QUÉBEC

RÉGIE DE L'ÉNERGIE

R-3669-2008

HYDRO-QUÉBEC

Demanderesse;

et

UNION DES MUNICIPALITÉS DU QUÉBEC (UMQ)

et

Autres intervenants dont les noms apparaissent ci-après

Devant les régisseurs :

Richard Carrier
Lucie Gervais
Jean-François Viau

ARGUMENTATION ÉCRITE DE L'UNION DES MUNICIPALITÉS DU QUÉBEC (UMQ)

Autres intervenants :

- Association coopérative d'économie familiale de Québec (ACEFQ);
- Énergie Brookfield Marketing s.e.c. (EBM);
- Groupe de recherche appliquée en macroécologie (GRAME);
- Newfoundland and Labrador Hydro (NLH);
- Ontario Power Generation Inc. (OPG);
- Regroupement national des conseils régionaux de l'environnement du Québec (RNCREQ);
- Stratégies énergétiques et Association québécoise de lutte contre la pollution atmosphérique (S.É./AQLPA);
- Union des consommateurs (UC);

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I. LE CONTEXTE DE LA PRÉSENTE CAUSE TARIFAIRE

1. La présente phase de la cause tarifaire (HQT R-3669-2008 Phase 2), initiée par une demande d'Hydro-Québec TransÉnergie (ci-après « le Transporteur »), revêt un caractère particulier en ce qu'elle porte sur les modifications des Tarifs et conditions du transport d'énergie électrique alors que sont survenues des modifications importantes de la réglementation aux États-Unis;

2. En effet, la *Federal Energy Regulation Commission* (ci-après la « FERC ») états-unienne adoptait, au mois de février 2007, l'Ordonnance 890 qui modifiait substantiellement l'Ordonnance 888 qui l'avait précédée;

3. La présente cause tarifaire est donc la première occasion, depuis l'adoption de l'Ordonnance 890 de la FERC, où le Transporteur désire intégrer à ses Tarifs et conditions les éléments pertinents de cette Ordonnance 890 et ses sous-ordonnances 890A, 890B, 890C et 890D;

4. La Régie est donc appelée à se pencher sur l'incidence de cette Ordonnance 890 sur les Tarifs et conditions du Transporteur;

II. LE CADRE LÉGAL APPLICABLE

5. Créée par la *Loi sur la Régie de l'énergie* (L.R.Q., c. R-6.01, art. 4), la Régie de l'énergie (ci-après « la Régie ») exerce sa compétence en la présente cause tarifaire de façon à concilier l'intérêt public, la protection des consommateurs et le traitement équitable du transporteur d'électricité et des distributeurs (art. 5 L.R.é.);

6. Dans le respect de sa mission, la Régie doit favoriser la satisfaction des besoins énergétiques du Québec, dans une perspective de développement durable et d'équité, tant au plan individuel qu'au plan collectif (art. 5 L.R.é.);

7. Cela dit, créée par le législateur québécois, pour répondre au besoin de la collectivité québécoise, la Régie doit d'abord et avant tout être guidée par sa loi constitutive et les particularités du contexte québécois de la production d'électricité;

8. À ce titre, l'article 49 L.R.é., dont plus particulièrement le sous-paragraphe 7°, doit ici trouver application :

> « **49.** Lorsqu'elle fixe ou modifie un tarif de transport d'électricité ou un tarif de transport, de livraison ou d'emmagasinage de gaz naturel, la Régie doit notamment:
>
> [...]
>
> 7° s'assurer que les tarifs et autres conditions applicables à la prestation du service sont justes et raisonnables ;
>
> [...]. »

9. Cet article impose le cadre légal formel d'intervention et d'analyse auquel la Régie doit se conformer;

10. On rappellera ainsi, d'entrée de jeu, que le Transporteur, corporation publique québécoise, n'est pas sujet à la juridiction de la FERC, de même que ses Tarifs et conditions n'ont pas à être soumis à la FERC, ni approuvés par cette dernière;

11. Néanmoins, évoluant dans le marché nord-américain de l'énergie, lequel tend vers l'intégration et la convergence, le Transporteur ne peut faire abstraction de la réalité nord-américaine, ni ignorer les décisions des autres organismes de régulation de ce marché, particulièrement en ce qui concerne l'évolution de la réglementation aux États-Unis;

12. C'est donc dans ce contexte nord-américain d'intégration, de convergence et de réciprocité des marchés de l'énergie que l'Ordonnance 890 et ses sous-ordonnances 890A, 890B, 890C et 890D de la FERC sont susceptibles d'influer sur les Tarifs et conditions du Transporteur;

13. La Régie a d'ailleurs déjà fait mention qu'« un grand nombre de modifications proposées par le Transporteur sont justifiées par leur conformité à ces ordonnances » (Décision de la Régie D-2008-116, p. 6) ;

14. Pour l'essentiel de nos propos, l'Ordonnance 890 vise les objectifs suivants : (1) renforcer les tarifs OATT de façon à restreindre les occasions de discrimination indue, (2) accroître la transparence des règles gouvernant la planification et l'utilisation des réseaux de transport ;

15. L'enjeu de la présente cause tarifaire consiste donc à analyser en quoi les modifications proposées par le Transporteur à ses Tarifs et conditions intègrent adéquatement les éléments pertinents de l'Ordonnance 890, tout en respectant les spécificités du contexte québécois, la protection de la charge locale et dans le respect de la juridiction de la Régie ;

16. Voilà le contexte général dans lequel l'intervention de l'UMQ en la présente cause tarifaire s'inscrit ;

III. PRÉSENTATION DE L'UMQ

A) *L'organisme*

17. Créée en 1919, l'UMQ représente des municipalités de toute taille se trouvant dans toutes les régions du Québec;

18. L'UMQ est le reflet de la mosaïque municipale québécoise constituée des régions, des grandes villes, de villes d'agglomération, de municipalité de centralité, de municipalités rurales, de communautés métropolitaines, de municipalités régionales de comté et de régies intermunicipales;

19. L'UMQ comprend pour de deux cent membres issus exclusivement du monde municipal qui regroupent près de 80% de la population québécoise et qui gèrent 90% des budgets municipaux québécois;

20. La mission de l'UMQ est de faire valoir les intérêts et de représenter tous et chacun de ses membres auprès des autorités gouvernementales et des diverses instances décisionnelles partout à travers la province;

21. Ses objectifs sont notamment de contribuer au progrès économique et social de ses membres tout en favorisant leur autonomie ainsi que la mise en œuvre de partenariats souples et variés visant à assurer leur dynamisme et leur performance dans leur gestion des fonds publics;

22. Devant la Régie, l'intervention de l'UMQ a été accueillie, à titre de représentant du monde municipal, dans plusieurs dossiers portant sur la tarification et les programmes d'Hydro-Québec;

23. S'agissant de concilier l'intérêt public et de jauger des besoins énergétiques du Québec, dans une perspective de développement durable et d'équité, tant au plan individuel qu'au plan collectif (art. 5 L.R.é.), la perspective de l'UMQ, représentant de corps publics municipaux à l'échelle du territoire québécois, est certainement de nature à éclairer la Régie dans les décisions qu'elle doit prendre en la présente cause tarifaire, cela soumis respectueusement;

B) *L'intérêt dans la cause tarifaire*

24. L'intérêt de l'UMQ à la présente cause tarifaire émane notamment du fait que certaines municipalités membres sont actives dans la production d'électricité à partir des sources dites intermittentes, plus spécifiquement la source éolienne;

25. Depuis l'adoption par la FERC des ordonnances 888 et 889, la proportion d'électricité produite ou à être produite à partir de sources intermittentes a sensiblement augmenté;

26. À cette fin, certains aménagements et précisions proposés par la FERC dans l'Ordonnance 890 et ses sous-ordonnances ont notamment pour but de revoir certaines dispositions du *pro forma* OATT (Ordonnance 888) qui pourraient permettre à des Transporteurs de discriminer les nouvelles sources commerciales de production, dont les sources intermittentes;

27. En outre, la FERC voulait encourager la production d'électricité à partir de sources intermittentes;

28. Aussi, elle a prévu divers mécanismes tels la réallocation des ressources, le service ferme conditionnel et elle a soustrait les ressources intermittentes du palier le plus punitif pour les écarts de livraison;

29. C'est pourquoi, au cours de la présente cause tarifaire, l'UMQ avait notamment pour objectif d'examiner comment le Transporteur propose de transposer, dans ses Tarifs et conditions, les dispositions du *pro forma* OATT qui visent à non seulement empêcher l'exercice de toute discrimination indue mais aussi à promouvoir le développement des sources intermittentes de production d'électricité;

30. Par ailleurs, l'UMQ compte parmi ses membres des consommateurs important dans toutes les classes de tarifs généraux;

31. Aussi, en raison de l'importance manifeste de la présente cause tarifaire pour la charge locale, l'UMQ désirait s'assurer que :

    a. Les modifications soient compatibles avec les exigences de fiabilité du réseau avec, le cas échéant, des dispositions susceptibles de décourager les comportements inappropriés;
    b. Les modifications ne transfèrent pas les coûts engendrés par une catégorie de clients à une autre catégorie;
    c. Les risques librement assumés par une catégorie de clients ainsi que les implications soient en tout temps supportés par cette même catégorie;

32. De façon générale et sous réserve des commentaires qui suivent, l'UMQ se montre satisfaite à l'égard des propositions présentées et modifications proposées par le Transporteur à ses Tarifs et conditions;

IV. ANALYSE ET COMMENTAIRE DES MODIFICATIONS PROPOSÉES PAR LE TRANSPORTEUR À SES TARIFS ET CONDITIONS

A) *Le cadre d'analyse*

I. Mise en contexte de l'ordonnance 890

33. L'ordonnance 890 de la FERC représente un amendement à l'ordonnance 888[1];

34. L'ordonnance 890[2] vise essentiellement à remédier aux occasions de *discrimination indue* dans la fourniture d'un service de transport d'énergie électrique et, par voie de conséquence, à remédier aux manquements à l'OATT *pro forma* établi par l'ordonnance 888;

35. Les ordonnances 890A, 890B et 890C et 890D constituent des réponses de la FERC à des demandes de révision ou de clarification de l'ordonnance 890;

36. L'Ordonnance 890 introduit une série de réformes, dont les suivantes :

- Plus grande transparence et cohérence (« *consistency* ») dans le calcul de l'ATC;
- Processus de planification ouvert, transparent et coordonné à la fois au niveau tant régional que local;
- Réforme des pénalités pour les déséquilibres en énergie et en puissance;
- Adoption d'une composante «ferme sous condition» au service de point à point à long terme et réforme des exigences actuelles pour la fourniture du service de réallocation;
- Réforme de la politique des droits de renouvellement;
- Réforme et clarification accrue dans les secteurs qui ont généré des disputes récurrentes tels : les droits de renouvellement, la réallocation des ressources de production;
- Clarification d'autres ambiguïtés dans le tarif;
- Accroître la transparence et l'accès à l'information du client;

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[1] Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

[2] Preventing Undue Discrimination and Preference in Transmission Service, OrderNo. 890, 72 FR 12,266 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007) (OrderNo. 890).

37. Ces réformes sont autant d'éléments susceptibles d'influer sur les Tarifs et conditions du Transporteur, mais toujours dans le respect de la spécificité du contexte québécois;

II. Applicabilité de l'ordonnance 890 à la situation québécoise

38. C'est pourquoi il convient de déterminer jusqu'à quel degré l'Ordonnance 890 de la FERC doit influer sur les Tarifs et conditions du Transporteur;

39. Tel que précédemment mentionné, le Transporteur n'est pas assujetti à la juridiction de la FERC;

40. Néanmoins, le Transporteur ne peut agir en autarcie puisque ses Tarifs et conditions peuvent entraîner des répercussions sur les activités de vente d'électricité aux États-Unis de Hydro-Québec Production ou de ses filiales si les standards de « réciprocité » et de « comparabilité » de la FERC ne sont pas rencontrés;

41. Plusieurs décisions de la FERC ont déjà examiné dans quelle mesure les Tarifs et conditions (OATT) des entités « étrangères » aux Etats-Unis répondaient aux exigences « réciprocité » et de « comparabilité » des Ordonnances 888 et 890 et les sous-ordonnances;

42. Ces décisions constituent parfois des analyses s'inscrivant dans le cadre d'application de l'Ordonnance 888, mais les principes qui y sont énoncés valent tout autant sous l'égide de l'Ordonnance 890;

43. Ainsi, dans la décision *H.Q. Energy Services Inc.*, la FERC s'est prononcée sur le degré de « comparabilité » à atteindre :

Onglet 1 : H.Q. Energy Services Inc., 125 FERC 61,140 (2008), par. 16:

> « 16. The Commission requires in cases where a market-based rate seller is a foreign utility or is affiliated with a foreign utility that owns, operates, or controls transmission facilities outside of the United States and is interconnected with the United States to demonstrate that comparable, non-discriminatory access is offered on those facilities so that competitors of the seller may reach United States markets. »

44. Cela dit, dans la décision *Ontario Hydro Interconnected Markets Inc.*, la FERC a eu l'occasion de rappeler en quoi elle s'intéresse aux activités de transport d'Hydro-Québec:

Onglet 2 : *Ontario Hydro Interconnected Markets Inc.*, 83 FERC 61,348 (1998), p. 3:

> « We explained that Hydro-Québec's transmission facilities were relevant to our analysis of transmission market power and that :
>
> > [t]he fact that these transmission facilities are located in Canada does not diminish the possibility that Energy Alliance's competitors may require transmission service from Hydro-Quebec to reach United States markets. The Commission's concern is not transmission service to serve Canadian loads – it is transmission to serve United States load. Entities may wish to locate in Canada, but sell to United States utilities, or entities may wish to market Canadian power in the United States, and they may require Hydro Quebec's transmission service in order to do so. (73 FERC at 61,030). »

45. Appelée à évaluer les normes en vigueur au Canada, par rapport aux exigences qui ont cours aux États-Unis, la FERC se montre ouverte à toute une variété d'approches tant et aussi longtemps qu'elle est en mesure de considérer que le transporteur canadien offre une accès non-discriminatoire à son réseau de transmission de sorte que ce réseau peut effectivement être utilisés par les différents compétiteurs du marché de l'énergie pour atteindre le marché états-unien :

Onglet 3 : *TransAlta Enterprises Corporation*, 75 FERC 61,268, 61,875 (1996), p. 3;

46. Par ailleurs, la FERC prend soin de souligner qu'elle n'a pas à s'ingérer dans la détermination des normes gouvernant les Tarifs et conditions pour l'ensemble du Canada, particulièrement dans un contexte de marché strictement canadien, mais qu'elle sera concernée dès qu'il est question du marché états-unien :

Onglet 4 : *H.Q. Energy Services (U.S. Inc.)*, 79 FERC 61,152 (1997), p. 6:

> « In prior market-based rate cases involving power marketer affiliates of Canadian utilities, the Commission has applied the same general standards that we use for reviewing requests for market-based rates by power marketers affiliated with United States utilities. In Energy Alliance, for example, we stated that the marketer must be able to show that its transmission-owning utility affiliate offers non-discriminatory access to its transmission system that can be used by competitors of the power marketer to reach the United States. We added, however, that we would consider a variety of approaches when dealing with the market power of foreign utility affiliates of United States marketers. In

> Powerex, although we rejected the marketer's application for failure to demonstrate mitigation of transmission market power, *we emphasized that the Commission, while wishing to assure reciprocal service into and out of Canada when Canadian entities seek access to United States markets, does not intend to open intra-Canadian electric markets by imposing open access tariffs for transactions wholly within Canada. Moreover, the Commission stated that it would determine on a case-by-case basis what tariffs, other than the Open Access Rule pro forma tariff, would satisfy our concerns, i.e., be consistent with our comparability principles.*» [Soulignés dans l'original, nos italiques; références omises]

47. Bref, selon la jurisprudence établie, le standard de « comparabilité » est soumis à une appréciation au cas par cas qui tienne compte des aspects significatifs, le tout permettant le respect des particularités et du contexte du marché interne;

48. Il appert ainsi que la FERC peut tolérer des déviations de l'OATT *pro forma* en autant que de telles déviations soient compatibles (« *consistent with* ») ou supérieures (« *superior to* ») à cette dernière;

49. Par conséquent, l'analyse de la « comparabilité » ne doit pas nous conduire à rechercher des libellés parfaitement identiques entre les Tarifs et conditions du Transporteur et l'OATT *pro forma*, même s'il va de soi que la similarité des textes sur les éléments essentiels assure et rassure sur la comparabilité de ceux-ci d'une juridiction à l'autre;

B) *Rappel des principes privilégiés par l'UMQ*

50. Le principe de la « séparation fonctionnelle » guide la position de l'UMQ dans l'examen des propositions du Transporteur notamment quant à la réallocation des ressources ainsi que dans son examen des frais pour les services de compensation d'écart de réception et de livraison;

51. De même, l'UMQ soutient qu'il y a lieu de favoriser la compétitivité sans que les privilèges accordés aux uns se fassent au détriment de la charge locale, de sorte que :

    - si déséquilibre il y a, celui qui crée un tel déséquilibre doit en supporter les conséquences;
    - les règles retenues doivent favoriser l'uniformité (« *consistency* ») et la transparence (« *transparency* ») dans le calcul des ATC;
    - les conditions de crédit et autres conditions doivent être rigoureux, mais justes et constants d'une situation à l'autre;

52. Voyons maintenant les éléments de convergences entre les propositions du Transporteur et les positions de l'UMQ;

C) *Les éléments de convergence*

53. Pour tous les thèmes pour lesquels l'UMQ ne se prononce pas formellement, c'est qu'elle s'en remet à la discrétion de la Régie dans son appréciation des modifications proposées par le Transporteur à ses Tarifs et conditions;

54. Sur le **Thème 2** (Uniformité et transparence pour le calcul de la capacité de transfert disponible), l'UMQ appuie la proposition du Transporteur quant aux modifications apportées à l'Appendice C-1 concernant la coordination des ATC avec les réseaux voisins en vue de se conformer à l'obligation de conformité (« *consistency* ») de la FERC :

- Pièce C-11-26, Complément de preuve de l'UMQ, 23 septembre 2010;
- Témoignage de Louis-Renault Rozéfort en chef, N.S., vol. 14, 15 février 2011, p. 190 (ligne 14) à la p. 194 (ligne 8) ;

55. Sur ce sujet, l'UMQ souligne l'opinion de l'organisme de réglementation de la Colombie-Britannique (BCUC) – qui donne ici le point de vue d'un régulateur canadien – selon lequel :

- Les entités voisines doivent tenir compte des contraintes de part et d'autre d'une interconnexion quand elles calculent les ATC ou les *Available Flowgate Capacity* (AFC);
- Les entités voisines doivent tenir compte des contraintes de part et d'autre d'une interconnexion quand elles approuvent les réservations pour un service de transport ;

Onglet 5 : *In the matter of a complaint by Transcanada Energy ltd. regarding the service agreement with British Columbia Transmission Corporation for long term firm point to point transmission service*, (September 10, 2009) Order Number G-103-09 (BCUC), p. 32:

> « The Commission Panel is of the view that FERC principles do support allowing a transmission provider to consider constraints in adjoining areas when calculating ATC. *The distinction as between achieving "consistent" and "identical" ATC values on either side of an interface does not, in the Panel's view, support the proposition that the value on the other side of an interface need not be considered at all in determining ATC for long term firm capacity.* Rather, the Commission Panel acknowledges that in real time the ATC values must necessarily be identical, (see, for example evidence of BCTC T3: 342) for reliability purposes, but is of the view that consistency is a sufficient goal for the longer term. In the event that the Commission Panel is found to be incorrect, and it is determined that FERC principles are inconsistent with such an approach, the Panel is still of the view that, in the particular circumstances of this case, in this jurisdiction, it is incumbent upon BCTC to take the constraints on the Alberta system into account when determining long term

firm ATC on its system. As noted above, BCTC must consider and abide by the import limits into Alberta in real time. » [Nos italiques]

56. Sur le **Thème 4** (Écarts de réception et de livraison), l'UMQ est d'avis qu'il y a lieu d'accepter le prix de référence proposé par le Transporteur, puisque, dans une très large mesure, le prix de référence répond aux exigences que doit considérer la Régie :

    - Pièce C-11-17, Mémoire de l'UMQ, 19 juin 2009, p. 10 ;

57. En outre, dans un contexte de séparation fonctionnelle, le Transporteur ne dispose pas de ressources de production;

58. Si la Régie devait cependant décider que les prix offerts par le Producteur ne répondent pas à la définition de coûts incrémentiels et décrémentiels envisagés par la FERC, l'UMQ est d'avis que les coûts échoués devraient être alloués à ceux qui sont responsables du déséquilibre ;

