April 24, 2018

Applications for Party Status in a Permission to Appeal Application

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Bill Commented On: *Balancing Pool v ENMAX Energy Corporation*, 2018 ABCA 143 (CanLII)

This decision deals with applications by two parties (the Balancing Pool and TransAlta) to be accorded party status (or, failing that, intervenor status) in permission to appeal applications launched by TransCanada Energy, ENMAX and Capital Power relating to one aspect of the long-running line loss proceedings before the Alberta Utilities Commission (AUC). Justice Paperny's decision on these preliminary matters merits reporting on ABlawg for two reasons. First, it provides an example of a Court taking the unusual step of granting party status in relation to that most preliminary of applications, a permission to appeal application (rather than at the subsequent stage where leave has been granted). Second, it provides an opportunity to update the status of the line loss file (AUC Proceeding 790).

ABlawg hosts several posts on the line loss matter, here, here and here. To provide context this post begins with a succinct summary taken from Justice Paperny's judgment (at paras 4 & 5):

> The AUC [line loss] proceedings unfolded in two phases: Phase 1 to determine if the rule contravened transmission regulations; and Phase 2 to determine what remedy was available. In Phase 1, a majority of the AUC panel determined that the AESO line loss rule that had been in place between January 1, 2006 and December 31, 2016 (the historical period) was contrary to the legislative regime and unlawful.
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> Phase 2, the consideration of remedy, proceeded in three modules. Module A considered whether the AUC could order a remedy to address payments made pursuant to the unlawful line loss rule. In Module B, the AUC heard proposals for a new line loss methodology to replace the unlawful line loss rule. In Module C, the AUC selected what methodology should be used for determining loss factors, and decided to whom revised invoices for line loss charges or credits for the historical period should be issued. In the Module C decision (Decision 790-D06-2017) [the subject of a post here], the AUC directed the AESO to re-issue invoices for line loss charges or credits to those parties that held Supply Transmission Service (STS) contracts when the charges or credits were first incurred [rather than to the current holder of the STS contracts]. This has been referred to as the Invoicing Issue ….

The Invoicing Issue as developed by the AUC turned in large part on the applicability (or not) of a provision of the AESO's tariff (s 15(2)) to this scenario. The present decision involved applications for party status in relation to permission to appeal applications launched by ENMAX, Capital Power and TransCanada with respect to the Phase 2, Module C, Invoicing

Issue contending that the AUC erred in law in concluding that s 15(2) of the tariff was inapplicable.
Justice Paperny granted the Balancing Pool's application for party status at the permission to appeal stage but denied that of TransAlta's (although with leave (at para 27) to TransAlta to renew its application should leave be granted).
The joinder test was formulated most recently by Justice Hunt in *Carbon Development Partnership v Alberta (Energy and Utilities Board)*, 2007 ABCA 231 (CanLII) at para 9:

> ... The joinder test is whether or not the applicant has a legal interest in the outcome of the proceeding. If so, there are two different sub-tests. The first is whether it is just and convenient to add the applicant. The second is whether or not the applicant's interest would only be adequately protected if it were granted party status.

In light of this, the principal reason for judicial reticence in granting an application for party or intervenor status at such a preliminary stage is simply that at this stage it is difficult to know how an applicant's interest will be affected unless and until permission is granted.

In this particular case however the Balancing Pool was in a unique position since it had only recently assumed significant responsibility for line losses associated with generating units encumbered by power purchase arrangements (PPAs) when those PPAs were "terminated" by the PPA buyers pursuant to the change of law clause. All of the disputes surrounding the validity of those terminations have now been settled (see the PPA settlement post here). The Balancing Pool was in a unique position because its assumption of responsibility resulted from what was effectively a statutory assignment or novation that afforded it no opportunity to bargain for the treatment of any possible contingent liabilities (see discussion of some these issues in a separate but related post entitled "PPA Terminations and the AESO Tariff"). Justice Paperny put it this way (which almost prompts me to write another post about the death of the definite article) at paras 24 – 25):

> Balancing Pool has satisfied me that it should be added as a named respondent to the permission to appeal application. Proceeding 790 has been a long, drawn out process. Balancing Pool was not a complainant at the outset of the proceedings because its legal and financial interests at that point were either undetermined, unknown or non-existent. That it will be materially and directly affected by the decision was largely a result of its late acquisition of STS contracts. Its rights and obligations, and its submissions before the AUC, were very much part of the Module C proceedings. That it is not named as a respondent is reflective of the manner in which the proceedings unfolded rather than a lack of legal interest or standing.
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> I am satisfied that extraordinary circumstances within the meaning of *Carbon* have been demonstrated in the case of Balancing Pool. As noted, Balancing Pool is currently a holder of a large number of STS contracts and as such is specifically and directly interested in the matter at issue. Moreover, Balancing Pool acquired these contracts through the operation of statute rather than by commercial negotiation, which affords Balancing Pool a distinct legal and

> commercial perspective relative to the other parties. Balancing Pool is a statutory entity funded by Alberta's energy consumers, and represents distinct and broad interests compared to the named parties. Accordingly, Balancing Pool is positioned to provide a unique perspective to this Court in the permission to appeal applications. Balancing Pool's contributions to the permission to appeal applications will not cause undue delay or inconvenience, as they have agreed to be bound by the time lines and page constraints already in place. Accordingly, Balancing Pool's application to be added as a respondent is granted.

This is all pretty convincing although I find it hard to imagine how any submissions from the Balancing Pool will persuade a Court *not* to grant permission for an appeal on a set of issues that do seem to involve important and substantial questions of law (and that is the principal issue on a permission application – not the merits). That said, I acknowledge that the Balancing Pool's submissions may have some impact on the manner in which the questions are framed and that that itself is significant enough to justify joinder.

Justice Paperny dealt more summarily with TransAlta's application—perhaps because she was convinced by the opposing submissions (at para 18) which emphasised that TransAlta's interests as a former PPA owner were already well represented by ATCO which was listed as a respondent. That was sufficient to reject (at least at this stage in the proceedings) TransAlta's application.

Finally, to review the status of the overall proceedings, the Court (or at least a single judge of that Court) will hear the permission applications in the Module C matters together with earlier applications for permission to appeal in relation to Module A matters. In total there are (at para 28) "twelve applications for permission to appeal in these proceedings brought by seven different parties with distinct grounds of appeal."

This post may be cited as: Nigel Bankes "Applications for Party Status in a Permission to Appeal Application" (24 April, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/04/Blog_NB_Party_Status.pdf

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