Balancing Pool is also a mechanism by which the benefits – or costs – of electricity deregulation are passed onto, or collected from, electricity consumers. The proceeds from the 2000 PPA auctions were paid into the Balancing Pool. The entire $2.1 billion in proceeds were paid out to customers in just one year, 2001, to deal with a "cost" – prices in the deregulated market, even with the expanded number of sellers, hit record levels for Alberta. If the Balancing Pool runs a shortfall, it must be collected from industrial, commercial and residential consumers through a surcharge on their bills.

16. Section 45.5 of the *1998 Act* provided that the PPAs were to be determined by an Independent Assessment Team (the "**IAT**") appointed by the Minister, after considering proposals from the Owners and submissions from interested parties. On July 6, 1998, the Minister of Energy appointed PricewaterhouseCoopers and Charles Rivers Associates to act as the IAT, pursuant to s. 45.2 of the *1998 Act*.

17. The IAT determined the PPAs and, in accordance with s. 45.9 of the *1998 Act*, submitted them to the AEUB on July 9, 1999.

The Public Hearing Process Before the Alberta Energy and Utilities Board

18. Section 45.9(2) of the *1998 Act* required the AEUB to publish a public notice advising that it had received the report of the IAT and the PPAs.

19. Section 45.91 of the *1998 Act* limited the AEUB's role in approving the PPAs, and set out the narrow set of circumstances in which the AEUB could "vary" the PPAs. It provided as follows:

> **45.91(1)** The Board shall
>
> (a) approve the power purchase arrangements and other determinations made by the independent assessment team, unless subsection (2) applies, and
>
> (b) approve any negotiated settlement reached under Part 6.
>
> **(2)** The Board may vary the power purchase arrangements or other determinations made by the independent assessment team at the request of a person if that person satisfies the Board
>
> (a) that the independent assessment team did not carry out its duties in accordance with this Act and the regulations, or
>
> (b) that the power purchase arrangements or other determinations of the independent assessment team are obviously unreasonable, are not supported adequately by economic analysis or are not in the public interest.
>
> **(3)** The Board may request the independent assessment team to assist the Board in making variations under subsection (2), and on being requested to assist, the independent assessment team shall do so.

20. Thus, the AEUB was required by the *1998 Act* to give public notice of the IAT's submission of the PPAs, and the AEUB's power to vary the PPAs as drafted by the IAT was constrained by the legislation.

21. The AEUB conducted a public regulatory proceeding to inform relevant stakeholders of the draft terms of the PPAs, gather their input, and receive variance requests as provided in the *1998 Act*. On July 12, 1999, it issued a public notice advising interested parties of the IAT report and invited requests for variance to be filed no later than July 29, 1999. Ultimately, 70 requests for variances to the PPAs were received from participants.

22. On August 30, 1999, the AEUB issued Decision U99073, in which it determined that 8 of the 70 variance requests would proceed to a public hearing. None of these 8 variance requests concerned the Change in Law provision at issue in this proceeding.

23. The AEUB published notice of the public hearing by faxing it directly to a list of interested parties and, on September 16, 1999, by placing an ad in the Calgary Herald, the Calgary Sun, the Edmonton Journal and the Edmonton Sun.

24. The AEUB held a public hearing in Calgary from October 13, 1999 to October 20, 1999. Numerous interested parties registered appearances, including:

    a. ATCO Electric;

    b. EPCOR Generation Inc.;

    c. Luscar Ltd.;

    d. Transalta Utilities Corp.;

    e. a consortium of customers, each with separate legal counsel, comprised of the Alberta Urban Municipalities Association, the Alberta Association of Municipal Districts and Counties, the Alberta Cogenerators Council, Municipal Interveners, the Alberta Irrigation Projects Association, the Alberta Federation of REAs, the Public Institutional Consumers of Canada, Independent Power Producers Society of Alberta, Senior Petroleum Producers Association, Industrial Power Consumers Association of Alberta, Consumers' Coalition of Alberta and the City of Calgary;

    f. EBSI Alberta Ltd.; and

    g. the IAT.

25. On December 30, 1999, the AEUB issued Decision U99113, in which it determined that none of the parties had persuaded it that any of the conditions in s. 45.91 were met. Accordingly, it made no variations to the PPAs. However, the AEUB directed the IAT to update certain opening balances and other items in the PPAs to make them consistent with its decision U99099 regarding electric tariff applications.