59. Subsidiairement, l'UMQ demande à la Régie de réitérer que tous les coûts non recouvrables découlant de l'option des Tarifs et conditions, y compris ceux découlant d'une divergence entre la formule de prix pour le service de compensation d'écarts (SCE) et le coût d'acquisition de ces services, seront traités ultérieurement, selon les dispositions des articles 26 et 34.5 des Tarifs et conditions;

    - Interrogatoire de Louis-Renault Rozéfort par le Président Richard Carrier, N.S., vol. 14, 15 février 2011, p. 195 (ligne 25) à la p. 197 (ligne 23) ;

60. De l'avis de l'UMQ, cette question devrait faire l'objet d'une proposition spécifique et être traitée ultérieurement dans un autre forum suivant les articles 26 et 34.5 des Tarifs et conditions;

    - Interrogatoire de Louis-Renault Rozéfort, N.S., vol. 14, 15 février 2011, p. 194 (lignes 10 à 25) et p. 195 (lignes 1 à 6) :

      « Il y a un autre petit élément de la preuve de UMQ, c'est la C-11-17; c'étaient les annexes 4 et 5, je pense. Un point sur lequel l'UMQ, je pourrais dire, a une difficulté, c'est que le Transporteur dit: « Si jamais la Régie devait fixer des formules de prix qui diffèrent des formules de prix qui sont offertes par le producteur, le manque à gagner serait récupéré de l'ensemble de la clientèle. » Là, j'ai dit: « O.K., minute là, on va arrêter ça, on décidera plus loin. » Parce que je pense que dans les articles 26 et 34.5, les articles disent que finalement tous les coûts non recouvrables seront soumis à l'examen de la Régie. Je me suis dit: « Arrêtons ça là. La Régie peut décider ce qu'elle veut dans cette cause-là, on décidera dans une tarifaire à qui vont devoir aller ces coûts-là, ne décidons pas tout de suite à qui vont devoir aller les coûts. » »

61. Le Transporteur, dans sa plaidoirie (argumentation écrite du Transporteur sur le Thème 4, par. 130), ne juge pas prématurée la reconnaissance d'un compte d'écart tel que proposé considérant que la présente demande tarifaire constitue le forum approprié afin de traiter de ce sujet découlant de l'application de la tarification du SCE;

62. Avec égards, l'UMQ maintient sa position : elle ne conteste pas que la Régie soit le forum approprié pour traiter de ces questions, mais il n'en demeure pas moins que celles-ci sont, pour le moment prématurées ;

63. Sur le **Thème 9** (Service ferme conditionnel et nouvelle répartition de la production), l'UMQ constate avoir fait évoluer le point de vue du Transporteur et elle s'en réjouit ;

64. En effet, dans une première version de sa preuve, le Transporteur se donnait une obligation de faire la réallocation des ressources, cette obligation pouvant même laisser supposer qu'il pourrait « accaparer » les ressources de sa zone de réglage ;

65. La version maintenant proposée des Tarifs et conditions reconnaît que le Transporteur ne possède pas de ressources et qu'il effectue donc la nouvelle répartition à partir des ressources situées dans sa zone de réglage, sous réserve de l'obtention du consentement du propriétaire des ressources concernées :

    - Pièce C-11-26, Preuve de l'UMQ, 23 septembre 2010, p. 4 ;

66. De l'avis de l'UMQ, le Transporteur n'a pas obligation de faire une réallocation des ressources, à moins de le faire à partir de ses propres ressources ;

67. L'UMQ juge cependant impératif de mentionner qu'elle est également d'opinion que l'article 15.4 des Tarifs et conditions tel que proposé par le Transporteur ne prévoit pas que le client peut faire une réallocation à partir de ses propres ressources, ce que la FERC prévoit explicitement ;

    - Pièce C-11-26, Preuve de l'UMQ, 23 septembre 2010, p. 5 ;

D) *Les éléments de divergence*

68. Sur le **Thème 11** (Acquisition du service de transport : délais pour études d'impacts, prolongation pour commencement du service et priorité des réservations), l'UMQ prend acte de l'engagement numéro 5 du Transporteur dans le cadre de l'audience tenue du 18 au 27 octobre 2010, à savoir qu'à propos de la notion des « états de préconfirmation » il se montre ouvert pour harmoniser davantage le texte de l'article 14.2 des Tarifs et conditions à celui de l'article 13.2 ;

    - HQT-41, Document 1, p. 4 ;

69. L'UMQ invite la Régie à exercer sa discrétion à ce sujet, si elle le juge appropriée ;

70. Quant au **Thème 15** (Solvabilité (Appendice L)), l'UMQ constate qu'il subsiste quelques divergences entre sa position et celle privilégiée par le Transporteur, ceci méritant quelques commentaires ;

71. Ainsi, au paragraphe 18 de son argumentation écrite sur ce thème, le Transporteur fait valoir, à propos de l'UMQ :

    > « 18. L'UMQ s'interroge plus particulièrement sur les raisons pour lesquelles certaines dispositions de l'Appendice L prévoient un délai de trois jours pour remédier à un défaut (articles 5 et 11.4 des Tarifs et conditions), alors que d'autres dispositions prévoient un délai de cinq jours pour fournir de nouvelles garanties suite à une modification des conditions de crédit par le Transporteur (articles 7 et 11.2 des Tarifs et conditions) :
    >
    > - Contre-interrogatoire de Marie-Claude Lalande et Sylvain Clermont par Me Jean-François Girard, N.S., vol. 7, 27 octobre 2010, p. 134 (lignes 2 à 18) ; »

72. Qu'il nous soit permis de rectifier : l'UMQ ne s'interroge pas, elle constate ;

73. Elle constate ainsi que les différentes dispositions de l'Appendice L prévoient différents délais, parfois de trois (3) jours (articles 5, 7, 10, 11.4 notamment), parfois de cinq (5) jours ((articles 4, 5(a), 7, 11.2, 11.4 notamment), sans parler du délai de dix (10) jours prévu à l'article 6 ;

74. Parfois même, un délai de trois (3) jours côtoie un délai de cinq (5) jours dans la même disposition (articles 7 et 11.4 notamment) ;

75. De l'avis de l'UMQ, il y a lieu de constater le risque de confusion qu'un tel foisonnement de délais différents est susceptible de créer dans certaines circonstances, particulièrement là où il y a similarité dans les situations visées (voir les articles 5 et 7), d'où la proposition de l'UMQ d'adopter un délai uniforme de cinq (5) jours dans tout les cas :

    - Pièce C-11-16, Preuve de l'UMQ, 10 juin 2009, p. 17-18 ;
    - Contre-interrogatoire de Marie-Claude Lalande et Sylvain Clermont par Me Jean-François Girard, N.S., vol. 7, 27 octobre 2010, p. 136 (lignes 4 à 11) :

      « Q. 200 - Bien, ce n'est pas ça, ce n'était pas ma question, je n'ai pas demandé si c'était incohérent, je vous ai demandé n'y aurait- il pas lieu d'harmoniser le délai qui est prévu aux articles 7 et 11.2 avec celui qui est indiqué à l'article 11.4?
      R. Alors, ma réponse ce serait il n'y a pas lieu d'harmoniser selon moi. »

76. Le Transporteur s'oppose à cette suggestion sous prétexte qu'il est justifié que le délai consenti au client qui a fourni une garantie au Transporteur dans une forme qui n'est pas acceptable, qui a dépassé sa limite de crédit ou qui a donné des garanties insuffisantes soit plus court que le délai consenti au client qui se voit avisé, pour la première fois, de la nécessité de fournir une garantie par suite d'une modification des conditions de crédit par le Transporteur :

    - Argumentation écrite du Transporteur sur le Thème 15, par. 20 ;
    - Contre-interrogatoire de Marie-Claude Lalande et Sylvain Clermont par Me Jean-François Girard, N.S., vol. 7, 27 octobre 2010, p. 134 (lignes 2 à 18); p. 141 (ligne 15) à la p. 142 (ligne 4) ;
    - Voir également Pièce HQT-8, doc. 9 (B-84), R17.7 ;

77. Avec égards, l'intervention de l'UMQ ne se situe pas dans ce registre, cette dernière tentant seulement de faire remarquer au Transporteur le risque de confusion engendré par des délais multiples et différents selon les situations alors qu'un délai uniforme permettrait d'éviter un tel scénario ;

78. D'ailleurs, en réponse à une demande de renseignement, le Transporteur a déjà reconnu la pertinence de prévoir un délai de cinq (5) jours, lorsque le dépassement de la limite de crédit ou l'insuffisance des garanties résulte d'une modification des conditions de crédit par le Transporteur :

    - Pièce HQT-8, doc. 9 (B-84), R17.5 ;

79. L'UMQ l'invite donc à faire preuve de la même *harmonisation* à l'égard des autres délais ou, à défaut, la Régie de l'imposer ;

80. Dans le même ordre d'idée, l'UMQ ne peut que déplorer l'opposition du Transporteur quant à sa suggestion de prévoir que le délai de trois jours ouvrables court « à compter de la réception de l'avis du Transporteur » sous prétexte que « cela est implicite des termes utilisés » (par. 22 de l'argumentation écrite du Transporteur sur le Thème 15) :

    - Pièce HQT-8, doc. 9 (B-84), R17.5 ;
    - Contre-interrogatoire de Marie-Claude Lalande et Sylvain Clermont par Me Jean-François Girard, N.S., vol. 7, 27 octobre 2010, p. 134 (lignes 2 à 18); p. 141 (ligne 15) à la p. 142 (ligne 4) ;

81. L'UMQ comprend mal cette réticence du Transporteur alors que par sa proposition, l'UMQ ne vise qu'une plus grande cohérence du texte ;

82. En effet, pourquoi parfois préciser que le délai applicable court « suivant réception de l'avis du Transporteur » (articles 4. 7 11.2, 11.4 notamment) et ne pas faire la même précision ailleurs (articles 5 et 10 notamment) ;

83. Par conséquent, l'UMQ insiste : il y aurait lieu de préciser, chaque fois que nécessaire dans les différentes disposition de l'Appendice L, qu'un délai court « suivant réception de l'avis du Transporteur » ;

84. L'UMQ estime en effet qu'une telle précision apportée aux textes est plus susceptible de rencontrer les exigences de transparence de la FERC ;

E) *Les suggestions de l'UMQ aux Tarifs et conditions acceptées par le Transporteur*

85. En terminant, l'UMQ tient à souligner que les suggestions suivantes, formulées par l'UMQ en cours de la présente audience, ont déjà été acceptées par le Transporteur et, par le fait même, seront intégrées aux Tarifs et conditions ;

    - Pièce C-11-16, Preuve de l'UMQ, 10 juin 2009, p. 19-20 ;

86. Par souci de clarté, l'UMQ a tenu à reprendre sommairement ces modifications qui découlent directement de ses propositions dans le cadre du tableau suivant :

Articles	Propositions acceptées par le Transporteur
Art. 3	Utiliser la forme plurielle dans : »[...] les services complémentaires énoncés dans la présente section qui ont été fournis par le Transporteur **associés** au service non réservé. »
Art. 19.3	Ajouter l'expression en caractères gras « y compris le coût estimé d'une nouvelle répartition **dans la mesure du possible** »

Articles	Propositions acceptées par le Transporteur
Art. 19.9	Remplacer avant le délai convenu par **dans le délai convenu**
Appendice L, art. 2	Reformuler comme suit : **Les états financiers consolidés du Client ou, si applicable, de son Garant, pour les trois dernières (3) dernières années financières ou, depuis le début des activités si cette période est inférieure à trois (3) années. Ces états financiers doivent avoir été vérifiés par un vérificateur indépendant enregistré mondialement.**
Appendice L, art. 3a	Clarifier en faisant référence à la dette à long terme dans : Si le Client ou son Garant, selon le cas, n'a pas de notation de crédit **pour la dette à long terme.**
Appendice L, art. 7	Ajouter par courrier recommandé dans : Cet avis écrit expédié **par courrier recommandé** modifiera conséquemment les termes et conditions de l'offre de crédit [...]
Appendice L, art. 7	Remplacer trois (3) jours ouvrables par cinq (5) jours ouvrables dans : [...] tout dépassement de limite de crédit ou de Garanties Tangibles insuffisantes [...] devraient être remédiés dans les cinq (5) jours ouvrables suivant la réception de l'avis.
Appendice L, art. 10	Ajouter par courrier recommandé dans : Le Transporteur fera parvenir, **par courrier recommandé,** un avis écrit au Client. Si le défaut n'est pas corrigé dans les trois (3) jours ouvrables suivant l'avis [...]

Le tout respectueusement soumis.

Montréal, le 5 juillet 2011

Dufresne Hébert Comeau inc.

Dufresne Hébert Comeau inc.
Procureurs de la demanderesse

#384076

QUÉBEC

RÉGIE DE L'ÉNERGIE

R-3669-2008

HYDRO-QUÉBEC

Demanderesse;

et

UNION DES MUNICIPALITÉS DU QUÉBEC (UMQ)

et

Autres intervenants dont les noms apparaissent ci-après

Devant les régisseurs :

Richard Carrier
Lucie Gervais
Jean-François Viau

LISTE D'AUTORITÉS DE L'UNION DES MUNICIPALITÉS DU QUÉBEC (UMQ)

Onglet 1 : *H.Q. Energy Services Inc.*, 125 FERC 61,140 (2008), par. 16:

Onglet 2 : *Ontario Hydro Interconnected Markets Inc.*, 83 FERC 61,348 (1998), p. 3:

Onglet 3 : *TransAlta Enterprises Corporation*, 75 FERC 61,268, 61,875 (1996), p. 3;

Onglet 4 : *H.Q. Energy Services (U.S. Inc.)*, 79 FERC 61,152 (1997), p. 6:

Onglet 5 : *In the matter of a complaint by Transcanada Energy ltd. regarding the service agreement with British Columbia Transmission Corporation for long term firm point to point transmission service*, (September 10, 2009) Order Number G-103-09 (BCUC), p. 32 :

Montréal, le 5 juillet 2011

Dufresne Hébert Comeau s.e.c.

Dufresne Hébert Comeau inc.
Procureurs de la demanderesse

#384045

125 FERC ¶ 61,140
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

November 5, 2008

In Reply Refer To:
H.Q. Energy Services (U.S.) Inc.
Docket Nos. ER97-851-017
ER97-851-018
ER97-851-019

Skadden, Arps, Slate, Meagher & Flom LLP
Attn: Jerry L. Pfeffer, Esq.
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111

Reference: Updated Market Power Analysis in Compliance with Order No. 697

Dear Mr. Pfeffer:

1. On June 26, 2008, H.Q. Energy Services (U.S.) Inc. (H.Q. Energy) filed an updated market power analysis in accordance with the regional reporting schedule adopted in Order No. 697.[1] H.Q. Energy also submitted revised tariff sheets to

[1] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 882, *clarified*, 121 FERC ¶ 61,260 (2007) (Order Clarifying Final Rule), *order on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008) FERC Stats. & Regs. ¶ 31,268 (2008), *order on reh'g and clarification*, 124 FERC ¶ 61,055 (2008). The Commission stated that "both the Commission and market participants will benefit from greater data consistency that will result from regional examination of updated market power analyses and a methodical study of all sellers in the same region. This will give the Commission a more complete view of market forces in each region and the opportunity to reconcile conflicting submissions, enhancing our ability to ensure that sellers' rates remain just and reasonable." Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 13.

incorporate the required provisions adopted by the Commission in Order Nos. 697 and 697-A.[2]

2. On July 29, 2008, H.Q. Energy submitted revised tariff sheets to provide for the sale of ancillary services in the market administered by the Midwest Independent System Operator, Inc.[3]

3. On September 19, 2008, H.Q. Energy filed a notice of change in status updating a representation made in its June 26, 2008 updated market power analysis. H.Q. Energy clarifies that possible changes to H.Q. Energy's Canadian transmission affiliates'[4] open access transmission tariffs (OATTs) to conform with the requirements of Order Nos. 890 and 890-A,[5] currently under consideration by the Québec Energy Board (Régie de l'énergie), will likely be implemented after January 2009 rather than before January 2009, given that the Régie de l'énergie will not rule on H.Q.-TransÉnergie's OATT by the end of the year.

4. As discussed below, H.Q. Energy's submittals satisfy the Commission's standards for market-based rate authority, and are accepted for filing,[6] effective September 27, 2008, as requested.

5. H.Q. Energy is a wholly-owned subsidiary of Hydro-Québec (H.Q.), a Crown corporation in the Province of Québec, Canada.

6. In the United States, H.Q. Energy has an indirect ownership interest in Bucksport Energy, LLC, a qualifying cogeneration facility located in Bucksport, Maine located in the ISO New England, Inc. (ISO-NE) market. Also, H.Q. Energy owns the Les Cedars

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[2] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914-18, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 382-85.

[3] *Midwest Independent System Operator, Inc.*, 123 FERC ¶ 61,297, at P 46 (2008).

[4] H.Q. Energy's Canadian transmission affiliates are Hydro-Québec TransÉnergie (H.Q. TransÉnergie) and Cedar Rapids Transmission Company (collectively, transmission affiliates).

[5] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g and clarification*, Order No. 890-B, 123 FERC ¶ 61,299 (2008).

[6] H.Q. Energy Services (U.S.) Inc., First Revised FERC Rate Schedule No. 1, Third Revised Sheet Nos. 2 (superseding Second Revised Sheet Nos. 1-2).

generating plant, which is physically located in Québec but which the New York Independent System Operator, Inc. (NYISO) models as an integral generator in the NYISO market.[7]

7. Notices of H.Q. Energy's June 26, 2008 filing, its July 29, 2008 filing, and its September 19, 2008 filing were published in the *Federal Register*,[8] with interventions or protests due on or before August 25, 2008, August 19, 2008, and October 10, 2008 respectively. On July 17, 2008, Newfoundland and Labrador Hydro filed a timely motion to intervene and provide informational comments. On July 28, 2008, H.Q. Energy filed an answer.

8. Pursuant to Rule 214 of the Commission's Rule of Practice and Procedure, 18 C.F.R. § 385.214 (2008), Newfoundland and Labrador Hydro's timely, unopposed motion to intervene serves to make it a party to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept H.Q. Energy's answer because it has provided information that assisted us in our decision-making process.

9. Newfoundland and Labrador Hydro states that it does not take a position regarding any action the Commission may pursue with respect to H.Q. Energy's filing. Newfoundland and Labrador Hydro states that it seeks to provide background information regarding positions that it has taken before the Régie de l'énergie, which regulates electricity transmission in Québec. Newfoundland and Labrador Hydro states that its interests are directly affected by this proceeding, as it plans to export electricity to the United States beginning in 2015 from its Lower Churchill Project and is in active discussions with H.Q. Energy's Canadian transmission affiliate, H.Q. TransEnergie. Newfoundland and Labrador Hydro alerts the Commission to concerns it has regarding the sufficiency of H.Q. TransÉnergie's OATT and its implementation in an open and non-discriminatory manner. Newfoundland and Labrador Hydro states that over the past

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[7] H.Q. Energy was authorized to sell electric energy and capacity at wholesale at market-based rates in *HQ Energy Services (U.S.) Inc.*, 81 FERC ¶ 61,184 (1997), *reh'g denied*, 82 FERC ¶ 61,234 (1998); *HQ Energy Services (U.S.) Inc.*, 79 FERC ¶ 61,152 (1997).

[8] 73 Fed. Reg. 40,571 (2008); 73 Fed. Reg. 46,615 (2008); 73 Fed. Reg. 56,811 (2008).

year, it has filed three complaints with the Régie de l'énergie regarding administration of H.Q. TransÉnergie's OATT in relation to its transmission service requests.[9]

10. Newfoundland and Labrador Hydro states that H.Q. TransÉnergie has not yet updated its OATT to be consistent with Order No. 890's additional transmission planning requirements.

11. Newfoundland and Labrador Hydro states that its present complaints before the Régie de l'énergie are to ensure that an erroneous implementation of the H.Q. TransÉnergie OATT does not deprive Newfoundland and Labrador Hydro of access to the U.S. Northeast electricity markets over the H.Q. TransÉnergie system. Newfoundland and Labrador Hydro states that its complaints before the Régie de l'énergie raise issues regarding insufficient information provided in system impact studies and failure to properly calculate and post available transmission capacity, which are similar to issues the Commission has addressed in OATT compliance cases.

12. In its reply comments, H.Q. Energy states that Newfoundland and Labrador Hydro has not objected to anything contained in H.Q. Energy's updated market power analysis. H.Q. Energy further states that the issues raised by Newfoundland and Labrador Hydro are currently pending before the Régie de l'énergie.

13. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.[10] As discussed below, the Commission concludes that H.Q. Energy satisfies the Commission's standards for market-based rate authority.

