

November 24, 2017

Balancing Pool Must Fulfil its Statutory Obligations

By: Nigel Bankes

Case Commented On: *ENMAX PPA Management Inc v Balancing Pool*, [2017 ABQB 718 \(CanLII\)](#)

In this decision Justice Karen Horner has directed the Balancing Pool (BP) to fulfil its statutory obligations and reach a decision as to whether ENMAX had validly terminated its Keephills Power Purchase Arrangement (PPA) on the basis of the change of law clause in the PPA.

The background to the ongoing PPA dispute in the province is discussed in series of previous posts [here](#), [here](#), [here](#) and [here](#). My most recent post [here](#) discusses Justice Jeffrey's decision in *ENMAX PPA Management Inc v Balancing Pool*, [2017 ABQB 605 \(CanLII\)](#) with respect to the termination of the Battle River PPA. It will be recalled that this was the first PPA to be terminated by notice served in December 2015 and in this case the BP had concluded that ENMAX's termination was effective. That decision by the BP is subject to the Attorney General's application for a declaration and judicial review which application is still outstanding. Indeed, in this decision Justice Horner notes that the matter will not likely come to trial until sometime between July and December 2018.

The current decision deals with ENMAX's *Keephills* PPA. ENMAX delivered its notice to terminate the Keephills PPA in May 2016. Since then the BP has declined to reach a decision on the termination relying in large part on the litigation commenced by the Attorney General referenced above. In this case ENMAX argued that the BP had failed to discharge its statutory obligations and as a result that it was entitled to relief. In particular, ENMAX sought

- (a) an interim injunction compelling the Respondent Balancing Pool to complete and communicate the results of its assessment and verification of ENMAX's Termination Notice ("the Keephills Termination Notice") in respect of the Power Purchase Arrangement for the Keephills Generation Facility ("the Keephills PPA"); and
- (b) an interim injunction compelling the Balancing Pool to take offer and dispatch of Keephills Units 1 and 2 without further delay.

Justice Karen Horner has granted ENMAX's first application and has directed that (at para 48) "an injunction in favour of ENMAX will issue compelling the Balancing Pool to forthwith and in good faith complete and communicate the result of its assessment and verification of the Termination Notice issued on May 5, 2016 by ENMAX in respect of the Keephill's PPA without further delay".

Justice Horner held that since ENMAX's application was an application for mandatory injunction it was necessary that ENMAX establish a strong *prima facie* case rather than simply that there was a serious issue to be tried. But that was hardly difficult (at para 24):

There is no question that that the Balancing Pool is required to conduct an assessment of the Keephills Termination Notice. There is also no question that the Balancing Pool has declined to complete the assessment. Its refusal to do so, pending the outcome of the AG Application, is a breach of its obligation under s. 2(1)(g) of the PPR. ENMAX has a strong *prima facie* case in respect of that breach.

As for irreparable harm, Justice Horner concluded that (at para 28) “the proper test in Alberta is whether the Applicant has established that there is doubt as to the adequacy of damages: *Amoco Canada Petroleum Co. v Southern Gas Co.* (1992), 1992 CanLII 6137 (AB QB), 3 Alta LR (3d) 247, at para. 48; *Catalyst Canada Services v Catalyst Changers Inc.*, 203 ABQB 73, at para. 73.” Seen in that light there was some doubt that damages would provide ENMAX with an adequate remedy given the uncertainties that ENMAX faced in the absence of a decision on the PPA and the complexities associated with Alberta's electricity market. The balance of convenience also favoured ENMAX given the time that would be required to definitively resolve the Attorney General's application. For these reasons it was appropriate to grant ENMAX's request for an injunction. Presumably, mandamus would also have issued for the fulfillment of this statutory duty had that been part of ENMAX's application – and as an aside I puzzle as to why the application was not framed in terms of mandamus.

Justice Horner denied ENMAX's second application for the simple reason that this application is premature. There can be no duty on the BP to assume responsibility for the offer and dispatch of the Keephills units unless the PPA has terminated. Since the BP has yet to reach a conclusion on that point its statutory duty to take over the PPA has yet to be triggered.

In the result then, absent an appeal, the BP will need to reach a decision verifying (or not) ENMAX's notice of termination. But this is hardly likely to deliver the certainty that ENMAX says that it needs since it seems inevitable that either ENMAX or the Attorney General will seek judicial review of the BP's decision. And that application will surely have to stand in line behind the Attorney General's existing application.

This post may be cited as: Nigel Bankes “Balancing Pool Must Fulfil its Statutory Obligations” (24 November, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/11/Blog_NB_Balancing_Pool.pdf

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