26. On May 8, 2000, the AEUB issued Order U2000-190, in which it approved the PPAs and other determinations made by the IAT.

27. Both Decision U99113 and Order U2000-190 were duly published and no judicial review proceedings were taken therefrom.

The Change in Law Provisions

28. One of the principal functions of the IAT in determining the PPAs was to allocate costs and risks among PPA Owners, PPA Buyers, and electricity consumers through the Balancing Pool. One such risk was the possibility that a Change in

Law during the Effective Term of the PPAs might affect the Owners' costs of production.

29. The IAT drafted s. 4.3 of the PPAs to provide for this possibility. The overall scheme is set out in the introductory ss. 4.3(a) and (b):

> (a) Subject to the provisions of this Section 4.3, this Arrangement shall be performed by the parties from the Effective Date and throughout the Effective Term in accordance with any Change in Law.
>
> (b) Subject to the provisions of this Section 4.3, the Owner shall be kept in the same financial position in respect of this Arrangement after giving effect to any Change in Law as it would have been had such Change in Law not occurred, and the amounts payable pursuant to this Arrangement shall be subject to adjustment for any Change in Law.

30. Sections 4.3(c) through (i) go on to provide mechanisms by which cost increases payable by the Owners as a result of a Change in Law are to be passed on to the Buyers, who then have the option to absorb the costs or pass them on to consumers through increased prices.

31. However, the PPAs also provided an "exit clause" that was exercisable in circumstances where the cost of complying with a Change in Law was so high that it would make the PPA unprofitable for the Buyer. Section 4.3(j), as drafted by the IAT, reads:

> (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]

32. The purpose of s. 4.3, its role in allocating the risk of new costs among Owners, Buyers, and consumers, and the allocation of unrelated price and market risks were described in the IAT's report submitted to the AEUB on July 9, 1999 along with the PPAs.

33. Like the other provisions of the PPA, s. 4.3(j) was not altered by the AEUB in the public hearing process, and it formed part of the PPAs approved by Order U2000-190.

34. When a Buyer validly exercises the exit clause, the PPA is deemed to have been sold to the Balancing Pool and the Balancing Pool assumes the rights and obligations of the Buyer, in accordance with s. 96(3) of the *2003 Act*.

The August 1, 2000 Letter Amending the Change in Law Provisions

35. Following the AEUB's approval of the PPAs, the PPAs were to be sold in a public auction held in accordance with the *Power Purchase Arrangement Auction Regulation*, Alberta Regulation 85/2000. The first set of auctions commenced on August 2, 2000, and continued over a three week period.

36. Before the auction, on June 26, 2000, the IAT wrote a letter to Larry Charach, Director of the Electricity Branch of the Alberta Department of Resource Development, attaching a set of errata and clarifications to the PPAs that it stated clarify the "obvious intent of PPAs as originally filed" and which were to be "considered as being attached to and forming part of each PPA" ("**First Errata**"). The errata were attached in a spreadsheet and all related generally to errors in formulas and calculations.

37. On July 6, 2000, Neil McCrank, Chairman of the AEUB, wrote to the Minister of the Alberta Department of Resource Development to advise of the First Errata and the need for an amendment to Order U2000-190. This letter noted that:

> During its review of the PPAs the Board recognized a potential for a process whereby parties, with the agreement of the IAT, would identify and correct errors in the PPAs. The Board did not consider that an amendment to its order would be required unless the intent of the PPAs was changed.

38. On July 31, 2000, the IAT wrote a further letter to Larry Charach of the Alberta Department of Resource Development indicating that it had received a number of queries and requests for additional clarification of certain aspects of the PPAs from potential bidders. The IAT indicated that it had prepared responses to the queries which "clarify what we believe to have been the obvious intent of PPAs as originally filed." Again, the IAT requested that the attached errata sheet, which set out the queries and the IAT's clarification of the same ("**Second Errata**") should "be considered as being attached to and forming part of each PPA, as applicable."

39. The Second Errata contained 12 queries. Eleven of the 12 queries contained technical corrections to various aspects of the PPAs, as was the general case with the entirety of the First Errata.

40. However, one query, Query 8, made a much more substantial change to the PPAs, including in respect to the way the IAT described the risk allocation inherent in its July 9, 1999 report. Titled "PPA Section 4.3(j) – Unprofitability of the PPA Due to Change in Law," it read as follows:

Clarification is required of the phrase "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..."