14. The Commission adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.[11] H.Q. Energy has prepared the pivotal supplier and wholesale market share screens for the ISO-NE and NYISO markets, consistent with the requirements of Order No. 697.[12]

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[9] Newfoundland and Labrador Hydro included the three complaints as an attachment to its comments: Case No. P-110-1565, *Newfoundland and Labrador Hydro v. Hydro Quebec* (filed Jan. 11, 2008); Case No. P-1566, *Newfoundland and Labrador Hydro v. Hydro Quebec* (filed Jan. 11, 2008); and P-110-1597, *Newfoundland and Labrador Hydro v. Hydro Quebec* (filed April 4, 2008).

[10] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

[11] *Id.* P 62.

[12] *Id.* P 235.

15. The Commission has reviewed H.Q. Energy's pivotal supplier screen and wholesale market share screen and has determined that H.Q. Energy passes the pivotal supplier screen and the wholesale market share screen in the ISO-NE and NYISO markets. Accordingly, the Commission finds that H.Q. Energy satisfies the Commission's requirements for market-based rates regarding horizontal market power.

16. The Commission requires in cases where a market-based rate seller is a foreign utility or is affiliated with a foreign utility that owns, operates, or controls transmission facilities outside of the United States and is interconnected with the United States to demonstrate that comparable, non-discriminatory access is offered on those facilities so that competitors of the seller may reach United States markets.[13]

17. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.[14] The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage or distribution facilities; sites for generation capacity development; and sources of coal supplies and equipment for the transportation of coal supplies such as barges and rail cars (collectively, inputs to electric power production).[15] The Commission also requires sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.[16]

18. H.Q. Energy states that its transmission affiliates own transmission assets located in Québec, which are subject to OATTs accepted by the Commission as satisfying reciprocity requirements and which do not allow H.Q. Energy and its affiliates to raise barriers to entry or impede competitors in Canada from accessing U.S. electricity markets.[17] H.Q. Energy also states that its transmission affiliates are in the process of adapting their OATTs to the provisions of Order Nos. 890 and 890-A, and those OATTs

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[13] *Id.* P 1007-1008.

[14] *Id.* P 440.

[15] *Id.* P 447. In Order No. 697-A, the Commission revised the definition of inputs to electric power production to include "physical coal supply sources and ownership of or control over who may access transportation of coal supplies." Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

[16] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

[17] H.Q. Energy's June 26, 2008 Filing at 7-8.

are currently under consideration by the Régie de l'énergie.[18] H.Q. Energy also states that its transmission affiliates continue to provide open and non-discriminatory access to all suppliers within Canada seeking to deliver power to the U.S. markets over and through their transmission facilities, and therefore H.Q. Energy has mitigated any transmission market power.[19] Further, H.Q. Energy states that it does not own or control inputs to electric power production, and it affirmatively states that neither it nor its affiliates have or will erect barriers to entry in relevant markets.

19. Based on H.Q. Energy's representations, H.Q. Energy satisfies the Commission's requirements for market-based rates regarding vertical market power.

20. Order No. 697 adopted two standard required provisions that each seller must include in its market-based rate tariff: a provision requiring compliance with the Commission's regulations and a provision identifying any limitations and exemptions regarding the seller's market-based rate authority.[20] In addition to the required tariff provisions, Order No. 697 adopted a set of standard provisions that must be included in a seller's market-based rate tariff to the extent that they are applicable and also requires an asset appendix.[21] In Order No. 697-A, the Commission also required that each seller include in its market-based rate tariff a provision identifying which category of seller it qualifies as in each region.

21. H.Q. Energy's market-based rate tariff includes the Commission's two required provisions, indicating that H.Q. Energy intends to comply with the Commission's regulations, including the affiliate restrictions. H.Q. Energy's market-based rate tariff also includes a set of standard provisions with regard to sales of certain ancillary services in various markets, as well as a provision regarding sales of ancillary services as a third party supplier, and the required category designation. H.Q. Energy's filing also includes

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[18] H.Q. Energy submits that its transmission affiliates anticipate that the revised terms and conditions of the OATTs will become effective after January 2009. H.Q. Energy's June 26, 2008 Filing at 7, n.16 & Attachment D. H.Q. Energy further states that on September 11, 2008, the Régie de l'énergie ruled that it required additional information to support the proposed tariff amendments in H.Q. TransÉnergie's request for tariff modifications to comply with Order Nos. 890 and 890-A. H.Q. Energy's September 19, 2008 Filing at 2.

[19] *See H.Q. Energy Services (U.S.) Inc.*, 79 FERC ¶ 61,152 at 61,652-53; *TransÉnergie U.S.,Ltd.*, 91 FERC ¶ 61,230, at 61,838 (2000).

[20] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914.

[21] *Id.* at P 917.

the required asset appendix. We find that H.Q. Energy's market-based rate tariff satisfies the Commission's requirements set forth in Order Nos. 697 and 697-A, and accept their revised market-based rate tariffs, effective September 27, 2008, as requested.

22. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or longer) market-based power sales during the most recent calendar quarter.[22] Public utilities must file Electric Quarterly Reports no later than 30 days after the end of the reporting quarter.[23]

23. H.Q. Energy must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.[24]

24. Additionally, in Order No. 697, the Commission created two categories of sellers.[25] Category 1 sellers are not required to file regularly scheduled updated market power analyses. Category 1 sellers are wholesale power marketers and wholesale power

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[22] *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C,101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003). Attachments B and C of Order No. 2001 describe the required data sets for contractual and transaction information. Public utilities must submit Electric Quarterly Reports to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at http://www.ferc.gov/docs-filing/eqr.asp.

[23] The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2008). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

[24] *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005); 18 C.F.R. § 35.42 (2008).

[25] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate, or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888[26]); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.[27] Sellers that do not fall into Category 1 are designated as Category 2 and are required to file regularly scheduled updated market power analyses.[28]

25. Based on H.Q. Energy's representations, we find that H.Q. Energy meets the criteria for a Category 1 seller and is so designated.

By direction of the Commission.

Kimberly D. Bose,
Secretary.

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[26] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and rev'd in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[27] 18 C.F.R. § 35.36(a)(2) (2008).

[28] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

83 FERC ¶ 61,348

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
Vicky A. Bailey, William L. Massey,
Linda Breathitt, and Curt Hébert, Jr.

Ontario Hydro Interconnected Markets Inc.	)	Docket No. ER97-852-001
	)	

ORDER DENYING REHEARING

(Issued June 30, 1998)

The Commission, in Ontario Hydro Interconnected Markets Inc., 78 FERC ¶ 61,369 (1997) (March 31 Order) denied without prejudice Ontario Hydro Interconnected Markets Inc.'s (Ontario Markets) application for authorization to charge market-based rates. In this order, we deny Ontario Markets' request for rehearing of the March 31 Order.

I. Background

On December 18, 1996, as amended on January 3, 1997 and January 30, 1997, Ontario Markets, a wholly-owned subsidiary of Ontario Hydro, applied to the Commission for authority to sell power at market-based rates. In support thereof, Ontario Markets stated that neither it nor Ontario Hydro owns or controls any generation or transmission assets in the United States. Ontario Markets also stated that Ontario Hydro will implement an open access transmission tariff, upon Commission approval of Ontario Markets' market-based rate application, under which Ontario Hydro will provide open access transmission service on a comparable, non-discriminatory basis for wheeling through and out of the Province of Ontario, Canada.

More specifically, Ontario Markets stated that Ontario Hydro has been unbundling its transmission and generation functions and had created "The Electricity Exchange" (Exchange) that operates a Provincial power pool under which most of the customers within Ontario are supplied. Ontario Markets stated that the Exchange makes purchase decisions based on the price from suppliers both inside and outside of Ontario, including United States suppliers.

In the March 31 Order, we noted that, under our precedent, we apply the same general standards for reviewing requests for market-based rates by United States public utilities to a proposed power marketer affiliated with a Canadian electric utility. In order to demonstrate that it has mitigated transmission market power, the power marketer must be able to show that its transmission-owning utility affiliate offers non-

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discriminatory access to its transmission system that can be used by competitors of the power marketer to reach United States loads. 1/ The Commission emphasized, however, that it would consider a variety of approaches when evaluating the market power of foreign utility affiliates of United States power marketers.

The Commission found that Ontario Markets' market-based rate application did not meet the Commission's standards for granting market-based rates because Ontario Markets had not demonstrated that Ontario Hydro's transmission market power has been adequately mitigated. We noted that, inter alia, Ontario Hydro apparently retains day-to-day control over the Provincial power pool and its proposed transmission tariff fails to offer any transmission service into Ontario and only offers recallable "through" transmission and recallable export transmission for one year or less. The Commission found that these limited services are inadequate to mitigate Ontario Hydro's transmission market power. 2/ Therefore, the Commission rejected without prejudice Ontario Markets' request for market-based rates.

II. Discussion

Ontario Markets raises three arguments on rehearing. First, Ontario Markets argues that the Commission lacks authority under the Federal Power Act (FPA) to require a foreign utility -- Ontario Hydro -- to provide open access transmission services in Canada to United States public utilities as a condition for Ontario Markets to sell power at market-based rates. Ontario Markets contends that section 201 of the FPA expressly limits the Commission's jurisdiction to the transmission of electric energy in interstate commerce and to the sale for resale of electric energy in interstate commerce, where such transmission takes place within the United States. 3/ Ontario Markets contends that the Commission, by requiring open access transmission in a foreign country as a condition for market access in the United Sates, is improperly regulating foreign ("cross-border") commerce.

The Commission addressed this argument in Energy Alliance Partnership, 73 FERC ¶ 61,019 (1995) (Energy Alliance). In that case, a power marketer seeking market-based rate authority argued

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1/ 78 FERC at 62,528.

2/ Having denied Ontario Markets' application on this basis, the Commission did not reach the questions of generation market power or other barriers to entry/reciprocal dealing and affiliate abuse.

3/ Rehearing Request at 5 (citing 16 U.S.C. § 824 (1994)).

that the transmission facilities of its foreign utility affiliate (Hydro-Quebec) were beyond the scope of the Commission's jurisdiction and that the Commission cannot require Hydro-Quebec to mitigate its transmission market power as a condition for granting market-based rate authority to the affiliate. We explained that Hydro-Quebec's transmission facilities were relevant to our analysis of transmission market power and that:

> [t]he fact that these transmission facilities are located in Canada does not diminish the possibility that Energy Alliance's competitors may require transmission service from Hydro-Quebec to reach United States markets. The Commission's concern is not transmission service to serve Canadian loads -- it is transmission to serve United States loads. Entities may wish to locate in Canada, but sell to United States utilities, or entities may wish to market Canadian power in the United States, and they may require Hydro Quebec's transmission service in order to do so. [4/]

Our rationale in Energy Alliance applies equally to the situation presented in the instant case. In order to grant Ontario Markets market-based rate authority, we must ensure that its Canadian affiliate does not give Ontario Markets market power in the United States by denying Ontario Markets' competitors market access in the United States, notwithstanding that the affiliate's transmission facilities are located in Canada. As we did in Energy Alliance, we emphasize that our concern is with transmission access to serve United States loads, not Canadian loads.

We also note that Ontario Hydro raised a similar argument on rehearing of Order No. 888. 5/ It asserted that the Commission, in applying the reciprocity provision of section 6 of the pro forma tariff to Canadian transmission-owning entities, was improperly attempting to regulate foreign entities. While the case before us involves an analysis of market power in the United States, and not application of Order No. 888's reciprocity

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4/ 73 FERC at 61,030.

5/ Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 at 31,656-57 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997) order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998).

condition, our legal response in many respects is similar. In Order No. 888-A, we soundly rejected the claim that we were regulating foreign utilities:

> Just as we [in section 6] are not asserting jurisdiction over domestic non-public utilities under sections 205-206 of the FPA, we also are not asserting jurisdiction over foreign entities. Rather, we are simply placing the same reasonable and fair condition on both types of entities' uses of the transmission ordered in the Final Rule. [6/]

Here, too, we are not asserting jurisdiction over a foreign entity by denying market-based rates to a U.S. public utility whose foreign affiliate can exert market power by denying the marketing affiliate's competitors market access to serve United States loads. Rather, we are asserting jurisdiction over the U.S. marketing affiliate and we are applying the same standards to this U.S. public utility that we apply to all other U.S. public utilities that are affiliated with transmission owners. Regulation of the U.S. public utility and the conditions under which it is authorized to sell power at market-based rates in the United States clearly is within the scope of our authority under the FPA. It is not the regulation of foreign commerce, as Ontario Markets claims.

Second, Ontario Markets argues that the Commission's requirement that Ontario Hydro provide open access transmission services in Canada to United States public utilities violates the national treatment obligations under the North American Free Trade Agreement (NAFTA) 7/ and the General Agreement on Tariffs and Trade (GATT). 8/ Ontario Markets states that the principle of national treatment requires that the United States place no greater regulatory burden on Canadian companies selling in the United States than is placed on United States companies. Ontario Markets asserts that the Commission's reciprocal market access requirement will result in market access that is less favorable for Canada (unless it provides reciprocal open access) than that afforded the United States's own citizens.

As an initial matter, Ontario Markets again misstates what the Commission has done in the March 31 Order. We have not placed any "requirement" on Ontario Hydro. Instead, using the

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6/ Order No. 888-A at 30,292.

7/ 32-3 Int'l Legal Materials 682 (1993); 19 U.S.C.A. § 3301 et seq. (1995 Supp.)(legislation implementing NAFTA).

8/ 61 Stat. A5, A18-A19 (1947).

same standards that apply to other U.S. affiliated power marketers that seek authority to sell power at market-based rates, the Commission has determined that the marketer's transmission-owning affiliate has not mitigated market power in the United States. It is up to the marketer and the transmission-owning affiliate to determine whether they want to mitigate market power in order for the marketer to obtain approval to sell power at market-based rates. (We note that the marketer always has the option to sell power at cost-based rates.)

Additionally, in its request for rehearing of Order No. 888 and its motion for stay pending judicial review, Ontario Hydro made a similar NAFTA argument that application of the reciprocity condition of section 6 of the pro forma tariff to foreign transmission owners would violate NAFTA's national treatment principle. We rejected this claim in Order No. 888-A:

> NAFTA's national treatment principle requires that each signatory "accord national treatment to the goods" of other signatories in accordance with Article III of the General Agreement on Tariffs and Trade (GATT). National treatment means that the United States "must not discriminate between foreign and domestic energy on the basis of nationality . . ." and that Canadian electricity must be treated "no less favorabl[y] than U.S. electricity, under all U.S. laws and rules respecting the sale, . . . distribution, and use of . . . electricity." Thus, this Commission must accord Canadian energy supplies treatment that is no less favorable than the treatment accorded United States supplies. Ontario Hydro's interpretation, however, would twist this principle into a requirement that Canadian entities be treated better than United States entities, including United States non-public utilities that are subject to the reciprocity condition.
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> . . . . Under the reciprocity condition, non-public utilities do not have to offer an open access tariff (i.e., a tariff that offers transmission service to any eligible customer), but rather must offer comparable transmission services only to those transmission providers whose open access tariffs the non-public utility uses. The same condition applies to foreign utilities. Thus, Ontario Hydro is in plain error in arguing that application of the reciprocity condition to foreign entities would result in less favorable treatment than that accorded to United States citizens. Ontario Hydro's reading of NAFTA would place transmission-owning Canadian entities (or their corporate affiliates) in a better position than any

> domestic entity; not only would Canadian entities not be subject to the open access requirement, but, unlike domestic non-public utilities, they would be able to use the open access tariffs we have mandated without providing any reciprocal service. Ontario Hydro has cited no precedent demonstrating that NAFTA imposes such an unreasonable requirement. [9/]

Here, too, Ontario Markets is in plain error when it argues that our "conditioning" market-based rate authorization on Ontario Hydro mitigating market power in the United States will result in treatment that is less favorable than that accorded to U.S. entities. Indeed, just the opposite is true: were we not to apply the same standards to Ontario Markets and its affiliate, Ontario Hydro, that we apply to all other U.S. utilities and their transmission-owning affiliates, we would place Canadian entities in a better position than comparable domestic entities. That is not what the national treatment principle requires.

Third, Ontario Markets argues that the Commission has failed to apply its own standards for approving the request of a foreign entity to sell power at market-based rates, as set forth in TransAlta Enterprise Corporation, 75 FERC ¶ 61,268 (1996) (TransAlta). Ontario Markets states that in TransAlta, the Commission held that it would approve the market-based rate application of a United States affiliate of a Canadian utility, if the utility mitigates its transmission market power through the establishment of a provincial power pool. Ontario Markets believes that its application meets the TransAlta standards because Ontario Hydro would adequately mitigate its transmission market power by: (1) adopting a tariff for the provision of transmission services through and out of Ontario; (2) agreeing to purchase power from United States entities on a non-discriminatory basis through the Exchange; and (3) adopting standards of conduct similar to those required for United States public utilities.

Ontario Markets is overlooking the significant factual distinctions between its situation and that presented in TransAlta. As we explained in the March 31 Order, the Commission in TransAlta found that transmission market power of the applicant's affiliate had been mitigated because, inter alia, the electric utility industry in the Province of Alberta had been restructured with a single-system transmission tariff applicable to virtually all transmission facilities and was administered by

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9/ Order No. 888-A at 30,291-92 (footnotes omitted and emphasis in original); see also Order Denying Motion for Stay, Docket Nos. RM95-8-004 and RM94-7-005, 79 FERC ¶ 61,367 at 62,542 (1997).

a newly-created entity (and not by the marketer's electric utility affiliate), and the rates, terms, and conditions of the tariff were independently regulated by a government agency.

In contrast, we found in our March 31 Order that the facts presented in Ontario Markets' application fail to show that Ontario Hydro's transmission market power has been adequately mitigated. We explained that, unlike in the Province of Alberta, there has been no legislative or regulatory restructuring of the electric utility industry in Ontario. Moreover, we noted that the Ontario Provincial power pool, which decides how to dispatch the resources available to Ontario Hydro, was created by and is a division of Ontario Hydro. Although Ontario Markets' application does not make clear the exact legal relationship between Ontario Hydro and the Exchange, Ontario Hydro apparently retains day-to-day control over the Exchange. Therefore, the Commission found that, unlike in TransAlta, there is no comparable independent regulatory oversight. 10/

On rehearing, Ontario Markets has not provided new information that would indicate that our conclusions as to the factual differences between its situation and that in TransAlta are in error. Accordingly, we reaffirm our earlier finding that Ontario Hydro's transmission market power has not been adequately mitigated.

The Commission orders:

Ontario Markets' request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

David P. Boergers,
Acting Secretary.

10/ 78 FERC at 62,528-29.

75 FERC ¶ 61,263

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;
Vicky A. Bailey, James J. Hoecker,
William L. Massey, and Donald F. Santa, Jr.

TransAlta Enterprises Corporation) Docket No. ER96-1316-000

ORDER GRANTING LATE INTERVENTION,
ACCEPTING FOR FILING MARKET-BASED RATES,
AND GRANTING REQUESTS FOR WAIVERS AND AUTHORIZATIONS

(Issued June 12, 1996)

In this order, we will accept for filing, without suspension or hearing, an application from an affiliate of a Canadian electric utility to transact as a power marketer in the United States at market-based rates.

Background

On March 15, 1996, as amended on April 24, 1996, TransAlta Enterprises Corporation (TransAlta) filed an application for authorization to sell electric power in the United States at market-based rates. TransAlta explains that it is an affiliate of a Canadian electric utility, TransAlta Utilities Corporation (Utilities), located in the Province of Alberta. TransAlta seeks the same waivers and authorizations as those granted to other power marketers.

Notices of TransAlta's initial and amended filings in this proceeding were published in the Federal Register, 61 Fed. Reg. 13,491 and 19,618 (1996), with comments, protests and motions to intervene due on or before May 6, 1996.

On May 31, 1996, the Coalition for a Competitive Electric Market (Coalition), a coalition of power marketers with Commission-issued authorization to sell wholesale electric energy at market-based rates, filed a motion to intervene out-of-time in this proceeding. The Coalition explains that its delay in filing is attributable to its need to first review the requirements of the Commission's recent rulemaking on open access transmission. 1/ The Coalition also filed a protest in which it explains that

1/ See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed Reg. 21,540 (continued...)

TransAlta should not receive market-based rate authorization because its Canadian electric utility affiliate, Utilities, allegedly does not provide open access transmission service.

On June 7, 1996, TransAlta filed an answer to the Coalition's motion. TransAlta argues that the Coalition has failed to show good cause to intervene out of time in this proceeding. TransAlta notes that, contrary to the Coalition's claim, the Commission has not sought to impose the requirements of the Open Access Rule on Canadian utilities. In any event, TransAlta argues, it has demonstrated that the structure and operation of the Alberta transmission system is consistent with the transmission comparability and non-discrimination standards set forth in the Open Access Rule, and that it lacks transmission market power. TransAlta maintains that the Coalition's opposition to the type of bulk power market structure adopted in Alberta is irrelevant to the issues involved in this proceeding.

