

PPA Terminations and the AESO Tariff

By: Nigel Bankes

Matter Commented On: [Application](#) from the Alberta Electric System Operator (AESO) to the Alberta Utilities Commission (AUC) requesting legal determinations by the AUC under Section 8 of the *Alberta Utilities Commission Act* with respect to system access service for generation from the Keephills facilities, November 24, 2017

The complicated issues surrounding the termination of Power Purchase Arrangements (PPAs) are about to get a lot more complicated. Justice Horner's decision mandating the Balancing Pool to complete its assessment and verification of ENMAX's notice of termination (delivered May 5, 2016) of its Keephills PPA (see *ENMAX PPA Management Inc v Balancing Pool*, [2017 ABQB 718 \(CanLII\)](#) and my post on that decision [here](#)) has triggered an application by the Alberta Electric System Operator (AESO) to the Alberta Utilities Commission (AUC) to have the AUC decide certain questions of law so as to assist the AESO in ensuring the continuation of an appropriate legal framework within which the Keephills facilities will continue to supply power to the Alberta Interconnected System (AIES).

Before describing the application and the background to the application here is how you can get a copy of the application. The link above is to the AUC's Notice of Proceeding in response to the AESO's application. In order to see the application you need to register with the AUC's e-filing system. Don't worry, it's painless; if I haven't said it before, the AUC maintains a wonderful website. Select the e-filing button on the left hand side of the menu on the [AUC's home page](#) and follow the instructions for registration. Once registered, fill in the proceeding number #23138 and access the 12 page application.

What has Triggered the Application?

If the BP follows Justice Horner's instructions (it will) and *if* it accepts the validity of ENMAX's termination notice then the BP will be deemed to own the PPA and ENMAX will no longer hold the PPA. In the ordinary course the new owner of a generating facility (or PPA) would also assume the system access (STS) agreements between the former owner and the AESO and would do so by executing the AESO's *pro forma* Assignment, Assumption and Novation Agreement (AA&N Agreement). The BP has indicated that it will not do so apparently because of concerns that if it does so it will, or may, incur historic liabilities associated with the ongoing line loss proceedings before the AUC. For discussion of that equally complicated issue see previous posts [here](#) and [here](#). The BP has offered some alternatives including termination of the existing STS agreements and the execution of new ones. The AESO is unclear as to whether it has the authority to terminate the existing agreements.

The AESO is also concerned that the Keephills facilities must continue to be able to provide power to the AIES since otherwise (Application at para 32) the AESO anticipates that it will need to shed load. The AESO has indicated that it will put in place some interim arrangements in the form of amended rules to ensure that the Keephills units can be kept on-line even absent STS agreements but it has also indicated in this application that it prefers a contract-based solution for the longer term. In order to assist it in that endeavor it is asking the Commission to exercise its authority under s 8 of the *Alberta Utilities Commission Act*, [SA 2007, A-37.2](#) to “hear and determine” the following legal questions (Application at para 41):

- (a) In the event that the Balancing Pool verifies that the Keephills PPA has been terminated, would the Balancing Pool have a legally enforceable obligation to enter into the AESO’s pro forma AA&N Agreement regarding the ENMAX STS Agreements?
- (b) In the event that the Balancing Pool verifies that the Keephills PPA has been terminated, does ENMAX’s lack of eligibility to obtain system access service under Rate STS for the Keephills Units 1 and 2 mean that ENMAX has failed to comply with the ISO tariff, such that the AESO may lawfully terminate the ENMAX STS Agreements in accordance with subsection 4(1) of Section 2 of the ISO tariff?
- (c) In the event that the Balancing Pool verifies that the Keephills PPA has been terminated, are the ENMAX STS Agreements “discharged” as a result of the AESO and ENMAX having completed performance of their obligations under the STS Agreements?
- (d) In the event that the Balancing Pool verifies that the Keephills PPA has been terminated, are the ENMAX STS Agreements terminated as a result of the doctrine of frustration because performance by the AESO to provide system access service under Rate STS to ENMAX and for it to accept such service is rendered impossible?
- (e) In the event that the answer to any of (b), (c) or (d) is “yes”, is the AESO legally permitted to enter into new STS Agreements with the Balancing Pool for the Keephills Units 1 and 2?

The only clear winners in all of this are the members of Alberta’s energy regulatory bar who must be relishing these additional complexities. An early Christmas present methinks.

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