A literal interpretation of this clause could result in a Buyer being precluded from exercising its right to terminate the PPA pursuant to Section 4.3(j) because the Change in Law did not "render" the PPA "unprofitable" where the PPA was already "unprofitable" prior to the Change in Law.

It is proposed that Section 4.3(j) of the PPAs be clarified in a manner that makes it clear 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.

Response:

The IAT has reviewed PPA Section 4.3(j) and confirms that the intention was to provide and [sic] exit provision with no right to or liability for a Termination Payment in the event that a Change in Law rendered a PPA unprofitable *or more unprofitable*. This intention would be made more clear in the PPAs with the insertion of the following (in bold italics) at S4.3(j) of the PPAs:

"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, ***or more unprofitable***, to the Buyer in respect of a Unit, having taken account of any compensation entitlement under Section 4.3(j) 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 in original]

41. Query 8 was the result of an inquiry by or on behalf of Enron, one of the bidders in the PPA auction.

42. On August 1, 2000, the day before the first auction commenced, Neil McCrank, Chairman of the AEUB, wrote the Minister of the Alberta Department of Resource Development (the "**August 2000 Letter**"), referencing the two sets of errata provided by the IAT. He wrote that "without these corrections a number of the equations in the PPAs could be considered to be mathematically insoluble." He noted that:

> ... parties have expressed a wish for greater certainty with respect to the final form of the PPAs....

> ... In these unique circumstances, the Board is prepared to assist parties in determining the final form of the PPAs and the Board's approval of them.
>
> The Board hereby amends Board Order U2000-190 to include the errata/clarifications identified by the IAT in each of its two letters and attachments sent to Mr. L. Charach of the ADRD, dated June 26, 2000 and July 31, 2000 respectively. Both sets of errata/clarifications are to be considered as being attached to and forming part of each PPA.

43. Attached to the August 2000 Letter were two documents:

    a. the June 26, 2000 letter from the IAT to Larry Charach, attaching the First Errata; and

    b. the July 31, 2000 letter from the IAT to Larry Charach, attaching the Second Errata.

44. No public notice was given, and no public hearings held, in respect of the AEUB's consideration of any of the amendments purportedly made by the August 2000 Letter.

45. Although it published Order U2000-190 to approve the PPAs containing the Section 4.3 Change in Law provision as it stood on July 9, 1999, there is no record of the AEUB publishing the August 2000 Letter as an Order of the AEUB or as an amendment to its U2000-190.

The Amendment to the Change in Law Provision was *Ultra Vires* the AEUB

46. The Attorney General seeks a declaration that the part of the August 2000 Letter that purports to amend the Change in Law provision was *ultra vires* the AEUB and therefore void *ab initio*. Unlike the other amendments in the August 2000 Letter, the amendment to the Change in Law provision was not errata, but rather a substantive variance to the PPA which the AEUB could only make if one of the conditions in s. 45.91 of the *1998 Act* was met.

47. The Attorney General submits that none of the conditions set out in s. 45.91(2) of the *1998 Act* were met. Specifically, the original Change in Law provision filed by the IAT and approved by U2000-190 was not obviously unreasonable, was not unsupported adequately by economic analysis, was not contrary to the public interest, and did not reflect a failure of the IAT to carry out its duties in accordance with the *1998 Act* and the regulations. In short, the AEUB made an amendment to the PPAs that it was not authorized by law to make. Accordingly, that amendment was *ultra vires* and void *ab initio*.

48. In the alternative, the Attorney General submits that the reasons provided by the AEUB in the August 2000 Letter are wholly inadequate, and the process by which the AEUB amended the PPAs – completely separate and apart from the public regulatory process – failed to adhere to the most basic requirements of procedural

fairness. While it was proper for the AEUB to dispense with a formal regulatory process in respect of the technical clarifications in the First and Second Errata, it was not so proper in respect of Query 8 in the Second Errata (i.e. the amendment to the Change in Law provision) as this was clearly an important, substantive amendment to not just the rights of the parties to the PPAs, but to the financial and other interests of the electricity consumers and other relevant stakeholders who appeared at the public hearings.