Discussion

As an initial matter, notwithstanding TransAlta's opposition, we will grant the Coalition's motion to intervene out-of-time in this proceeding, in light of the arguments it raises and the absence of any prejudice or delay in allowing its intervention.

In Heartland Energy Services, Inc., 68 FERC ¶ 61,223 (1994) (Heartland), and other cases, 2/ we have explained the standards under which we review applications to sell at market-based rates. The seller (and each of its affiliates) must not have, or must have mitigated, market power in generation and transmission and not control other barriers to entry. In addition, the Commission considers whether there is evidence of affiliate abuse or reciprocal dealing. In our order in Energy Alliance Partnership, 73 FERC ¶ 61,019 (1995) (Energy Alliance), we determined that we would apply these same general standards in reviewing the application of a power marketer, affiliated with a Canadian electric utility, that seeks to transact in the United States at market-based rates.

1/(...continued)
(1996), III FERC Stats. & Regs. ¶ 31,036 (1996) (Open Access Rule).

2/ See, e.g., Duke Energy Marketing Corp., et al., 73 FERC ¶ 61,047 at 61,118 (1995); Duke/Louis Dreyfus L.L.C., et al., 73 FERC ¶ 61,309 at 61,867 (1995); USGen Power Services, L.P., 73 FERC ¶ 61,302 at 61,844 (1995) (USGen); Southern Company Services, Inc., 72 FERC ¶ 61,324 at 62,405 (1995), order on reh'g, 74 FERC ¶ 61,141 (1996) (Southern).

As explained below, we find that TransAlta's application satisfies all of these standards. Accordingly, we will accept the proposed market-based rates for filing, without hearing or suspension, to become effective June 24, 1996.

Generation Market Power

TransAlta explains that it does not itself own or control any generation resources. As to the generation resources owned or controlled by Utilities, its Canadian affiliate, TransAlta has submitted a generation dominance analysis that defines the relevant markets as being limited to "first tier" Canadian utilities to which Utilities is directly interconnected. This analysis demonstrates that Utilities' share of installed and uncommitted capacity in the defined Canadian markets will not exceed levels that the Commission previously has found to be acceptable. 3/ Because Utilities lacks generation market power in first-tier Canadian markets, it necessarily lacks generation market power in more remote United States markets which operate within our jurisdiction.

Transmission Market Power

To demonstrate the requisite absence or mitigation of transmission market power, the Commission normally requires a power marketer to show that a transmission-owning utility affiliate has on file with the Commission an open access transmission tariff for the provision of comparable services. Here, however, TransAlta's transmission-owning utility affiliate operates in foreign (Canadian) commerce. As such, we have no direct authority to require Utilities, over which we do not have jurisdiction, to file an open access tariff. 4/

In Energy Alliance, we held that we are amenable to a variety of approaches to deal with the market power of foreign utility affiliates of United States marketers. We determined that the marketer must be able to demonstrate that its transmission-owning utility affiliate offers non-discriminatory access to its transmission system that can be used by competitors of the power marketer to reach United States markets. 73 FERC at

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3/ See, e.g., Southern, 72 FERC at 62,405-06; Southwestern Public Service Company, 72 FERC ¶ 61,208 at 61,966-67 (1995) (Southwestern).

4/ In contrast, in the Open Access Rule (see supra note 1), the Commission recently directed all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to file open access non-discriminatory transmission tariffs.

61,030-31. TransAlta argues that Utilities offers such non-discriminatory, comparable transmission service.

TransAlta explains that the electric utility industry in the Province of Alberta, Canada recently has been restructured. A newly-created entity, Grid Company of Alberta (Alberta Gridco), now administers a single system transmission tariff governing service over virtually all transmission facilities in the Province, including those owned and operated by Utilities. Utilities has no day-to-day control over Alberta Gridco's administration of the tariff. 5/ Also, the rates, terms and conditions of the tariff are regulated by the Alberta Energy and Utilities Board (Alberta Board).

In addition, a mandatory power pool in Alberta (Alberta Power Pool) requires electric utilities to buy and sell all energy through the pool by means of competitive bidding. Buyers within Alberta (on-system customers) pay Alberta Gridco a postage stamp network transmission charge and an ancillary service charge. Sellers pay an interconnection charge for any new generating unit. Companies located outside the Province that transact with the Alberta Power Pool pay a tie line transmission charge.

These arrangements are sufficient for a foreign utility affiliate of a United States marketer to address the market power concerns raised by the Commission in Energy Alliance, supra, and to meet the general principles of transmission comparability in Order No. 888. All potential users of the Alberta transmission system (affiliated or not) are subject to the same rates, terms and conditions and have access to the Alberta system to reach loads in the United States. Indeed, TransAlta's application does not indicate any limitation on the ability of power sellers in the United States to use the Alberta pool and transmission grid to reach potential markets in Canada. We view the expansive scope of the Alberta arrangements, allowing for power sales from Canada into the United States and vice versa, as a positive factor in our assessment of TransAlta's application for market-based rates.

The Coalition's principal objection to the Alberta Power Pool arrangement is that it does not allow Canadian buyers to enter into bilateral transactions and requires sellers to Canadian markets to deal only with the Alberta Power Pool. The Coalition also objects to the intention of Alberta Gridco to adopt, in the future, a tie line charge based on the differential

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5/ Decisions with respect to Alberta Gridco's operations are subject to voting rules that prevent any one utility from making unilateral decisions, i.e., approvals require a 75 percent majority.

between power supply costs at the receipt and delivery points. The Coalition makes the unexplained assertion that this rate method may be excessive and may be designed to discourage exports of power from Alberta. For these reasons, the Coalition asks the Commission to deny TransAlta's request for market-based rate authority for sales in the United States.

In our judgment, the Coalition's concerns about the Alberta Power Pool's approach to arranging power sales to Canadian buyers do not warrant denial of TransAlta's application for market-based rates for its own sales in the United States. The Coalition's concerns about the specific charge for transmission service under a yet-to-be-developed method are, at this point, speculative. Moreover, the Commission did not, in Energy Alliance, require that specific rate methods be adopted by Canadian regulators. However, if an entity requires transmission service over Alberta Gridco to reach United States markets and that access is effectively denied through discriminatory practices against exporters, including imposing discriminatory charges against exporters, the Commission will consider appropriate remedies on a case-by-case basis. 6/

Affiliate Abuse

We typically require a power marketer with market-based rate authorization to file for Commission approval under section 205 of the Federal Power Act (FPA) before selling power to or purchasing power from any utility affiliate. As we explained in Energy Alliance (73 FERC at 61,031), however, this general requirement does not apply to situations, such as that presented by TransAlta, involving sales of power to or from a Canadian utility outside of the Commission's jurisdiction.

We also typically require the power marketer seeking market-based rate authorization to file a code of conduct governing the relationship between the marketer and its affiliated utilities. While, as explained in Energy Alliance, power transactions with affiliated utilities in foreign commerce are not subject to the Commission's jurisdiction, TransAlta has, in fact, developed a code of conduct to meet the requirements of the Province of Alberta. Our review indicates that this code of conduct is similar to that which the Commission requires when a power marketer is affiliated with a regulated utility. Accordingly, we have no basis for denying TransAlta's application in this regard or requiring additional conditions to market-based rate authorization.

6/ See, e.g., Public Service Company of New Mexico, 75 FERC ¶ ____, slip op. at 8 (1996), wherein the Commission noted that an unjustified denial of transmission service will result in the suspension of market-based rate authority.

Other Barriers to Entry/Reciprocal Dealing

TransAlta does not point to any other barriers to entry and we are aware of none. Nor do we see any evidence of or concern for reciprocal dealing.

Waivers and Authorizations

TransAlta requests waivers and authorizations similar to those granted to other power marketers and independent power producers: (1) waiver of the accounting and other requirements of Parts 41, 101 and 141; (2) waiver of the requirements of subparts B and C of Part 35 (other than 35.12(a), 35.13(b), 35.15, and 35.16); (3) abbreviated filings with respect to interlocking directorates under Part 45; and (4) authorization for blanket approval of issuances of securities or assumptions of liabilities pursuant to Section 204 of the FPA and Part 34. Consistent with our orders on this subject, 7/ we will grant the requested waivers and authorizations.

Reporting Requirements

Consistent with previous Commission decisions, 8/ we will require TransAlta to file quarterly reports. However, in accordance with TransAlta's request, we will require TransAlta to report only transactions that result in delivery of electricity to customers in the United States and not sales to customers located in Canada.

We also will direct TransAlta to inform the Commission promptly of any change in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing. These include, but are not limited to: (1) ownership of generation or transmission facilities or inputs to electric power production other than fuel supplies; or (2) affiliation with any entity not disclosed in the instant filing that owns generation or transmission facilities or inputs to electric power production, or affiliation with any

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7/ See, e.g., Morgan Stanley Capital Group, 69 FERC ¶ 61,175 at 61,696-97 (1994), order on reh'g, 72 FERC ¶ 61,082 (1995) (Morgan Stanley); Enron Power Marketing, Inc., 65 FERC ¶ 61,305 (1993), order on reh'g, 66 FERC ¶ 61,244 (1994) (Enron); Citizens Power & Light Corporation, 48 FERC ¶ 61,210 (1989);

8/ See, e.g., Enron, 65 FERC at 62,406 and 66 FERC at 61,599; accord, Morgan Stanley, 69 FERC at 61,694-95 and 72 FERC at 61,436 n.8, 61,437 n.15.

entity that has a franchised service area. 9/ Alternatively, we will allow TransAlta the option of filing a new market analysis every three years. 10/

The Commission orders:

(A) The Coalition's motion to intervene out-of-time in this proceeding is hereby granted.

(B) TransAlta's proposed market-based rates are hereby accepted for filing to become effective June 24, 1996, without suspension or hearing.

(C) TransAlta's request for waiver of Parts 41, 101 and 141 of the Commission's regulations is hereby granted.

(D) Within 30 days of the date of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by TransAlta should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.214 (1995).

(E) Absent a request to be heard within the period set forth in ordering paragraph (D) above, TransAlta is hereby authorized to issue securities and assume obligations or liabilities as guarantor, executor, surety, or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of TransAlta, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(F) Until further order of this Commission, the full requirements of Part 45 of the Commission's regulations, except as noted below, are hereby waived with respect to any person now holding or who may hold an otherwise prescribed interlocking directorate involving TransAlta. Any such person instead shall file a sworn application providing the following information:

9/ See, e.g., Morgan Stanley, 69 FERC at 61,694-95 and 72 FERC at 61,436-37; InterCoast Power Marketing Company, 68 FERC ¶ 61,248 at 62,134, order on clarification, 68 FERC ¶ 61,323 (1994).

10/ See, e.g., USGen, 73 FERC at 61,847; Morgan Stanley, 69 FERC at 61,695.

(1) full name and business address; and

(2) all jurisdictional interlocks, identifying the affected companies and the positions held by that person.

(G) The Commission reserves the right to modify this order to require a further showing that neither public nor private interests will be adversely affected by continued Commission approval of TransAlta's issuances of securities or assumptions of liabilities, or by the continued holding of any affected interlocks.

(H) TransAlta is hereby granted waiver of the provisions of subparts B and C of Part 35 of the Commission's regulations, except as to sections 35.12(a), 35.13(b), 35.15 and 35.16 of the Commission's regulations.

(I) TransAlta is hereby directed to conform to the filing and reporting requirements specified in this order. If TransAlta transacts prior to July 1, 1996, the first quarterly report of transactions undertaken by it will be due within 30 days of the calendar quarter ending June 30, 1996. If not, the first quarterly report of transactions will be due within 30 days of the calendar quarter ending September 30, 1996.

(J) Transalta is hereby directed to inform the Commission promptly of any change in status that would reflect a departure from the characteristics that the Commission has relied upon in approving market-based pricing.

(K) TransAlta is hereby informed of the following rate schedule designation for its market-based rate schedule: TransAlta Enterprises Corporation, Rate Schedule FERC No. 1.

By the Commission.

(S E A L)

Lois D. Cashell,
Secretary.

79 FERC ¶ 61,152

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;
Vicky A. Bailey, James J. Hoecker,
William L. Massey, and Donald F. Santa, Jr.

H.Q. Energy Services (U.S.) Inc.) Docket No. ER97-851-000

ORDER DIRECTING FURTHER INFORMATION AND ANALYSIS AND DEFERRING ACTION ON MARKET-BASED RATES

(Issued May 9, 1997)

In this proceeding H.Q. Energy Services (U.S.) Inc. (H.Q. Energy), a wholly-owned subsidiary of Hydro-Quebec, applied to the Commission for market-based rate authority. As discussed below, the Commission does not have sufficient information to complete its analysis of H.Q. Energy's request. We find that H.Q. Energy has satisfied all but one of the Commission's requirements for market-based rates. However, we are unable to conclude at this time that H.Q. Energy has demonstrated that Hydro-Quebec, its Canadian utility affiliate, lacks generation market power. Accordingly, we will defer action on H.Q. Energy's request for market-based rates and direct H.Q. Energy to provide further information and analysis concerning generation market power consistent with the Commission's guidance in New York State Electric & Gas Corporation, 78 FERC ¶ 61,309 (1997) (NYSEG), which was issued after H.Q. Energy completed its application.

Background

On December 18, 1996, as amended on December 19, H.Q. Energy filed an application (December Application) to sell power at market-based rates. On March 11, 1997, H.Q. Energy filed a supplemental petition (March Supplement), which substantially amends its December Application in response to the Commission's decision in British Columbia Power Exchange Corporation, 78 FERC ¶ 61,024 (1997) (Powerex).

According to its application, H.Q. Energy is a wholly-owned subsidiary, incorporated in the State of Delaware, of Hydro-Quebec, the utility for the Canadian province of Quebec. After Commission approval of its application for market-based rates, H.Q. Energy intends to engage in various wholesale power marketing activities in the United States. H.Q. Energy does not own any electric generation or transmission facilities, and none of its affiliates owns any generation or transmission facilities that are located in the United States. H.Q. Energy's application includes a proposed code of conduct that H.Q. Energy suggests is

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consistent with the standards established by the Commission in the OASIS Rule. 1/

H.Q. Energy's March Supplement includes revised transmission tariffs for Hydro-Quebec and its affiliate Cedar Rapids Transmission Company Ltd. (Cedar Rapids). 2/ H.Q. Energy also discusses changes in the Quebec regulatory regime. In legislation entitled "An Act respecting the Regie de l'energie" (Regie Act), the Province of Quebec created a new regulatory body, the Regie, with functions, powers and procedures similar to those of this Commission.

Other salient aspects of H.Q. Energy's application, including the transmission tariffs proposed for its transmission-owning utility affiliate, its generation market power study and its proposed code of conduct, are described in further detail below.

Notices of H.Q. Energy's filings were published in the Federal Register, 3/ with comments, protests and motions to intervene due on or before March 27, 1997.

In response to H.Q. Energy's December Application, Enron Power Marketing, Inc. (Enron) filed a timely motion to intervene and protest on January 3, 1997, raising no substantive issues. On January 15, 1997, the following entities timely filed the following pleadings: Niagara Mohawk Power Company (Niagara

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1/ Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct, Order No. 889, 61 Fed. Reg. 21,737 (1996), FERC Stats. & Regs. ¶ 31,035 (1996), order on reh'g, Order No. 889-A, 62 Fed. Reg. 12,484 (1997), FERC Stats. & Regs. ¶ 31,049 (1997), reh'g pending (OASIS Rule).

2/ H.Q. Energy explains that Cedar Rapids owns and operates transmission facilities in Quebec and in the Province of Ontario. For convenience of reference, we generally will refer to Cedar Rapids and Hydro-Quebec collectively as Hydro-Quebec when discussing the transmission tariffs and transmission market power issues.

3/ 62 Fed. Reg. 1112, 62 Fed. Reg. 13,605 (1997). Comments, protests and motions to intervene in response to H.Q. Energy's December Application were due January 15, 1997. As noted below, several intervenors filed pleadings after that date but before March 27, 1997, the deadline for responses to the March Supplement. As a result, all such pleadings are timely filed.

Mohawk), motion to intervene and protest; Plum Street Energy Marketing, Inc. (Plum Street), motion to intervene; New York State Electric & Gas Corporation (NYSEG), motion to intervene; Newfoundland and Labrador Hydro (Newfoundland Hydro), motion to intervene; Electric Clearinghouse, Inc., motion to intervene and protest; and Enron, protest. Those interventions of Plum Street, NYSEG and Newfoundland Hydro raise no substantive issues.

Also in response to the December Application, the following entities filed the following pleadings on the specified dates: 4/ the Grand Council of Crees and the New England Coalition for Energy Efficiency and the Environment (collectively, the Crees), motion for extension of time to file comments and intervention, filed January 21, 1997; Vermont Public Power Supply Authority (Vermont Public Power), motion to intervene, filed January 22, 1997; TransCanada Energy Limited, motion to intervene, filed January 24, 1997; Indeck Capital, Inc. and Indeck Energy Services, Inc. (collectively, Indeck), motion to intervene, filed January 30, 1997; Central Vermont Public Service Corporation (Central Vermont), motion to intervene, filed January 31, 1997; and The Utility-Trade Corp. (Utility-Trade), motion to intervene, 5/ filed February 4, 1997. Those interventions of Indeck, Central Vermont and Utility-Trade raise no substantive issues. 6/

Some of the issues raised by intervenors in their responses to the December Application were rendered moot by modifications included in the March Supplement. We will not address such issues or further describe intervenors' arguments in connection therewith.

4/ See supra note 2 regarding the timeliness of these pleadings.

5/ Utility-Trade styled its pleading a notice of intervention. Under the Commission's Rules of Practice and Procedure, however, only the Secretary of Energy and state commissions are permitted to file notices of intervention to achieve intervenor status. See 18 C.F.R. § 385.214(a) (1996). Accordingly, we will regard Utility-Trade's pleading as a motion to intervene.

6/ In a letter filed January 17, 1997, H.Q. Energy requested that the Commission defer action on the December Application, pending the anticipated legislative action in the Province of Quebec and possible amendment of the application. In addition to the above-listed pleadings, the Crees filed, on February 24, 1997, a motion to delay filing additional pleadings until H.Q. Energy amended the December Application. The new comment period established after the March Supplement renders the Crees' motion moot.

In response to H.Q. Energy's March Supplement, the following entities timely filed the following pleadings on the specified dates: the Crees, motion to file additional pleadings and comments, filed March 21, 1997; Mouvement Au Courant, motion to intervene, filed March 26, 1997; Niagara Mohawk, supplemental protest, filed March 27, 1997; Newfoundland Hydro, extension of time to file protest, 7/ filed March 27, 1997; Burlington Electric Department, motion to intervene, filed March 27, 1997; and Indeck, motion to intervene, raising no substantive issues, filed March 27, 1997.

Also in response to the March Supplement, the following entities filed the following pleadings on the specified dates: the Crees, comments and intervention, filed March 28, 1997, as corrected April 1, 1997; CNG Energy Services Corporation (CNG Energy), motion to intervene out of time, raising no substantive issues, filed April 9, 1997; Newfoundland Hydro, comments, filed April 10, 1997; Consolidated Edison Company of New York (ConEd), motion to intervene out of time in support of H.Q. Energy's application, raising no substantive issues, filed April 17, 1997; and Mouvement Au Courant, supplement to motion to intervene, filed April 30, 1997.

On April 11, 1997, H.Q. Energy filed a response to various motions to intervene and protests. In addition to addressing substantive issues raised by intervenors, H.Q. Energy opposes the motions to intervene of the Crees and of Mouvement Au Courant, on the alleged grounds that their interests relate exclusively to matters of Quebec policy and law. On April 28, 1997, H.Q. Energy filed a response to Newfoundland Hydro's comments.

To the extent that intervenors or H.Q. Energy's responses raises issues that require resolution in this order, their arguments are described below.

Discussion

A. Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 8/ the timely, unopposed motions to intervene serve to make the movants parties to this proceeding. Additionally, given the early stage of this proceeding and the absence of undue prejudice or delay, we will grant the unopposed motions for late intervention of CNG Energy and ConEd. We also

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7/ We will treat Newfoundland Hydro's pleading as a motion to file out of time.

8/ 18 C.F.R. § 385.214 (1996).

will accept the late-filed comments of Newfoundland Hydro, the filing of which H.Q. Energy does not oppose. Moreover, notwithstanding the opposition of H.Q. Energy, we will grant intervenor status to the Crees and to Mouvement Au Courant and will accept their respective late-filed pleadings, as we find that their interests may not be adequately represented by other parties to this proceeding. We will also accept H.Q. Energy's responses. Given the unusual nature and complexity of the case, involving Canadian affiliates, and the evolving regulatory regime in Quebec, these pleadings have aided us in understanding the issues.