49. The Attorney General submits that consumers of electricity, including the Government of Alberta and other taxpayer-funded entities, stand to be substantially prejudiced if Buyers are able to abandon their obligations under the PPAs by relying on the "amended" Change in Law provision. This would require the Balancing Pool to make ongoing payments to the Owners from the proceeds of marketing the PPA electricity in the stead of the Buyers; however, the shortfall between the payments due to the Owners and the estimated proceeds of sales is estimated by the Government of Alberta to be up to $2 billion between 2016 and the expiry of the PPAs in 2020. If the Balancing Pool cannot recoup the costs of paying the Owners by marketing the power, the costs would be charged to Alberta electricity consumers through surcharges on their bills. This would be true, irrespective of the roughly $11 billion in profit that the Government of Alberta estimates the Buyers collectively made from their PPA operations, and irrespective of how small the cost of the Change in Law in comparison to the current or future losses the Buyers may experience as a result of the market supply and demand risks the IAT intended be allocate to them.

Alberta Regulation 175/2000

50. On August 18, 2000, Alberta Regulation 175/2000 was purportedly filed with the Registrar of Regulations, becoming the *Power Purchase Arrangements Determination Regulation.* It contained the following documents:

    a. AEUB Order U2000-190;

    b. the August 2000 Letter;

    c. the June 26, 2000 letter from Keith Anderson, of the IAT, to Larry Charach, Director of the Electricity Branch of the Alberta Department of Resource Development, containing the First Errata; and

    d. the July 31, 2000 letter from Keith Anderson, of the IAT, to Larry Charach, Director of the Electricity Branch of the Alberta Department of Resource Development, containing the Second Errata, including the amendment to s. 4.3(j) of the PPAs.

51. There was no Order in Council or Ministerial Order enacting Alberta Regulation 175/2000, and the AEUB did not have legislative authority to make regulations or file its orders as regulations.

52. The Attorney General seeks a declaration that Alberta Regulation 175/2000 is *ultra vires* on the basis that:

a. there was no statutory provision authorizing its enactment; and

b. to the extent it contains an amendment to s. 4.3(j) of the PPAs, it is based on the August 2000 Letter which was *ultra vires* the AEUB and is thus void *ab initio*.

The August 2000 Letter was Unknown to the Public and Government Officials at Key Material Times

53. As noted above, the August 2000 Letter was written on the day before the August 2, 2000 commencement of the PPA auction. The Government has no records indicating how bidders were informed of the contents of the August 2000 Letter and its purported implications for the Change in Law provision prior to the bidding on the next day.

54. Participants in the AEUB public hearing process were never notified of the August 2000 Letter and, as noted above, no hearing was held in respect of varying the PPAs as filed by the IAT.

55. The August 2000 Letter was posted to an auction website no earlier than August 3, 2000, after the auction began. The website was taken down on October 1, 2000.

56. On September 20, 2000, the Lieutenant Governor in Council made the *Dispensing with Publication Regulation*, Alberta Regulation 201/2000, which exempted Alberta Regulation 175/2000 from publication, including publication in the Alberta Gazette, which would have resulted in distribution to members of the media and the public.

57. The present Minister of Energy, Minister of Environment and Parks, and Attorney General only became aware of the August 2000 Letter after ENMAX sought to abandon its obligations under the PPA. The concept of the purported "or more unprofitable" amendment was not set out in written or verbal briefings from government officials between May 2015 and the first week of March 2016. The existence of the August 2000 Letter was not communicated to the ministers, by officials of the Government of Alberta or otherwise, until senior government officials first learned of its existence in a mid-March 2016 meeting with the Chief Executive Officer of the Balancing Pool.

The Battle River PPA and the PPA Program have been Profitable for ENMAX to Date

58. The Battle River PPA has proven profitable for ENMAX so far. From its 2006 purchase to 2015, ENMAX is estimated to have realized a net present value (2016) of $1,700,000,000 in gross revenue for a pre-tax earning of $277,000,000,

after paying the $501,000,000 purchase price for the PPA re-selling opportunity and making the required payments to the Owner.

59. The PPA program has proven overall very profitable for ENMAX in respect of its Keephills PPA where it is estimated to have realized a net present value (2016) of $6,464,000,000 in gross revenue for a pre-tax earning of $3,248,000,000 after paying the PPA purchase price of $357,000,000 and making the required payments to the Owner – an investment multiple of 10 times its original PPA purchase price.

ENMAX Contributed to Unprofitability it may Experience in the Future

60. During the term of the 385 megawatt Battle River PPA, ENMAX by its own conduct worsened its prospects of making a profit from the PPA by building and operating its own 800 megawatt gas-fired station. This new generating facility, the largest single unit in Alberta, increased the supply of electricity just as demand began to trend downwards, placing downward pressure on prices that ENMAX and other electricity suppliers could achieve.

The Change in Law Relating to Greenhouse Gas Pricing

61. In July 2007, the *Specified Gas Emitters Regulation* (the "***SGER***") came into force. The *SGER* is a form of greenhouse gas pricing policy, designed to reduce greenhouse gas emissions by internalizing the environmental damage they cause within a market system. Facilities covered under the *SGER* account for roughly half of greenhouse gas emissions in Alberta and have been required since the inception of the *SGER* to reduce their greenhouse gas emissions by a prescribed amount or make a payment to government in lieu of their physical compliance. The 2007 *SGER* has never been claimed or accepted as a Change in Law allowing for the lawful termination of a PPA.

62. On June 25, 2015, the Alberta Government passed the *Specified Gas Emitters Amendment Regulation*, Alberta Regulation 104/2015, which, among other things, increased the operational efficiency requirements on a regulated facility (including Battle River 5) from 12% to 15% (for the year 2016) and to 20% (for the year 2017).

63. On June 30, 2015, a Ministerial Order was issued pursuant to the *Climate Change and Emissions Management Act*, S.A. 2003, c. C-16.7, which increased the cost of contributing to the Climate Change and Emissions Management Fund and obtaining Fund credits from $15 per tonne (for the year 2015) to $20 per tonne (for the year 2016) and to $30 per tonne (for the year 2017).

64. These two changes will not have the effect of rendering ENMAX's performance of the Battle River PPA unprofitable for the balance of the PPA term. The Attorney General estimates on a net present value (2016) basis that the PPA would result in revenue to ENMAX of $307,000,000 between January 1, 2016 and December 31, 2020, while ENMAX is required to pay the Owner

$391,000,000 for the same period. In other words, due to low prices, ENMAX will realize a loss of $84,000,000, even in the absence of the amendments to the *SGER*. The estimated market loss of $84,000,000 is three times greater than ENMAX would pay in the *SGER* cited as its reason for termination.

ENMAX's Termination of the Battle River PPA

65. On December 11, 2015, ENMAX wrote the Balancing Pool and ATCO Power, the Owner of the Battle River generating unit, to advise that it intended to terminate the PPA effective January 1, 2016. It wrote:

> Pursuant to Article 4.3(j) of the Power Purchase Arrangement Thermal for Battle River (the "**PPA**"), ENMAX PPA Management Inc. ("**ENMAX**"), as the Buyer under the PPA, hereby gives notice of its termination of the PPA, effective January 1, 2016, at 12:01 a.m.
>
> ENMAX is terminating the PPA pursuant to Article 4.3(j) on the basis that a Change in Law has occurred that could reasonably be expected to render continued performance by the Parties to the Arrangement for the balance of the Effective Term unprofitable or more unprofitable, for ENMAX. ENMAX makes this determination as a result of:
>
> - the promulgation of amendments to the *Specified Gas Emitters Regulation* ("**SGER**"), which came into force on July 14, 2015, and serviced to changed [sic] emission intensity limits for certain facilities, including Battle River 5, as of January 1, 2016; and
>
> - the changes to the Climate Change and Emissions Management Fund, which increase the costs of carbon as of January 2016, thereby increasing compliance costs for Battle River 5.

66. On January 13, 2016, the Balancing Pool acknowledged the ENMAX letter and advised that it was continuing its investigation, assessment and verification of the extraordinary event claimed by ENMAX.

67. On January 27, 2016, the Balancing Pool wrote ENMAX (the "**2016 BP Decision**"):

> This is to advise you that Balancing Pool has completed its investigation, assessment and verification in respect of the claimed extraordinary event set forth in your letter of December 11, 2015 respecting the Battle River PPA. Balancing Pool has verified the occurrence of the extraordinary event and, correspondingly, confirms your entitlement to terminate the Battle River PPA pursuant to Article 4.3(j) thereof.

68. The Balancing Pool disputed the timing of the termination, and ENMAX subsequently filed an application to this Court (file number 1601-01689) seeking

a declaration that its termination was effective January 1, 2016, and not January 27, 2016, the date of the 2016 BP Decision.