B. Market-Based Rates

We generally have allowed power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. In order to demonstrate the absence or mitigation of market power, a transmission-owning public utility must have on file with the Commission an open-access transmission tariff for the provision of comparable services. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing. 9/

As we discuss below, we find that H.Q. Energy meets all but one of the criteria for granting market-based rates. Because, however, H.Q. Energy in preparing its generation market power analysis did not have the benefit of the guidance set forth in NYSEG, we cannot conclude on the basis of the information and analysis before us that H.Q. Energy has demonstrated that its affiliate Hydro-Quebec lacks generation market power in United States markets. Accordingly, we will direct H.Q. Energy to submit additional information and analysis, consistent with NYSEG, on generation market power. In the meantime, we will defer action on H.Q. Energy's request for market-based rates, pending receipt of such additional information and analysis.

1. Transmission Market Power

In the case of a power marketer that is affiliated with a transmission-owning United States utility, mitigating transmission market power requires the transmission-owning utility affiliate to have on file with the Commission an open access transmission tariff that conforms to the pro forma tariff

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9/ E.g., Progress Power Marketing, Inc., 76 FERC ¶ 61,155 at 61,919 (1996); Northwest Power Marketing Company, L.L.C., 75 FERC ¶ 61,281 at 61,889 (1996). Accord, Heartland Energy Services, Inc., 68 FERC ¶ 61,223 at 62,060-63 (1994) (Heartland).

contained in the Open Access Rule (as modified on rehearing). 10/ In this case, the transmission-owning utility affiliate is Canadian.

In prior market-based rate cases involving power marketer affiliates of Canadian utilities, the Commission has applied the same general standards that we use for reviewing requests for market-based rates by power marketers affiliated with United States utilities. 11/ In Energy Alliance, for example, we stated that the marketer must be able to show that its transmission-owning utility affiliate offers non-discriminatory access to its transmission system that can be used by competitors of the power marketer to reach the United States. We added, however, that we would consider a variety of approaches when dealing with the market power of foreign utility affiliates of United States marketers. 12/ In Powerex, although we rejected the marketer's application for failure to demonstrate mitigation of transmission market power, we emphasized that the Commission, while wishing to assure reciprocal service into and out of Canada when Canadian entities seek access to United States markets, does not intend to open intra-Canadian electric markets by imposing open access tariffs for transactions wholly within Canada. Moreover, the Commission stated that it would determine on a case-by-case basis what tariffs, other than the Open Access Rule pro forma tariff, would satisfy our concerns, i.e., be consistent with our comparability principles. 13/

In this case, H.Q. Energy has submitted proposed transmission tariffs under which Hydro-Quebec will provide transmission service that are virtually identical to the Open

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10/ See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), reh'g pending (Open Access Rule).

11/ The cases include: Energy Alliance Partnership, 73 FERC ¶ 61,019 (1995) (Energy Alliance); TransAlta Enterprises Corporation, 75 FERC ¶ 61,268 (1996) (TransAlta); Powerex; and Ontario Hydro Interconnected Markets Inc., 78 FERC ¶ 61,369 (1997), reh'g pending (Ontario Hydro).

12/ 73 FERC at 61,030-31. Accord, TransAlta, 75 FERC at 61,875-76.

13/ See Powerex, 78 FERC at 61,100.

Access Rule pro forma tariff. The main difference is that while the pro forma tariff refers to the Commission as the applicable regulatory agency, these tariffs refer to the Regie. 14/ Similarly, the proposed tariffs substitute Canadian law for United States law -- e.g., Canadian commercial law in lieu of the Uniform Commercial Code. H.Q. Energy states that the transmission rates were developed using the Commission's standard average cost, rolled-in methods. While there are separate tariffs and charges for Hydro-Quebec and Cedar Rapids, customers using both services will pay only the Hydro-Quebec transmission charge.

The Crees argue that the proposed transmission tariffs are not equivalent to the Commission's pro forma tariff because they will be subject to the regulatory oversight of the Regie rather than this Commission. They complain that the Regie is not an adequate substitute for the Commission because it is appointed by the same government that owns Hydro-Quebec and because its decisions are not subject to judicial review. We disagree with the Crees' assumption that a foreign entity must submit to the Commission's jurisdiction for transmission services provided in foreign countries. The Commission's jurisdiction in this proceeding extends only to H.Q. Energy's jurisdictional power sales in the United States. As a condition of approving those sales, the Commission simply evaluates the transmission arrangements that are available in Canada (under the jurisdiction of Canadian governments and regulatory agencies) against the standards that the Commission requires for open access transmission services under our jurisdiction. Here, the terms and conditions of transmission service are identical to the Commission's pro forma tariff in all material respects.

The Crees also object to the use of a postage stamp rate in the proposed transmission tariffs. They argue that a postage stamp rate is discriminatory when the transmission grid extends over a large area. The Crees suggest that lower rates for shorter distances, or rates reflecting a zonal approach, would be more appropriate. The Crees also argue that use of the firm rate as the ceiling for the nonfirm rate is unreasonable. We disagree. The rates at issue here reflect rate designs previously approved by the Commission for jurisdictional transmission services, including in the Open Access Rule pro

14/ The Regie Act provides that the Regie will operate as an independent commission to regulate transmission rates on a traditional cost of service basis, establish terms and conditions of service and address service complaints.

forma tariffs. 15/ Moreover, Hydro-Quebec and Cedar Rapids will obtain transmission service for their own wholesale power sales under the proposed tariffs.

We conclude, therefore, notwithstanding the Crees' arguments, that Hydro-Quebec has mitigated its transmission market power adequately to support authorization of market-based rates for H.Q. Energy's United States wholesale sales.

2. Generation Market Power

The Commission's generation dominance analysis assumes that the seller, and its affiliates owning, operating or controlling transmission facilities, have satisfactory open access transmission available. As discussed above, H.Q. Energy has demonstrated compliance with that requirement. We find, however, as discussed below, that it has not provided sufficient information to demonstrate that its utility affiliate lacks generation market power.

While H.Q. Energy in its generation market analysis defines the relevant markets as those utilities with which Hydro-Quebec and Cedar Rapids are directly interconnected, it does not compute generation market shares using the Commission's hub-and-spoke method, which is the method that the Commission usually employs in market-based rate cases. 16/ Instead, H.Q. Energy analyzes the amount of customer load that could be served by each interconnected utility (including Hydro-Quebec), using the size of each customer's interconnections with potential suppliers as a proxy for load. H.Q. Energy contends that its analysis shows market shares below 20 percent, which do not exceed levels that the Commission previously has found acceptable. 17/

As noted above, H.Q. Energy completed its application prior to the issuance of NYSEG. Thus H.Q. Energy prepared its generation market power analysis without the benefit of our discussion in NYSEG of why a similar approach to analyzing generation market power is insufficient for purposes of our market-based rate requirements. We explained in NYSEG that an analysis designed around the single factor of interconnection

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15/ See Open Access Rule, FERC Stats. & Regs. ¶ 31,036 at 31,650, 31,668.

16/ See NYSEG, 78 FERC at 62,237-38 & n.5.

17/ See, e.g., Southwestern Public Service Company, 72 FERC ¶ 61,208 at 61,966-67 (1995), reh'g pending; Louisville Gas and Electric Company, 62 FERC ¶ 61,016 at 61,146 (1993) (Louisville).

capacity is so selective and incomplete as to provide no basis upon which to draw conclusions about market power. 18/ The Commission also stated that interconnection capacity is not irrelevant to market power issues and it is one of the factors that will be considered in the market screen analysis now being used for mergers. The Commission directed that any proposed substitute to the traditional hub-and-spoke analysis must "fully address all the competition factors considered under the market power analysis in the [Commission's] merger policy statement." 19/

Accordingly, we will defer action on H.Q. Energy's market-based rate application until such time as H.Q. Energy provides further information and analysis concerning generation market power consistent with the discussion above and with our discussion in NYSEG. 20/

3. Other Barriers to Entry/Reciprocal Dealing

Intervenors raise a number of issues regarding barriers to entry and affiliate abuse. Even though we are deferring action on H.Q. Energy's market-based rate application at this time, we nonetheless will address these matters here in order to give guidance to the parties in the event that H.Q. Energy supplements its application with a revised generation market power analysis, as this order permits.

With regard to potential barriers to entry and reciprocal dealing concerns, we note that Hydro-Quebec wholly owns Green Mountain Energy Partners, an energy service company that intends to sell electricity and natural gas at retail to United States customers. Additionally, Hydro-Quebec holds a substantial interest in Noverco, Inc., which in turn holds interests in the main natural gas distributor in the Province of Quebec and in a natural gas distributor in Vermont.

Were we to accept H.Q. Energy's application for market-based rates after submission of the additional generation market

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18/ See 78 FERC at 62,328-29.

19/ Id. at 62,329 n.7. See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act, Order No 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. & Regs. ¶ 31,044 (1996). H.Q. Energy must address both physical and economic limitations on the definitions of the relevant product and geographic markets.

20/ We will provide notice and an opportunity for comments on the supplement.

concern. The code of conduct will be included as part of H.Q. Energy's rate schedule on file with this Commission, and any violations of the code can be reported to the Commission. Also, the code of conduct applies to all affiliates of Hydro-Quebec, without limitation. It does not exclude affiliates doing business in the United States, as the Crees mistakenly allege.

Finally, while the proposed code of conduct, as noted above, does not prohibit sharing market information beyond the OASIS Rule requirements, H.Q. Energy, in response to Niagara Mohawk's protest, agreed to revise the code of conduct in that regard. With this modification, which should be submitted along with the previously-discussed additional generation market power information, H.Q. Energy's code of conduct meets the Commission's requirements. In these circumstances, we are satisfied that there are no concerns of affiliate abuse here.

C. Waivers and Authorizations

H.Q. Energy, in its application, requests the same waivers and blanket authorizations as those afforded to other power marketers. Because we are deferring action on H.Q. Energy's application for market-based rates, there is no need to address the requested waivers and authorizations at this time.

D. Other Issues

The Crees complain that, while the Regie Act recognizes, for the first time, a market for wholesale energy competition in Quebec, Canadian wholesale purchasers must seek government approval prior to making purchases from suppliers other than Hydro-Quebec, and the Regie Act does not expressly recognize the authority of any utility other than Hydro-Quebec to act as a power marketer in Quebec. The Crees are concerned, therefore, that the Regie Act in practice may not lead to a competitive market. The Crees ask the Commission to condition approval of H.Q. Energy's application on amendments to Canadian laws to remove the requirement for Canadian government approval to obtain new suppliers and to recognize power marketers within Quebec on terms similar to those imposed by the Commission. To the extent the Crees seek our interference with trade that takes place wholly within Canada, we cannot do so. The market for power sales that take place wholly within Canada is beyond the scope both of this proceeding and of our jurisdiction.

We note that in Ontario Hydro, 78 FERC at 62,529, the Commission stated that it "seeks to assure reciprocal service into and out of Canada when Canadian entities seek access to United States markets." We believe that United States sellers should be able to sell to wholesale purchasers within Canada.

However, we also believe the Crees' concerns are premature at this time.

Conclusion

We note that with the exception of generation market power, H.Q. Energy has satisfied all our requirements for market-based rates. While we express no opinion on the ultimate resolution of the generation market power issue, we note that H.Q. Energy, and, for that matter, Hydro-Quebec, can utilize the open access tariffs of United States public utilities since the reciprocity condition is at this point fully satisfied. Thus, assuming an adequate showing can be made in its supplemental filing on generation market power, H.Q. Energy will be able to sell at market-based rates. Until that time, it would be able to transact at cost-based rates for the resale of power purchased either from Hydro-Quebec or from non-affiliates.

The Commission orders:

(A) The motions for late intervention of CNG Energy and ConEd are hereby granted.

(B) The late-filed comments of Newfoundland Hydro are hereby accepted.

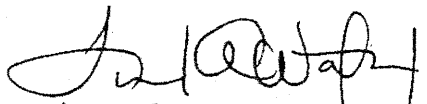
(C) The motions to intervene of the Crees and Mouvement Au Courant are hereby granted, and their respective late-filed pleadings are hereby accepted.

(D) H.Q. Energy's responses are hereby accepted.

(E) Action on H.Q. Energy's application for market-based rates, and related waivers and authorizations, is hereby deferred, and H.Q. Energy is hereby directed to provide additional information and analysis concerning generation market power and to amend its proposed code of conduct, as discussed in the body of this order.

By the Commission. Commissioners Bailey and Santa concurred with separate statements to be issued later.

(S E A L)



Linwood A. Watson, Jr.,
Acting Secretary.

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IN THE MATTER OF

A COMPLAINT BY TRANSCANADA ENERGY LTD. REGARDING THE SERVICE AGREEMENT WITH BRITISH COLUMBIA TRANSMISSION CORPORATION FOR LONG TERM FIRM POINT TO POINT TRANSMISSION SERVICE

DECISION

September 10, 2009

Before:

A.A. Rhodes, Panel Chair/Commissioner
L.A. O'Hara, Commissioner
P.E. Vivian, Commissioner

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COMMISSION ORDER G-103-09

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1.0 INTRODUCTION

This proceeding concerns the sale of long term firm point-to-point transmission service by British Columbia Transmission Corporation to users including its affiliates British Columbia Hydro and Power Authority and Powerex Corporation as well as the Complainant, TransCanada Energy Ltd. and NorthPoint Energy Solutions Inc. on the BC to Alberta path. TransAlta Energy Marketing Corp. is a potential customer, seeking transmission service on the path.

TransCanada and NorthPoint take the position that the transmission capacity has been oversold as conditions in Alberta frequently limit the use of the path in BC, with the result that these customers are often unable to make use of the transmission capacity which they purchased. TransCanada has filed a formal Complaint with the British Columbia Utilities Commission which NorthPoint supports. They submit that the appropriate level of transmission capacity which should be offered for sale is 480 MW, which was the limit in place prior to December 1, 2007, when BCTC made the decision to increase it to 785 MW, following a System Impact Study. TransAlta, on the other hand, submits that BCTC should offer more capacity for sale, up to the Western Electricity Coordinating Council path rating of 1,200 MW, to allow it access to the system. BCTC takes the position that its Open Access Transmission Tariff and published Business Practices require it to release Firm capacity on its transmission system on a first-come, first-served basis or to construct Network Upgrades to provide Long Term Firm Point-to-Point transmission service but that in this case a "pragmatic approach" favours using the existing capacity figure of 785 MW. BCTC therefore seeks an amendment to its tariff to limit capacity on the BC>AB path to 785 MW until such time as Alberta upgrades its system to accept the additional transmission which can flow over the BC system. BC Hydro and Powerex support BCTC's approach. The Joint Industry Electricity Steering Committee favours selling as much capacity as possible, but does not argue for a particular figure.

The procedural background and context are set out in Appendix A.

2.0 HISTORICAL CONTEXT AND REGULATORY FRAMEWORK

The British Columbia Transmission Corporation ("BCTC") is a provincial crown corporation which was created in 2003 to manage the transmission assets owned and previously operated by the British Columbia Hydro and Power Authority ("BC Hydro").

BCTC first applied for an Open Access Transmission Tariff ("OATT") in August, 2004, to replace BC Hydro's Wholesale Transmission Services ("WTS") Tariff, which was the tariff applicable to the provision of open access transmission service on BC Hydro's transmission system prior to the OATT. The OATT application was approved by the Commission on June 20, 2005.

Transmission services are scheduled by registered users through BCTC's Open Access Same-Time Information System ("OASIS"). OASIS was developed to comply with requirements in the U.S. imposed by the Federal Energy Regulatory Commission.

2.1 Regulatory Bodies

There are a number of relevant regulatory agencies in North America. BCTC voluntarily complies with many regulations and guidelines of US regulatory agencies, but is itself regulated by the British Columbia Utilities Commission ("BCUC", "Commission").

2.1.1 FERC

The Federal Energy Regulatory Commission ("FERC") is the agency responsible to regulate interstate transmission of natural gas, oil and electricity in the United States. The OATT itself, like the WTS before it, is modelled on the FERC pro forma tariff, which was established by FERC Order 888. The FERC pro forma tariff was implemented in the U.S. in 1996 to remedy a perceived problem of "undue discrimination" and was designed to "prohibit public utilities from using their monopoly power over transmission to unduly discriminate against others." (Exhibit B1-17, BCUC 2.20.1, Attachment-FERC Notice of Proposed Rulemaking, March 19, 2009, p. 4) Examples of areas

where undue discrimination might occur relate to situations where there is lack of clarity in assumptions, calculations, models etc. which could allow for the transmission provider to vary a calculation, model or assumption etc. depending upon the particular customer. (Exhibit B1-17, BCUC 2.29.1 Attachment-FERC Notice of Proposed Rulemaking, March 19, 2009, pp. 55, 57, 60)

In order to remedy what were viewed in the U.S. as continuing "opportunities for undue discrimination" under the Order 888 pro forma OATT, FERC issued Order 890 in February, 2007 to amend the tariff. The stated purposes of Order 890 involved "...(1) strengthening the pro forma tariff to remedy opportunities for undue discrimination, (2) providing greater specificity to facilitate FERC's enforcement and monitoring; and (3) increasing the transparency of the rules for planning and use of the transmission system." (Exhibit B1-1, p. 14, referencing Order No. 890 cover page summary)

FERC reviewed the historical background to reforms in the U.S., including Order 888, in Order 890. The over-riding concern behind the reforms related to the change in the industry structure in the U.S. in the 1970s which saw increased sources of different types of small generation with lower cost going up against the market power of existing vertically-integrated utilities with their ability to limit access to their transmission facilities, thereby favouring their own, more expensive generation. "The major concern of the Commission was whether the seller or its affiliates could limit competition and thereby drive up prices." (FERC Order 890, p. 9)

2.1.2 NERC

BCTC also plans and operates the transmission system in accordance with its obligations as a member of the North American Electric Reliability Corporation ("NERC") and its regional reliability organization, the Western Electricity Coordinating Council ("WECC").

NERC is the body responsible for setting reliability standards for the electricity industry in North America. NERC is not concerned with commercial terms and conditions of transmission service, which is FERC's domain. NERC has been approved by FERC as the electricity reliability organization

in the U.S. However, NERC's recommended standards are subject to approval by FERC before they become mandatory in the U.S. Similarly, NERC's proposed reliability standards are subject to approval by the BCUC in British Columbia.

2.1.3 WECC

The Western Electricity Coordinating Council ("WECC") is a regional organization, responsible for coordinating and promoting electrical system reliability in the Western Interconnection. BCTC is a member of WECC and participates, with the Alberta Electric System Operator ("AESO"), in joint studies to determine, for example, path ratings between the two jurisdictions. (BCTC Evidence, T3: 340) WECC path ratings are "Maximum Transfer Capabilities" and do not define the Firm Total Transfer Capability of the path. (Exhibit B1-1, p. 129)

2.1.4 BCUC

The British Columbia Utilities Commission is the regulatory body in British Columbia which regulates BCTC. BCUC has the mandate to approve the OATT and any proposed amendments and to monitor BCTC's compliance with its tariff. It is agreed by the parties that BCUC also has the jurisdiction to hear the TCE Complaint.

2.2 Reciprocity

BCTC's use of its OATT and compliance with FERC principles and NERC and WECC enable it to participate in U.S. market-dominated transactions. BCTC expressed the view that if it "fails to meet [FERC's] comparability standard Powerex's ability to maintain its authority to trade energy in the United States at market-based rates could be affected." (Exhibit B1-7, BCUC 1.34.1)

In fact, section 4.5(b) of the Master Agreement dated November 12, 2003 between BC Hydro and BCTC provides:

> "BCTC will at all times seek to ensure that the terms and conditions of the OATT, BCTC's business practices and governance (for example, independence from generation owners), or any of them:
>
> > (b) subject to the approval of the Commission, meet the requirements of FERC, other regulators and other transmission operators to the extent necessary to permit continued access at market-based rates by electricity market participants in British Columbia to the United States and other Canadian electricity markets outside of British Columbia, including by BC Hydro and Powerex." (Exhibit B2-1, p.3, FN 1; Exhibit B1-7, BCUC 1.34.1)

BCTC is not otherwise obliged to comply with FERC as BCTC is not a transmission provider within FERC's jurisdiction. (Exhibit B1-7, BCUC 1.16.2)

This reciprocity requirement was summarized by the U.S. Court of Appeals for the District of Columbia Circuit in Consumers Energy Company v. FERC, No. 03-1162 (D.C. Cir. May, 2004) at page 2 where Roberts, Circuit Judge stated, for the Court:

> "FERC does not presume to tell foreign transmission-owning utilities what tariffs they must file. If a marketing affiliate of such a utility wants to sell power at market-based rates in the United States, however, the utility must offer transmission service *comparable* to that required of a utility in the United States. Just as a domestic transmission-owning utility must allow competitors of its marketing affiliate to use its transmission services on a non-discriminatory basis to compete with the marketing affiliate, so too a foreign transmission-owning utility must allow companies that would compete with its marketing affiliate to use its transmission services to reach the United States market and compete on a level playing field with its marketing affiliate." (emphasis in original)

Roberts, Circuit Judge further stated, at p. 15:

> "We think it reasonable for the Commission to acknowledge the reality of an international border in deciding whether to insist on compliance with the minutiae of its regulatory requirements; it was certainly open to FERC to decide that a flexible approach requiring comparability on a case-by-case basis rather than letter-for-letter compliance across-the-board better accommodates jurisdictional limits and promotion of competitive markets for United States loads."

FERC itself explained, in its Order dated January 15, 1997 Rejecting Market Based Rates Without Prejudice for Powerex:

> "[t]he Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. In order to demonstrate the absence or mitigation of market power, a transmission-owning public utility must have on file with the Commission an open access transmission tariff for the provision of comparable services. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.

FERC further explained:

> "...our concerns are more limited for foreign transmission-owning entities than for transmission-owning entities in the United States. As originally stated in Energy Alliance, "The Commission's concern is not transmission service to serve Canadian loads – it is transmission to serve United States loads." (73 FERC at 61,030). In TransAlta, the Commission expanded its concerns to include access for United States competitors into Canadian markets on a reciprocal basis (75 FERC at 61,875). Thus, the Commission seeks to assure reciprocal service into and out of Canada when Canadian entities seek access to United States markets, ["This would include wheeling-through service needed to accommodate service for United States or Canadian companies into and out of Canada] but the Commission is not seeking to open intra-Canada electric markets through the imposition of open access tariffs for transactions wholly within Canada." (78 FERC 61,024 at pp. 3, 6)

FERC denied Powerex's market-based rate application in that case as it had not demonstrated adequate mitigation of its transmission market power. (This case was decided prior to the creation of BCTC.)

BCTC has stated, however, that, in its view, "FERC authority relating to reciprocity would allow BCTC's OATT to include a limit on Firm sales on the BC>AB path on a prospective basis...because it would not prevent customers from reaching the United States market on a comparable basis".

(BCTC Argument, p. 64) In fact, as noted above, BCTC is seeking an order amending Attachment C of its tariff to limit sales of transmission service to a specific MW amount (785). (Exhibit B1-1, p. 122)

BCTC also testified that the principal reason that BCTC adopted a tariff that follows FERC was not for reciprocity reasons but to be part of the Western Electricity Coordinated system. (Evidence of BCTC, T3: 349)

Commission Panel Discussion

Notwithstanding BCTC's evidence that reciprocity is not the principal reason that it adopted the FERC pro forma tariff, the Commission Panel acknowledges the importance of reciprocity to BCTC and its affiliates and has made every effort to respect FERC principles and guidance as provided in FERC's decisions where they are relevant to circumstances in this jurisdiction. However, the Commission is of the view that this jurisdiction is unique in many respects and that some FERC principles may or may not be properly applicable. The Commission Panel is of the view that the evil that FERC was and is continuing to try to eliminate with the use of the OATT and the subsequent amendments to it was a transmission provider keeping available capacity for itself or a related entity, to the exclusion of its competitors, in an effort to exercise market power. This situation has resulted in under-utilization of the transmission system, price discrimination, lack of transparency and the potential for monopoly pricing of electricity in the United States. In contrast, in this case the allegations relate to BCTC's potential overselling of the transmission system on the BC>AB path, arguably to its own benefit. There is no allegation that BCTC inappropriately favoured its affiliate. (Trans Canada Reply, p. 24) One result of the release of additional LTF PTP capacity is an effective increase in the tariff – with the result that pricing becomes less transparent. This is addressed further in Section 4.2.

3.0 BACKGROUND TO COMPLAINT

TransCanada Energy Ltd. ("TCE" or "TransCanada") has a Service Agreement with BCTC dated December 18, 2006 for Long Term Firm Point-to-Point ("LTF PTP")Transmission Service over the BC to Alberta ("BC>AB") path. The Service Agreement is for a period of five years and two months, commencing on January 1, 2007 and terminating on March 1, 2012. It contemplates a maximum of 100 MW of capacity and 2400 MWh of energy to be transmitted per day. The Service Agreement is contained as an attachment to BCTC's OATT, which contains additional standard form terms and conditions governing the relationship between the parties. (TCE Complaint, Exhibit B2-1, p. 1)

The BC>Alberta path is made up of a single 500kV transmission line between Cranbrook, BC and Langdon, Alberta, and two 138kV lines between Natal, BC and Coleman, Alberta and between Fording Coal at Elk River, BC and Pocaterra, Alberta. (Exhibit B1-11, Attachment 3, BCTC Report No. SPA 2007-85 November 2007, p. 8)

TCE has been a customer of BCTC and, prior to that, BC Hydro, since 1996. (TCE Evidence, T2: 165) Its current Service Agreement is the result of its having exercised a rollover right contained in an earlier service agreement which was executed on July 13, 2004, in December of 2006. (TCE Argument, p. 1)

In May of 2004 BCTC announced that, effective August 01, 2004, new Firm Total Transfer Capability ("TTC") limits would be in effect and that the Firm TTC limit on the BC>AB path would increase from 210 MW to 545 MW. (Exhibit B2-6, BCUC 1.16.1)

On June 28, 2004 BCTC posted a System Impact Study on its website which concluded that Long-Term Firm Point-to-Point Transmission Service was available on the BC>AB path. (Exhibit B2-6, BCUC 1.16.1)

Also on June 28, 2004 BCTC posted a bulletin entitled "TTC on the BC-Alberta Intertie". The bulletin was issued in response to a customer enquiry and indicated that BCTC had performed an analysis

of historical hourly TTC on the BC >AB path during the January 1, 1999 to June 1, 2004 period which indicated that "[a]lthough Real-time TTC on the BC>AB path may be less than 480 MW (545 MW – 65 MW TRM [Transmission Reliability Margin]) at times due to system conditions, BCTC found that 93% of the hours had hourly TTC, after accounting for TRM, greater than 480 MW. This data supports BCTC's 545 MW Firm TTC based on the methodology in Section 2.2.4 of the Business Practices." (Exhibit B2-6, BCUC 1.16.1; Evidence of BCTC T3: 374-375)

In April 2007 BCTC conducted a further System Impact Study in part to determine what, if any, Network Upgrades would be required to increase Firm PTP ATC from BC to Alberta. The study did not look at contingencies in the Alberta system but rather assumed that the Alberta system was capable of importing the transferred amounts with no resultant problems. The study found that the 138 kV ties to Alberta would be overloaded with an increase in transfer levels but that if the ties were opened to force all exports to flow on the Cranbrook – Langdon ("CBK-LGN") 500 kV line, and therefore operated in an "open loop configuration" during periods of heavy transfer, the overloading conditions could be avoided. The study concluded that, as long as the 138 kV ties were operated, as noted above, in an open loop configuration, the system could support an increase from 545 MW FTTC to 850 MW FTTC with no Network Upgrades. An increase from 850 MW to the WECC path rating of 1200 MW would require the system to be reinforced. (Exhibit B1-11, Attachment 3, BCTC Report No. SPA 2007-88 April 3, 2007, pp. 2-3) The study therefore concluded, "Not considering the limitations within the Alberta system, the BCTC system is capable of delivering 1200 MW to the BC Alberta border when adequate reactive reinforcement is provided." (Exhibit B1-11, Attachment 3 – BCTC Report No. SPA 2007-88 April 3, 2007, p. 4)

BCTC held an "Open Season" in July, 2007, which invited bids for transmission service over the BC>AB path. The purpose of an Open Season is to allow BCTC to study a group of transmission requests together to improve efficiency and share cost responsibility for any associated network upgrades among participants. TCE asked BCTC whether there was any downside to it not participating given that its current requests were in "received" status and was advised that requests in the queue ahead of the commencement of the Open Season Period would be

processed in that queue priority, ahead of the Open Season. TCE decided not to participate in the Open Season. (Exhibit B2-6, BCUC 1.16.1)

A further System Impact Study conducted by BCTC and published in November 2007, which again specifically assumed Alberta to be capable of importing 1200 MW from BC, confirmed the above conclusions. The study noted that the open loop configuration required to avoid overloading the 138 kV ties at transfers above 550 MW would reduce the reliability for Elk Valley Coal, Elkford, Cranbrook Regional Hospital and Fording Coal as opposed to when the ties were operated in a looped configuration. (Exhibit B1-11, Attachment 3 – BCTC Report No. SPA 2007-85, pp. 7, 10) BCTC takes the position, however, that although the reliability of supply is slightly lower with the open ties, this configuration is nothing out of the ordinary and is "not an unacceptable practice". (T3: 435-436)

Commencing in December, 2007, BCTC sold an additional 125 MW of LTF PTP transmission service on the BC>AB path, bringing the total to 605 MW. It then sold a further 180 MW of LTF PTP transmission service commencing in January, 2008 to bring the total to 785 MW. As at January 01, 2008, 785 MW of LTF PTP transmission service had been sold under ten contracts for LTF PTP transmission service to four customers: BC Hydro, TCE, NorthPoint Energy Solutions Inc. ("NorthPoint")and Cargill Power Markets LLC. ("Cargill"). The increased transmission capacity of 305 MW was taken by BC Hydro (280 MW) and Cargill (25 MW). Cargill was the only new customer to purchase transmission service following the December, 2007 increase. Its contract has an end date of July 31, 2009 and it has no rollover right but is indicated as having "Partial Service under Study". (Exhibit B1-1, pp. 129-130; Exhibit B1-7, BCUC 1.42.1)

The following table shows the LTF PTP Service Agreements on the BC>AB path as of the date of the Application, November 21, 2008.

Table 1

Current LTF PTP Service Agreements on BC>AB Path

	Customer	Firm Capacity (MW)	First Service Start Date on BC>AB Path (Under Initial Service Agreement)	Contract Date of Current Service Agreement	Service Start Date Under Current Service Agreement	Service End Date[197] Under Current Service Agreement	Rollover Right
1	BC Hydro	50	1 Jan 2000	24 May 2007	1 July 2007	31 Dec 2008	Yes
2	BC Hydro	160	1 July 2001	27 May 2008	1 July 2008	31 July 2012	Yes
3	BC Hydro	120	1 Dec 2006	17 Oct 2007	1 Dec 2007	31 Dec 2008	Yes
4	BC Hydro	50	1 Dec 2007	30 Nov 2007	1 Dec 2007	31 Dec 2011	Yes
5	BC Hydro	50	1 Dec 2007	30 Nov 2007	1 Dec 2007	31 Dec 2011	Yes
6	BC Hydro	180	1 Jan 2008	28 Dec 2007	1 Jan 2008	31 Dec 2008	No
7	TCE	100	1 Sep 2004	18 Dec 2006	1 Jan 2007	29 Feb 2012	Yes
8	NorthPoint	25	1 Jan 2006	21 Dec 2006	1 Jan 2007	31 Dec 2008[198]	Yes
9	NorthPoint	25	1 Jan 2006	21 Dec 2006	1 Jan 2007	31 Dec 2008[199]	Yes
10	Cargill	25	1 Dec 2007	30 Nov 2007	1 Dec 2007	31 July 2009	Partial Service under Study
11	**Total**	**785**					

Source: Exhibit B1-1, Table 6-1, p. 130

On June 3, 2008 BCTC applied to the BCUC for approval to temporarily suspend the release of Firm Available Transfer Capacity on the BC>AB path and to suspend the Facilities Study related to that path until its next OATT Application. That Application was approved by BCUC Order G-110-08 issued on July 3, 2008.

TCE filed its Complaint on October 9, 2008.

As part of the instant OATT amendment application dated November 21, 2008, and in recognition of the fact that some customers might argue that the 785 MW limit in place is too high, BCTC sought an interim order allowing it to include a condition on rollover requests for BC Hydro Service Agreements dated May 24, 2007 and October 17, 2007 (both due to expire on December 31, 2008 for amounts of 50 MW and 120 MW respectively) and any queued requests for Firm ATC coming available on the BC>AB Path on January 1, 2009 (180 MW from BC Hydro's contract due to expire on December 31, 2008 with no rollover rights) stating:

> "This Service Agreement is subject to a further order of the British Columbia Utilities Commission in the matter of the 'British Columbia Transmission Corporation Application to Amend the Open Access Transmission Tariff' filed on 21 November 2008". (Exhibit B1-1 pp. 122-124; 149-153)

Commission Order G-175-08 approved the inclusion of the condition, as requested. Thus, as of January 1, 2009 there are contracts for 350 MW of transmission service bearing the above subject condition.

Parties in the queue currently awaiting the release of additional LTF PTP capacity include TransAlta. Table 2 shows the positions of the various parties in respect of the queue.

Table 2
Queue Requests on US – AESO and BC – AESO

OASIS	Customer	Path	Status	Capacity	Time Stamp	Start Time	Stop Time	Term (years)	Comments
70974668	Cargill	BPAT - AESO	PARTIAL	25.00	28-Aug-06	01-Jan-07	01-Jan-11	4	Partial to 1-Aug-09. Study suspended per BCUC ruling 8-July-08 (note 1)
71086993	NorthPoint	BPAT - AESO	STUDY	25.00	09-Nov-06	01-Jan-09	01-Jan-11	2	Study suspended per BCUC ruling 8-July-08
71086996	NorthPoint	BPAT - AESO	STUDY	25.00	09-Nov-06	01-Jan-09	01-Jan-11	2	Study suspended per BCUC ruling 8-July-08
71087026	BC Hydro	BPAT - AESO	STUDY	200.00	09-Nov-06	01-Jan-09	01-Jan-19	10	Study suspended per BCUC ruling 8-July-08
71087057	BC Hydro	BCTC - AESO	STUDY	200.00	09-Nov-06	01-Jan-11	01-Jan-21	10	Study suspended per BCUC ruling 8-July-08
71088297	BC Hydro	BCTC - AESO	PARTIAL	200.00	10-Nov-06	01-Jan-08	01-Jan-11	3	Partial to 1-Jan-09, 180 MW. Study suspended 8-July-08 (note 2)
71133341	Cargill	BPAT - AESO	STUDY	50.00	07-Dec-06	01-Jan-09	01-Jan-10	1	Study suspended per BCUC ruling 8-July-08
71133343	Cargill	BPAT - AESO	STUDY	50.00	07-Dec-06	01-Jan-09	01-Jan-10	1	Study suspended per BCUC ruling 8-July-08
71133348	Cargill	BPAT - AESO	STUDY	50.00	07-Dec-06	01-Jan-10	01-Jan-11	1	Study suspended per BCUC ruling 8-July-08
71133351	Cargill	BPAT - AESO	STUDY	50.00	07-Dec-06	01-Jan-10	01-Jan-11	1	Study suspended per BCUC ruling 8-July-08
71145601	TCE	BPAT - AESO	RECEIVED	100.00	15-Dec-06	01-Mar-12	01-Mar-13	1	N/A
71145604	TCE	BPAT - AESO	RECEIVED	100.00	15-Dec-06	01-Mar-12	01-Mar-14	2	N/A
71145605	TCE	BPAT - AESO	RECEIVED	100.00	15-Dec-06	01-Mar-12	01-Mar-17	5	N/A
71145606	TCE	BPAT - AESO	RECEIVED	100.00	15-Dec-06	01-Mar-12	01-Mar-15	3	N/A
71150644	Cargill	BPAT - AESO	STUDY	50.00	19-Dec-06	01-Jan-11	01-Jan-12	1	Study suspended per BCUC ruling 8-July-08
71150650	Cargill	BPAT - AESO	STUDY	50.00	19-Dec-06	01-Oct-11	01-Oct-17	6	Study suspended per BCUC ruling 8-July-08

OASIS	Customer	Path	Status	Capacity	Time Stamp	Start Time	Stop Time	Term (years)	Comments
71505520	NorthPoint	BPAT - AESO	STUDY	25.00	18-Jul-07	01-Jan-09	01-Jan-16	7	Study suspended per BCUC ruling 8-July-08
71505525	NorthPoint	BPAT - AESO	STUDY	25.00	18-Jul-07	01-Jan-09	01-Jan-16	7	Study suspended per BCUC ruling 8-July-08
71512624	Candela	BPAT - AESO	STUDY	25.00	23-Jul-07	01-Jan-08	01-Jan-10	2	Study suspended per BCUC ruling 8-July-08
71657256	TransAlta	BPAT - AESO	STUDY	100.00	12-Oct-07	01-Jul-08	01-Jul-13	5	Study suspended per BCUC ruling 8-July-08
71657257	TransAlta	BPAT - AESO	STUDY	100.00	12-Oct-07	01-Jul-08	01-Jul-13	5	Study suspended per BCUC ruling 8-July-08
71657258	TransAlta	BPAT - AESO	STUDY	100.00	12-Oct-07	01-Jul-08	01-Jul-13	5	Study suspended per BCUC ruling 8-July-08
71657259	TransAlta	BPAT - AESO	STUDY	100.00	12-Oct-07	01-Jan-09	01-Jan-14	5	Study suspended per BCUC ruling 8-July-08
71657260	TransAlta	BPAT - AESO	STUDY	100.00	12-Oct-07	01-Jan-09	01-Jan-14	5	Study suspended per BCUC ruling 8-July-08
71657261	TransAlta	BPAT - AESO	STUDY	100.00	12-Oct-07	01-Jan-09	01-Jan-14	5	Study suspended per BCUC ruling 8-July-08
71657262	TransAlta	BPAT - AESO	STUDY	100.00	12-Oct-07	01-Jan-10	01-Jan-15	5	Study suspended per BCUC ruling 8-July-08
71657263	TransAlta	BPAT - AESO	STUDY	100.00	12-Oct-07	01-Jan-10	01-Jan-15	5	Study suspended per BCUC ruling 8-July-08
71657264	TransAlta	BPAT - AESO	STUDY	100.00	12-Oct-07	01-Jan-10	01-Jan-15	5	Study suspended per BCUC ruling 8-July-08
71657265	TransAlta	BPAT - AESO	STUDY	100.00	12-Oct-07	01-Jan-11	01-Jan-16	5	Study suspended per BCUC ruling 8-July-08
71657266	TransAlta	BPAT - AESO	STUDY	100.00	12-Oct-07	01-Jan-11	01-Jan-16	5	Study suspended per BCUC ruling 8-July-08
71657267	TransAlta	BPAT - AESO	STUDY	100.00	12-Oct-07	01-Jan-11	01-Jan-16	5	Study suspended per BCUC ruling 8-July-08
			Total:	2650.00					

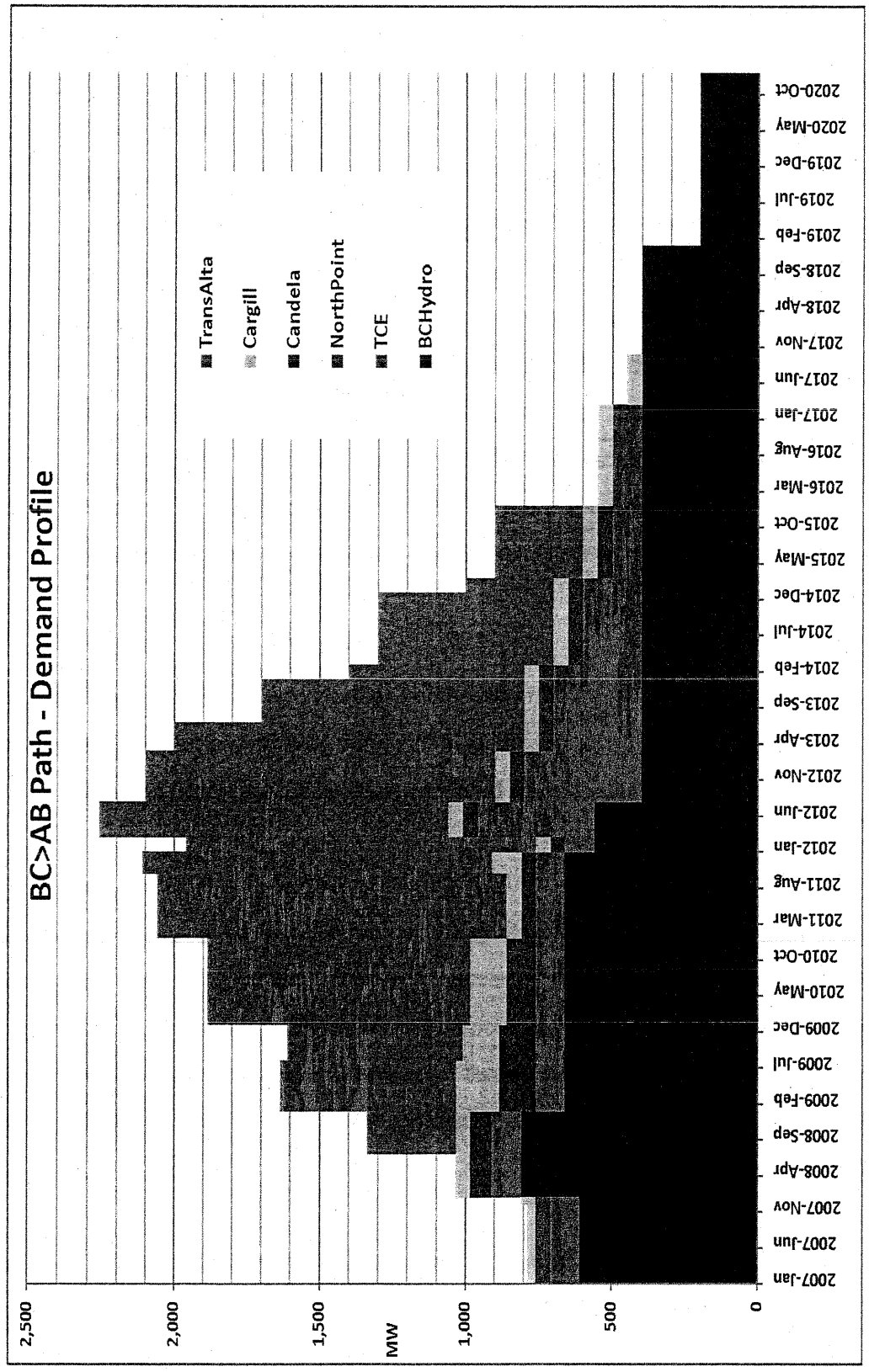
Note 1: Same as request on line 10 of Table 6-1.