69. The Attorney General seeks to quash the 2016 BP Decision on the grounds that it relied on the amendment to s. 4.3(j) contained in the August 2000 Letter, which was *ultra vires* the AEUB and thus void *ab initio*, and/or the August 2000 Letter purportedly filed as Alberta Regulation 175/2000, which likewise was *ultra vires* and thus void *ab initio*.

70. In the alternative, the Attorney General seeks to quash the 2016 BP Decision on the grounds that:

    a. the Balancing Pool unreasonably calculated the period over which the Change in Law rendered the PPA unprofitable (or more unprofitable) by considering only the five years remaining in the PPA, and not the overall profitability of the PPA over its 14 year duration;

    b. the Balancing Pool unreasonably calculated the unprofitability (or greater unprofitability) based on electricity prices at a single point in time, namely January 1, 2016, rather than assessing it based on probable fluctuations in electricity prices over the duration of the PPA available from various known forward contracts or reputable forecasting sources; and

    c. the Balancing Pool unreasonably failed to properly inquire whether ENMAX's claimed unprofitability was in any part self-inflicted.

Other PPA Buyers are Seeking to Terminate

71. Since the 2016 BP Decision, ENMAX and other PPA Buyers have written the Balancing Pool purporting to terminate the PPAs that they hold and, in ENMAX's case, an additional PPA to the one in question here:

    a. ENMAX, buyer of the Keephills 1 & 2 PPA, wrote the Balancing Pool on May 5, 2016;

    b. TransCanada Energy Ltd., buyer of the Sheerness PPA, wrote the Balancing Pool on March 7, 2016;

    c. TransCanada Energy Ltd., buyer of the Sundance A Units 1 & 2 PPA, wrote the Balancing Pool on March 7, 2016;

    d. ASTC Power Partnership., buyer of the Sundance B Units 3 & 4 PPA, wrote the Balancing Pool on March 7, 2016; and

    e. Capital Power PPA Management Inc., buyer of the Sundance Units 5 & 6 PPA, wrote the Balancing Pool on March 24, 2016.

72. To date, the Balancing Pool has not determined whether these Buyers may terminate their PPAs.

73. If all of these Buyers were permitted to abandon their obligations under the PPAs, even if the Change in Law did not render them unprofitable, the estimated impact on Alberta electrical ratepayers is in the order of $2 billion being the difference between the amounts the Balancing Pool will have to pay to Owners in the stead of Buyers and what the sale of the PPA power will provide to the Balancing Pool in revenues – the shortfall of which will have to be charged to consumers.

Remedy sought:

74. A declaration that the PPA was not amended by the August 2000 Letter, and that s. 4.3(j) reads as follows:

> 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.

75. A declaration that the *Power Purchase Arrangements Determination Regulation*, Alberta Regulation 175/2000, is *ultra vires* and thus void *ab initio*.

76. An order in the nature of *certiorari* quashing the 2016 BP Decision.

77. An order in the nature of *mandamus* referring the subject matter of the 2016 BP Decision back to the Balancing Pool, with directions.

78. An order granting the Applicant's costs.

79. Such further or other orders or directions as this Honourable Court deems appropriate.

Affidavit or other evidence to be used in support of this application:

80. The record to be provided by the Respondent Balancing Pool.

81. Further affidavit evidence to be filed.

82. Such further and other materials as counsel may advise and this Honourable Court may allow.

Applicable Acts and regulations:

83. *Alberta Energy and Utilities Board Act*, S.A. 1994, c. A-19.5.

84. *Electric Utilities Act*, S.A. 1995, c. E-5.5.

85. *Electric Utilities Act*, S.A. 2003, c. E-5.1.

86. *Electric Utilities Amendment Act, 1998*, S.A. 1998, c. 13.

87. *Interpretation Act*, R.S.A. 1980, c. I-7.

88. *Regulations Act*, R.S.A. 1980, c. R-13.

89. Such other acts and regulations as counsel may advise and this Honourable Court may permit.

WARNING

You are named as a respondent because you have made or are expected to make an adverse claim in respect of this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant(s) and against all persons claiming under the applicant(s). You will be bound by any order the Court makes, or another order might be given or other proceedings taken which the applicant(s) is/are entitled to make without any further notice to you. If you want to take part in the application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.