Note 2: Same as request on line 6 of Table 6-1.

Source: Exhibit B1-1, Attachment 6-1, pp. 152-153

The queue shows that the parties with contracts dated January 1, 2009 and later containing the subject condition include: NorthPoint (50 MW) and BC Hydro (300 MW). NorthPoint's witness testified that it purchased an additional 50 MW of transmission capacity as a "hedge" to protect the value of the 50 MW of capacity which it already owned prior to December 01, 2007. (T3: 284-285, 288) (See also Exhibit B1-7, TCE 1.6.2)

The following graph depicts the demand for transmission service (MW), by customer, by requested start and end dates.



(Source: Compiled from Exhibit B1-1, Table 6-1, p. 130, Attachment 6-1, pp. 152-153. This graph is provided for illustrative purposes only.)

4.0 TCE COMPLAINT

In essence, TCE's Complaint is that BCTC does not take into account the amount of energy that can actually flow over its system when determining how much LTF PTP capacity it can offer for sale. TCE submits that BCTC ought not to have released additional LTF PTP capacity on its system on the BC>AB path in December 2007/January 2008 (from 480 MW to 785 MW) when it knew that its existing LTF PTP customers would be subjected to increased curtailment and thus, loss of market share to subsequent, new customers, due to the inability of the Alberta system to accept the increased transmission during peak transfer periods. In NorthPoint's words, "[t]his is a case about overselling." (NorthPoint Argument, para. 1.01) TCE describes its complaint as focussing "on the means by which BCTC determines how much long-term firm point-to-point transmission service it can sell." (TCE Reply, p. 9)

BCTC argues that the Complaint must be determined on the basis of whether it followed its OATT in making 785 MW of capacity available to customers in its queue on a first-come, first-served basis. If it did, BCTC submits that the Complaint must be dismissed. (BCTC Argument, pp. 1-2)

BCTC takes the position that its actions in calculating and releasing additional Firm capacity on the BC>AB path were a transparent and consistent application of its OATT and its published Business Practices. (BCTC Argument, p. 3) However, in recognition of the fact that the current situation in Alberta is a limiting factor in terms of transmission flowing over the BC>AB path, BCTC seeks, as part of its OATT Amendment Application, to depart from what it believes is the letter of its existing tariff and to restrict the amount of transmission capacity available for sale over the path, pending upgrades in Alberta.

BCTC also raises the issue of the amount to which the transmission capacity for sale on the BC>AB path should be limited, assuming that a limit is determined to be a reasonable temporary solution to the problem.

TCE takes the position that the manner in which BCTC determines whether LFT PTP transmission service is available does not accord with FERC principles. TCE agrees that, to the extent that BCTC followed the provisions of its OATT in determining the amount of LTF PTP transmission service available for sale, its OATT must be amended to accord with FERC principles. (TCE Reply, p. 2)

4.1 Issues

In determining whether BCTC did, in fact, follow its OATT, there are a number of issues which have been brought forward and require consideration. These issues include: what is the product which TCE bought and alleges is being compromised due to overselling? In other words, what is "firm transmission service"? Secondly, as additional firm transmission service is only released when there is "Available Transfer Capability" or "ATC" (which is, by definition, above and beyond already committed uses), how is it calculated and should the calculation consider constraints in a neighbouring jurisdiction? If the calculation itself need not consider such constraints, should they be considered in any event as part of the overall planning process and/or relevant FERC principles? These issues must all be addressed in the context of the industry structure as a whole.

4.1.1 Industry Structure

4.1.1.1 British Columbia and Other OATT Jurisdictions

BCTC's OATT and Business Practices contain a number of provisions which either influence or determine how the electricity transmission industry operates in BC.

BCTC argues that these provisions expressly obligate BCTC: (1) to release Firm capacity on its Transmission system to customers on a first-come, first-served basis, where it has ATC, or to construct Network Upgrades to provide LTF PTP transmission service; and (2) to calculate Firm ATC based on prescribed requirements. BCTC also notes that its OATT minimizes its ability to exercise discretion, to accord with FERC's overriding objective of preventing undue discrimination. (BCTC Argument, pp. 3-4)

BCTC testified that the calculation of ATC takes the capacity rights of existing customers into account such that if the system is taken up fully by existing customers, assuming they exercise their rollover rights, no new customer is able to access the transmission system without entering a queue, having a study done, paying for the study and potentially paying for the required upgrades, such that the system is basically a "closed shop" for existing customers in terms of LTF PTP transmission service. (T3: 449-450)

LTF PTP customers also have the continued right to roll over their contracts, assuming this right was granted in the initial service contract. (see Constellation Power Source, discussed later, in Section 4.1.2.2.1)

Existing firm service customers with contract terms of a year or longer currently also have a right of first refusal to continue to take their capacity, provided that they agree to match the contract term offered by a competing request and agree to pay the Commission-approved rate. (Exhibit B2-1, Attachment A, BCTC OATT s. 2.2) BCTC proposes to amend this section to increase the contract term required for the reservation priority to five years, consistent with the FERC Order 890 pro forma tariff amendments. This amendment is approved in the Commission's companion Decision relating to other OATT amendments.

4.1.1.2 Alberta

The Alberta electricity market has a different structure than BC and is operated by the Alberta Energy System Operator ("AESO"). Alberta does not have an Open Access Transmission Tariff. It has no firm path reservation system, either internal or external. (T2: 203) Rather, Alberta has a "pool system" whereby a vendor of electricity must bid into the Alberta pool at zero price at the border and is paid the going price at the time. Alberta determines the import levels that it can accept, based on its own system usage, and posts these numbers in real time and also six months out. (AESO Evidence, T2: 254)

There is also no ability for a potential customer to trigger an upgrade on the Alberta system, although anyone could construct a merchant tie line. (T2: 248, 253)

4.1.1.3 Curtailment Practices

In the event that the Alberta system will not be able to accept all of the energy scheduled to flow into the pool over the BC>AB intertie, in the hour before delivery, AESO will allow BCTC to make the necessary curtailments of its customers' schedules, which BCTC does on a pro rata basis in accordance with the curtailment provisions contained in its OATT, to ensure that the Alberta ATC is not exceeded. If, in the last 20 minutes before the hour, BCTC has not made sufficient curtailments, the AESO will take steps to curtail transmission using its own curtailment model, which is on a "last-in / first-out" basis. (AESO Evidence, T2: 259-260) The AESO determines the order based on its receipt of "E-tags".

As noted above, the firm transmission sold on the BC system was 785 MW in 2008, whereas the maximum Alberta hourly import that year was 625 MW. As a result, scheduled imports into Alberta from BC were curtailed in approximately 26 percent of hours in 2008, 24.5 percent of the hours curtailed were due to Alberta constraints and 1.5 percent due to constraints in BC. (Exhibit B1-17, TCE 2.9.2)

LTF PTP capacity over the BC>AB path is most used in peak hours (from 0800 hrs. to 2200 hrs.) and super-peak hours (from 1600 hrs. to 2200 hrs.) (Exhibit B1-17, TCE 2.9.3)

Table 3 below shows the percentage of transmission curtailments, by period (i.e. peak, super peak and off peak) in 2007 (when the long term firm transmission capacity was 480 MW for 11 months and 605 MW for 1 month) as compared to 2008 (when the capacity was increased to 785 MW for the entire year). Table 3 indicates an approximate ten-fold increase in constraints originating in Alberta in peak and super peak hours in 2008 over 2007.

Table 3

Year		Peak Hours	Super Peak Hours	Off Peak Hours
2007	BC Constraints	2.4%	1.7%	0.7%
	Alberta Constraints	2.8%	3.1%	11.3%
2008	BC Constraints	1.5%	1.2%	1.0%
	Alberta Constraints	29.1%	30.4%	16.3%

(Source: Exhibit B1-17, TCE 2.9.4)

4.1.2 BCTC's OATT

4.1.2.1 Firm Transmission Service

During the course of the hearing, a number of different definitions were suggested to describe the product being purchased and sold, i.e. "firm transmission service". This term is not defined in the OATT.

BCTC defines "firm transmission service" as "the last service to be curtailed when curtailments occur". (T3: 390)

TCE's expert witness, Dr. Craig Roach, defines "firm transmission service" as "the highest priority service" but adds that "[i]n general, firm service is curtailed only for forced outages or scheduled maintenance." (Exhibit B2-16, BCUC 1.1.1) He also suggested that it would be a matter of judgment on the performance level expected for firm service but that firm service would not be routinely curtailed, and a curtailment level of 20 percent or more would catch his attention. (T2: 125)

BCTC disagrees with the second component of Dr. Roach's definition (i.e. curtailment only for forced outages or scheduled maintenance), taking the position that he "is extending the definition of firm service to include a reliability consideration, which in the context of commercial firm service doesn't exist." (T3: 391)

TCE argues that "commercially firm" is not a term that appears either in BCTC's tariff or in any of the relevant FERC Orders" and describes it as a "novel" term. (TCE Argument, p. 11)

In its June 3, 2008 Application to Temporarily Suspend the Release of Firm Available Transfer Capacity on the BC to Alberta Path (Exhibit B2-1 Tab E) BCTC explains that "[c]ustomers purchasing LTF PTP transmission service from BCTC under the OATT are, in effect, purchasing a priority right relative to Non-Firm PTP transmission services. LTF PTP transmission service is "Firm" service in the sense that it has priority over Non-Firm Point-to-Point (NF PTP) transmission service, *and is not subject to curtailments for economic reasons*. LTF PTP transmission service is expressly subject to curtailment for reliability reasons. [OATT Section 13.5] Purchasing LTF PTP transmission service on the BC>AB Path does not guarantee access to transmission service under all conditions, but secures priority to scarce transmission over holders of lower value services" [emphasis added].

NorthPoint notes that the term "firm" as used in s. 13 of BCTC's OATT is not defined precisely either in the OATT or in BCTC's Business Practices. (NorthPoint Argument, para. 2.08) NorthPoint argues that "whatever else may be said about it, the service that it and the other original LTF customers have received since December, 2007 is not true "firm" service, at least as that term is conventionally understood in plain English or even in the technical parlance of the electricity market, as enunciated, for example, by NERC." (NorthPoint Argument, para. 1.11) NorthPoint quotes the Oxford English Dictionary definition of the word "firm" as, "...among other things: securely fixed, not easily moved, stable... fixed, settled, established; immutable; secure; sure...constant, steadfast; unwavering...", and also cites the NERC definition of "Firm Transmission Service" as "[t]he highest quality (priority) service offered to customers under a filed rate schedule *that anticipates no planned interruption*." (NorthPoint Argument, para 2.08, emphasis as per NorthPoint; TCE Reply, p. 10) NorthPoint also notes the definition of "Firm Transmission Service" in

BCTC's Business Practices' glossary is "*Service which cannot be interrupted by British Columbia Transmission Corporation* but which is subject to curtailment for specified conditions (e.g., emergencies and equipment outages) [emphasis added]." (NorthPoint Argument, para. 2.08)

BCTC states that it takes no issue with the inclusion of the phrase "no planned interruption" in the NERC and WECC definitions of "Firm Transmission Service" and agrees that the NERC definition is essentially echoed in BCTC's Business Practices. BCTC does take issue, however, with the idea that the phrase "no planned interruption" implies that its LTF PTP transmission service includes a performance requirement based on the capability and reliability of a neighbouring transmission system as opposed to its own. (BCTC Argument, pp. 42-43)

BCTC also rejects any suggestion that the definition of "Long Term Firm Point-to-Point Transmission Service" in its OATT should be amended to accord with the NERC/WECC definition to the extent that the definitions in the OATT or otherwise used by BCTC are inconsistent. BCTC argues that it is unnecessary to amend the OATT because BCTC already addresses the concept of reliability in its System Impact Studies and its calculation of Firm Total Transfer Capability, the starting point for any calculation of additional transfer capability. BCTC also notes that the definition of "Long-Term Firm Point-to-Point Transmission Service" and the terms and conditions of that service as contained in Part II of its OATT track the language of FERC's pro forma tariff and cites the FERC decision in El Paso Electric Company (84 FERC P 63,008) in support of the proposition that "firm" has different meanings in the reliability context as compared to the commercial context, which are service duration, reservation and curtailment priorities and scheduling restrictions. BCTC further notes the comments of its expert witness, Dr. Ren Orans, who suggested that if BCTC were to "redefine firm, contingent upon availability of import limits in Alberta...there are implications that could ripple through the western interconnect..." which he suggested could result in transmission providers asking the purpose of the request for transmission service prior to providing it. BCTC also argues that changing the definition of LTF PTP service could offend the reciprocity principle under which Powerex is able to access the US electricity markets at market-based rates. (BCTC Argument, pp. 43-45; BCTC Evidence, T3: 418-420)

Commission Panel Discussion

The Commission Panel accepts the credentials of both Dr. Roach and Dr. Orans as expert witnesses qualified to provide opinion evidence in this proceeding.

The Commission Panel accepts the evidence of Dr. Roach and finds that there is a reasonable expectation on the part of purchasers of firm transmission service that that service will generally only be curtailed for outages or scheduled maintenance, in other words, for reliability purposes. This interpretation is consistent with the difference in the descriptions of curtailment provisions for "firm" and "non firm" transmission service in BCTC's current OATT where firm service is contemplated as being curtailed to maintain reliable operation of the system or in the event of an emergency or other unforeseen condition which impairs or degrades the reliability of the system (s. 13.6) and non firm service is contemplated as being curtailed for reliability reasons as well as "interrupted" for economic reasons (s. 14.7) This analysis was also provided by BCTC in its June 3, 2008 application to temporarily suspend the release of ATC on the BC>AB path, as noted above. This interpretation is also consistent with the common language usage of the term "firm" and BCTC's Business Practices Glossary definition of "Firm Transmission Service". It is also consistent with the definition of "curtailment" in the OATT Definitions section which is: "[a] reduction in firm or non-firm transmission service in response to a transmission capacity shortage *as a result of system reliability conditions*". (emphasis added)

The Commission Panel acknowledges BCTC's position that it can only sell transmission capacity on its own system and it is common ground that the capacity constraints on the BC>AB path generally originate from reliability considerations in Alberta. However, regardless of where the constraints originate, in reality the "curtailment" occurs on the BCTC system and the fact is that additional sales of "firm capacity" on BCTC's system have resulted in increased curtailment of the transmission capacity of existing long term firm customers on BCTC's system. At some point, as curtailment increases, irrespective of the definition of "firm" transmission service, even the notion of transmission service itself disappears, firm or otherwise.

The Commission Panel does not, however, see any need to amend the OATT to include any particular definition of the term "firm". The Commission Panel acknowledges BCTC's position that its OATT is consistent with the wording of the FERC pro forma tariff in terms of its definition of Long Term Firm Point-to-Point Transmission service and related terms and conditions. The Commission Panel is of the view that there is ample support for the proposition advanced by Dr. Roach that "firm service" should not be "routinely curtailed", unless for reliability purposes, based on the wording of the tariff as it stands, absent an actual definition. The Commission Panel notes that this interpretation of "firm service" may involve some degree of judgment as to what is an unacceptable level of curtailment or, conversely, an acceptable level of service, as no specific number was advocated by any party, but the Commission Panel is of the view that this challenge is not insurmountable and should not invoke an excessive use of discretion.

In other words, even if one cannot precisely define exactly what firm transmission service is, this does not mean that it cannot be recognized for what it is not. At some point, the product being purchased and sold is not firm transmission service in any realistic sense. The Commission Panel is of the view that no specific number need be associated with the concept of what is an acceptable level of curtailment for firm capacity and that this issue is better reviewed on a case by case basis.

The Commission Panel also notes that, to the extent that the reliability concerns originate in Alberta, BCTC's customers are not actually being "curtailed" by BCTC (given the definition of curtailment to involve reliability considerations), but by AESO, although the curtailment is administered by BCTC pursuant to agreement. However, on the flip side, the fact that BCTC sells the capacity on its system to its customers in the first instance, and by doing so, creates the need for the additional curtailment on its system, (albeit on direction from AESO) is tantamount, in the Panel's view, to BCTC indirectly "interrupting" its customers' ability to transmit, for economic reasons, which is a phenomenon associated only with non firm transmission. This is necessarily the case because it has been clearly established that there is no "sink" on the BC side of the BC >AB Intertie and any party purchasing capacity on the BC>AB path cannot use it unless the energy can actually flow through the BC system and over the Intertie into Alberta. (TransAlta Evidence, T3: 302-303; BCTC Evidence, T3: 346-347; TCE Evidence, T2: 102-103)

The Commission Panel, further, does not agree that the FERC decision in El Paso referred to by BCTC is relevant to the circumstances of this case. The El Paso case involved a transmission provider's attempt to classify its entire transmission capacity as "capacity benefit margin" and therefore offer no firm capacity whatsoever on its system on the basis that the "Eddy County Tie" was a single circuit facility such that it could not meet "N minus 1" criteria for reliability. FERC noted that all parties had conceded that the OATT defined firm transmission service according to service durations, reservation and curtailment priorities, and scheduling restrictions such that any conclusion that "firm" service under the OATT included a guarantee that the loss of any single element in the service provider's system would not cause an interruption did not follow. FERC held that the ability to offer "firm" service in accordance with the tariff was independent of the reliability of the service such that 'firm" transmission service was capable of being offered and is required to be offered over any single circuit high voltage direct current ("HVDC") interconnection, so long as the interconnection has the capacity available to provide the service.

FERC went on to explain that because of the physical limitations of single circuit HVDC interconnections, any customer seeking firm transmission service over such interconnection "implicitly acknowledges that the service cannot be provided in accordance with "N minus 1" reliability criteria...and assumes a risk that the service may be interrupted...***in an emergency***". (El Paso Electric Company 84 FERC P 63,008 at pp. 4-5 (emphasis added))

The Commission Panel notes that the risk which FERC placed on customers seeking firm transmission service in El Paso was the risk of curtailment due to reliability issues on the transmission system, a risk made greater due to the Eddy County Tie in the El Paso system not being able to meet "N minus 1" reliability criteria. The risk of curtailment for reliability reasons on the BCTC system is a risk that all parties acknowledge and accept in this case. (See, for example TCE Evidence, T2: 218; NorthPoint Evidence, T3: 269) What is not accepted by TCE and NorthPoint and what is in issue in this case is the increased risk of curtailment due to reliability issues on another system brought about by the sale of additional capacity on the BCTC system.

4.1.2.2 Available Transfer Capability/Available Transmission Capacity

The acronym "ATC" was used throughout the proceeding. Its precise meaning and the words for which it stands tend to vary, depending on the context. As noted below, Attachment C to BCTC's current OATT describes "Available Transmission Capability", and this has been also described as "ATC". Attachment C is proposed to be amended to describe "Available Transfer Capability" or "ATC". "ATC" has also been described as "Available Transmission Capacity" (Exhibit B1-7, BCUC 1.71.1). The term, by definition, assesses the capability of a transmission system to accept new requests, after accounting for, among other items, the capacity taken by existing customers. At times, however, the term has also been used to describe the entire transmission capacity available for sale, based on the Total Transfer Capability of the system minus amounts needed to address reliability considerations, such as the Transmission Reliability Margin ("TRM"). Nothing in particular turns on the words making up the acronym and the Commission Panel has made every effort to minimize its use. However, to the extent that it is used, it is important for the reader to note the context.

NorthPoint argues that BCTC has oversold the LTF transmission rights on the BC to Alberta path due to a "misapprehension" on how ATC should be calculated, in that BCTC has determined that it ought not to consider constraints originating in Alberta in its calculation of ATC. (NorthPoint Argument, para. 3.01)

Attachment C to BCTC's current OATT sets out the methodology to be used by BCTC in assessing Available Transmission Capability.

Attachment C states that:

> "[i]n determining the level of transmission capacity that is available to meet new Transmission Service requests, BCTC will exclude from the total transfer capability of the Transmission System that capacity needed to reliably meet:
>
> 1. the current and reasonably forecasted load of Network Customers;

2. existing firm Point-To-Point Transmission Services;

3. previously received pending Applications for firm Point-To-Point Transmission Service; and

4. existing contractual obligations under other Tariffs, rate schedules and contracts." (Exhibit B2-1, Tab A, Attachment C)

BCTC states that: "[m]athematically, the Available Transmission Capacity (ATC) is defined as the Total Transfer Capability (TTC) less the Transmission Reliability Margin, less the Capacity Benefit Margin and less the sum of existing transmission commitments (which includes BC Hydro domestic load)...TRM on the BC>AB path is 65 MW and...the Capacity Benefit Margin is always zero." (Exhibit B1-7, BCUC 1.71.1)

4.1.2.2.1 Consideration of Markets in Neighbouring Jurisdictions – FERC Principles

The central issue in this proceeding is whether the capacity of the transmission system in a neighbouring jurisdiction needs to be taken into account by a transmission provider when determining its own capacity available for sale.

At the request of this Commission, BCTC conducted a study of selected systems in North America to determine how other system operators deal with the issue of cross-jurisdictional capacity. BCTC looked at ten different transmission providers in Canada and the U.S. The survey concentrated on jurisdictions where a transmission provider with an OATT (such as BCTC) interfaced with a pool-based system (such as AESO). The results of the study were not conclusive in that there were jurisdictions identified which did consider neighbouring system conditions in determining Total Transfer Capability or Long Term Firm ATC and others which did not. (Exhibit B1-1, pp. 142-148; Evidence of BCTC, T3: 320-321)

BCTC, however, takes the position that FERC decisions dictate that it "is precluded by its OATT from conditioning the release of Firm capacity on its own Transmission System based on whether

there is transmission capacity available on a third party system." (BCTC Argument, p. 8) BCTC cites three FERC decisions in support of this proposition: Commonwealth Edison Company 96 FERC 61,158 (2001); Exelon Generation Company, LLC v. Southwest Power Pool, Inc. 101 FERC 61,226 and Constellation Power Source, Inc. 102 FERC 61,142.

TransCanada argues that the above decisions are not applicable to the current situation as they deal with FERC's policy as it relates to the rollover rights of existing customers where transmission capacity has diminished over time. (TCE Reply, p. 42)

BCTC takes the position that the principles are the same in either context. (BCTC Argument, p. 22)

Commission Panel Discussion

The Commission Panel agrees with TCE that each of the FERC decisions upon which BCTC relies for the proposition that it cannot condition the release of Firm capacity on its own system based on whether there is capacity on a third party system deals with the rollover rights of existing customers, not potential new customers, and thus, in the Panel's view, the decisions provide little guidance for the current situation. The Panel does not agree with BCTC's assertion that the principle is the same in either context.

For example, in Commonwealth Edison, although FERC stated the applicant was "not authorized by the pro forma tariff or by its own OATT to condition a transmission customer's right to transmission service on whether there is transmission capacity on a third party's transmission system", FERC proceeded to confirm that "[a]ll long-term firm transmission customers have the right to roll over their service..." (p. 4) and that "rollover rights facilitate orderly planning." (p. 5) The decision was concerned only with roll over rights and, in the Panel's view, should not be extended beyond that context.

Similarly, in Exelon Generation Company FERC re-iterated that "[a]ll long-term firm transmission customers have the right to roll over their service..." (at para. 19) and further commented on the

right of first refusal enjoyed by existing transmission customers over other potential customers seeking their capacity. FERC explained that by its statement in another case (Idaho Power Rehearing Order, 95 FERC at 61,759) "the right of first refusal provision applies to existing capacity and does not require a transmission provider to build additional capacity in response to a request to rollover a transmission service", it "did not intend... that a transmission provider could deny a customer's rollover request to the extent that the transmission provider did not have sufficient available capacity to meet the request and could only grant the request if it were to build additional capacity. Implicit in this statement was the expectation that the transmission provider had already studied the impacts on its existing system of providing the transmission service and determined that it could provide that service (including any rollover if requested) using its existing system." In other words, " [b]ecause a determination to grant the initial service request carried with it the obligation to assume that the customer would continue to take service, the Commission expected that the transmission provider would have sufficient existing capacity to serve a rollover request and not then need to build additional capacity to serve that rollover request." (p. 8)

Constellation Power Source also dealt with rollover rights, reiterating much of the same language as in the Exelon Generation case discussed above. FERC confirmed that "[r]egardless of the length of the contract term, a transmission provider will grant a request for long-term firm transmission service only if it determines that it has sufficient available transmission capacity to provide the service. In making this determination, the transmission provider is obligated to plan its system to meet all of its firm loads, including any prospective rollovers of the transmission services used to meet those loads." (p. 11) FERC went on to note that, provided it is handled in the initial transmission contract, the transmission provider can limit a prospective customer's rollover rights. The rights of existing long term customers, however, include the right to continue to take service. (p. 8)

The Commission Panel therefore finds that the FERC principles contained in the decisions referred to do not preclude BCTC from considering the capacity of an adjoining jurisdiction when determining its own available transfer capability.

TransCanada, on the other hand, argues that FERC principles require BCTC to consider conditions on neighbouring systems when determining how much LTF PTP transmission service it can make available for sale. (TCE Reply, p. 2) TransCanada refers to comments contained in FERC Orders 890, 890-A, 890-B and 890-C in support.

In FERC Order 890 the Commission confirmed its intention to provide further guidance on the subject of ATC to improve transparency and consistency in its calculation and in the process of data exchange as between transmission providers. (FERC Order 890, pp. 57-58) FERC stated:

> "[w]e also require transmission providers to document their processes for coordinating ATC calculations with their neighboring systems. This requirement is particularly important with respect to seams between market and non-market areas, ..., and with respect to the request of other commenters to increase regional coordination regarding ATC calculation. While this Final Rule does not address all seams issues between market and non-market areas, it does take important steps towards that end by improving data exchange between transmission providers and providing increased transparency with respect to ATC calculation." (FERC Order 890, p. 196)

TransCanada quotes FERC Order 890-A where the Commission clarified "that adjacent transmission providers must coordinate and exchange data and assumptions to achieve consistent ATC values on either side of a single interface." (TransCanada Argument, p. 14)

In Order 890-B FERC clarified that "consistent" should be interpreted as "identical". (TransCanada Argument, p. 15 quoting FERC Order 890-B at para 15)

Then, in Order 890-C FERC backed off its interpretation of "consistent" as "identical" stating:

> "[t]he requirement then is, instead, to achieve consistency in such values through the development of ATC calculation methodologies that produce sufficiently accurate, consistent, equivalent, and replicable results. In some instances, it may be possible for transmission providers under these methodologies to achieve identical ATC values on either side of an interface. In others, such as when there are differences in reservation status or when there

> are multiple interfaces between the transmission providers, it may not be possible or even practical to achieve identical values." (TransCanada Argument, p. 16 quoting FERC Order 890-C at para. 9)

BCTC takes the position that the FERC authorities cited above "do not demonstrate an implicit tariff obligation on BCTC to condition LTF PTP transmission service on the availability of capacity on the Alberta system" and that there are no explicit OATT provisions requiring it to do so. It suggests that it achieves consistency in ATC values through the WECC Path rating process and that to use Alberta hourly import limits to determine a long term import limit would involve increased discretion, which is contrary to the FERC guidance in Order 890.

Commission Determination

The Commission Panel is of the view that FERC principles do support allowing a transmission provider to consider constraints in adjoining areas when calculating ATC. The distinction as between achieving "consistent" and "identical" ATC values on either side of an interface does not, in the Panel's view, support the proposition that the value on the other side of an interface need not be considered at all in determining ATC for long term firm capacity. Rather, the Commission Panel acknowledges that in real time the ATC values must necessarily be identical, (see, for example evidence of BCTC T3: 342) for reliability purposes, but is of the view that consistency is a sufficient goal for the longer term. In the event that the Commission Panel is found to be incorrect, and it is determined that FERC principles are inconsistent with such an approach, the Panel is still of the view that, in the particular circumstances of this case, in this jurisdiction, it is incumbent upon BCTC to take the constraints on the Alberta system into account when determining long term firm ATC on its system. As noted above, BCTC must consider and abide by the import limits into Alberta in real time. The Commission Panel accepts the evidence of Dr. Roach that short term reality should be reflected in long term calculations, rather than ignored.

4.1.2.2.2 BCTC's System

BCTC also argues that it only sells transmission capacity on its own system within British Columbia, to the knowledge of all parties. Its tariff specifically denotes a point of receipt ("POR") and point of delivery ("POD") within the provincial boundaries. It therefore concludes that it need not consider conditions in Alberta, and further states that it has never done so in the past. TCE agrees that BCTC provides transmission service only on its own system but argues that the determination of how much long-term point-to-point transmission service BCTC can sell is "not an academic exercise that is carried out without regard to real world conditions" and that the value of long term firm point-to-point transmission service to customers lies in actually being able to use the service they purchase to physically flow power (in this case, for the most part, from Washington into Alberta). (TCE Reply Argument, p. 9)

Commission Panel Discussion

It is clear from the evidence that, notwithstanding the POD within British Columbia, in reality, there is no destination for the energy within B.C. and that any energy which flows must be able to go into Alberta or it cannot flow at all. (TransAlta Evidence, T3: 302-303; BCTC Evidence, T3: 346-347; TCE Evidence, T2: 102-103) The Commission Panel accepts that BCTC may never have taken conditions in Alberta into account when determining the transmission capacity available for sale in British Columbia in the past, but the evidence indicates that conditions in Alberta did not become a particularly limiting factor until January of 2008, when BCTC increased the long term firm capacity available for sale to 785 MW. The Commission Panel is also of the view that BCTC did actually "consider" conditions in Alberta in its 2007 System Impact Studies, albeit by way of making an assumption that Alberta could accept all the energy which BCTC could transmit to the border. This assumption was false, to the knowledge of BCTC.

4.2 Did BCTC violate its OATT?

In determining whether to allow the TransCanada Complaint, the Commission Panel must determine whether BCTC, in fact, breached the provisions of its OATT.

BCTC takes the position that it has acted at all times in accordance with its OATT and that the TCE complaint must therefore be dismissed. (BCTC Argument, p. 2)

As noted above, it is BCTC's position that it "has consistently and transparently applied its OATT and published Business Practices in calculating and releasing Firm capacity on the BC>AB Path" and that these provisions "expressly obligate BCTC: (1) to release Firm capacity on its Transmission System to customers on a first-come, first-served basis or to construct Network Upgrades to provide LTF PTP transmission service; and (2) to calculate Firm ATC based on prescribed requirements." (BCTC Argument, p. 3) BCTC also submits that "[t]here is no express provision of the OATT that would have authorized BCTC to withhold Firm transmission capacity on BCTC's Transmission System". (BCTC Argument, pp. 3-4)

BCTC testified that, at the end of 2007, when it made the decision to sell increased incremental long term firm capacity up to 785 megawatts, it knew that its existing long term firm customers would experience increased curtailment. (T3: 377) It also testified it did not feel any need to inform its existing customers (of which there were 3) of the risk. (T3: 378, 449) BCTC further testified it did not consider seeking guidance from the BCUC prior to selling the incremental capacity as it believed that it was acting "wholly in accordance with [its] tariff" and that it "was and is the right thing to do". (T3: 378) It also testified that the consequences to existing customers in terms of additional curtailments were "not something that's of concern to BCTC in terms of what those impacts or implications are." (T3: 379)

Commission Panel Determination

The Commission Panel notes the OATT itself does not specifically define "firm transmission capacity" (as discussed above) and that Attachment C sets out what is basically an arithmetic calculation of Available Transmission Capacity (Available Transfer Capability) which BCTC has followed. No party was able to point to any specific provision in the OATT which requires BCTC to consider constraints in a neighbouring jurisdiction when calculating its long term firm point-to-point transmission capacity available for sale. Therefore, although this approach may have been open to BCTC on the basis of the FERC principles as set out in FERC Orders 890, 890-A, 890-B and 890-C it was not necessarily required by BCTC's OATT. **Accordingly, the Commission Panel finds that BCTC was in technical compliance with its tariff when it offered 785 MW of transmission capacity for sale. It follows that the TransCanada complaint must be dismissed.**

However, the Commission Panel is of the view that, while BCTC's actions were arguably consistent with the letter of its OATT, and with its interpretation of its OATT, as well as with certain FERC guidelines, there are a number of negative consequences flowing from BCTC's decisions which do not, in the Panel's view, accord with the spirit of the FERC guidelines, in terms of open access to transmission, transparency, and the rights of existing customers over potential new customers as outlined in the decisions relating to rollover rights referred to above. As noted, the Commission Panel is of the view that the situation on the BC>AB path is not comparable to any of the FERC cases referred to by BCTC. The BC >AB path is a single destination path. If Alberta cannot accept the energy, customers have no interest in using or ability to use the BCTC transmission capacity. The sale of additional LTF PTP capacity on the BC>AB path only serves to further degrade the service of existing customers.

The Commission Panel finds the fact that a transmission customer may need to purchase more capacity than it requires to ensure that it can flow the amount of energy it contracted to flow (as is the case with NorthPoint) means that the effective price of transmission is above the stated price and not transparent. BCTC also confirmed that it does not reduce the charges to its customers when their capacity is curtailed if the curtailment is the result of a problem on another system, i.e.

Alberta, so the customer is paying the full charge for reduced transmission. (Evidence of BCTC, T3: 398) Similarly, both Trans Canada and NorthPoint gave evidence that they often do not schedule the full amount of power that they could sell for transmission because they know that their transmission capacity will be curtailed and to schedule the full amount of capacity which they purchased would result in their basically having to rescind portions of their contracts with their energy suppliers. (NorthPoint Evidence, T3: 274, 286; TCE Evidence, T2: 224-225)

Further, the evidence suggests that other parties may be forming a queue which bears no resemblance to the amount of energy they could reasonably contract to transmit, in order to prompt a system upgrade. For example, TransAlta testified that it has 12 reservations in the queue, each for 100 MW, but its witness was unable to advise as to the magnitude of the annual cost should it be granted the capacity sought, other than to acknowledge that it would be "a large number". (T3: 308-309) To paraphrase a Powerex submission (albeit made in another proceeding in a different context) as noted by FERC, the queue becomes clogged with duplicative requests which reflect customers' attempts to secure service, rather than the actual quantity of service needed. (FERC Order 890, p. 24)

Similar concerns were also raised by Powerex in November and December of 2007 when BCTC made the decision to increase the long term firm capacity available for sale on the BC>AB path. Powerex noted in an e-mail to BCTC:

> "BCTC is selling as [sic] additional 305 MW firm over what they have done historically. In the study BCTC has stated that they assume the adjacent control areas can accommodate these increases. I am not suggesting that BCTC is prohibited from making that assumption but I would like to make sure that you fully understand the consequences of this change.... Once BCTC coordinates TTC with AESO all of the new 305 MW will be cut on average. The way this happens is via pro-rata reduction. So if you use 560 MW as the average number then somebody like TCPC who owns 100 MW will only receive 100 mw*(495/785) or 63 MW on average of their transmission but still have to pay for all 100 MW. This will leave both existing and new customers quite unhappy from a change that doesn't create any new space. Basically existing customers get less transmission and pay the same and new customers get less MWs then [sic] they

thought they were going to get but pay for the full amount." (Exhibit B1-27, e-mail #8)

In its response to Powerex, BCTC reiterated the position it takes in this Complaint, that it is not authorized under the OATT to condition a transmission customer's right to transmission service on whether there is transmission service capacity on a third party, citing the same cases noted above which the Commission Panel has found relate to rollover rights. (Exhibit B1-27, e-mail #11)

In the Commission Panel's view, none of these results accords with FERC principles. Pricing of transmission becomes non-transparent and the queue is unlikely to represent an accurate estimate of demand. The sale of additional capacity to new customers at the expense of the degradation of the transmission capacity of existing customers is, in the Panel's view, an example of undue discrimination in these circumstances.

In Order 890-B FERC discussed its decision to lift the price cap in the secondary market for transmission service for a trial period to "foster the development of a more robust secondary market for transmission capacity." It confirmed the positive obligation on transmission providers to offer all available capacity to customers on a non-discriminatory basis and to expand their systems as necessary to accommodate additional requests for service. FERC also stated that "[t]ransmission providers must continue to make primary capacity available at the rates specified in their individual OATTs. Customers that do not wish to participate in the secondary market may continue to take service from the transmission provider directly, just as if the price cap had not been lifted. For those customers participating in the secondary market, however, lifting the price cap will create additional incentives for others to make service available, increasing the ability to obtain transmission capacity." (FERC Order 890-B, pp. 45-47)

The existence of a secondary market and the comments of FERC that the transmission provider is to make primary capacity available at the rate specified in its OATT reinforces the Commission Panel's view that the increased curtailment of existing customers resulting from the sale of

additional long term firm capacity without a reduction in the price represents an effective increase in the tariff for primary capacity which is not transparent.

The Commission Panel accepts that BCTC should attempt to maximize its revenues and the utilization of the transmission system but notes that selling additional LTF PTP service which simply results in curtailment of existing customers is not increasing the use of the system. The Commission Panel agrees with TCE's argument (at p. 45) that FERC requirements relating to making all available transmission capacity available to customers on a non-discriminatory basis do not require that such capacity necessarily be sold as firm capacity.

As the Panel finds that BCTC was in technical compliance with its OATT, it follows that the OATT needs to be amended to address the negative consequences noted and to provide full transparency.

4.3 What is a Reasonable Figure for Transmission Capacity for Sale?

As noted above, one of the issues which require consideration and determination by the Commission Panel is the amount of transmission capacity which BCTC should offer for sale. In Part 6 of its OATT Amendment Application, which deals with Firm Transmission Sales to Alberta and the TransCanada Complaint, BCTC proposes to amend Attachment C to its tariff, which deals with the methodology for calculating Available Transmission Capacity/Available Transfer Capability, by adding the following sentence:

> "Notwithstanding any other provision in this Tariff, the transmission provider shall limit sales of Firm Point-to-Point Transmission Service on the BC>AB path to 785 MW.",

the current limit, "to address the unique circumstances faced on the BC>AB path" and to improve transparency. (Exhibit B1-1, p. 148)

As also noted above, other parties argue for different limits, as set out below.

4.3.1 WECC Path Rating 1200 MW

TransAlta argues that BCTC should upgrade its transmission system, which involves an estimated cost in the order of $36 million to $54 million, to increase the transmission capacity available for sale to the WECC path rating of 1200 MW (1160 MW Operating Transfer Capability). It is common ground that such an upgrade would not serve to solve any problems on the Alberta side, such that all existing customers would experience further curtailments. TransAlta would be required to pay the cost of the upgrade.

TransAlta takes the position that this option is preferable as it is consistent with FERC principles regarding consistency in ATC calculations, it does not involve withholding of available transmission capacity and/or giving preferential treatment to existing customers and therefore supports reciprocity. (TransAlta Argument, paras. 4-6) TransAlta recognizes the "seams issue" with Alberta but suggests that this does not provide justification to withhold available ATC in British Columbia to the benefit of existing transmission customers, which include BCTC's affiliates, and that such withholding is "clearly contrary to FERC requirements". (TransAlta Argument, paras. 13-14) TransAlta also argues that, if ATC were based on the Alberta system limitations, BCTC would be required to exercise discretion to determine when and if it should approach its regulator to seek to increase its sales of long term firm transmission capacity. (TransAlta Argument, paras. 20-22) TransAlta further suggests that any approach which limits ATC on BC's system based on capacity on an adjacent system could create problems on the BC-US seam due to precedent, and finally, that reciprocity requires that "comparable" services be offered in non-FERC jurisdictions, and that limiting firm transmission service to the existing level and offering a lower priority service to new customers than that given to existing customers, as suggested by BCTC, would offend this notion. (TransAlta Argument, paras. 24-29)

The Joint Industry Electricity Steering Committee ("JIESC") argues in favour of the sale of all available capacity on the BC system without consideration of Alberta's ability to accept the power as being in the interest of ratepayers, making economic sense and being in the public interest while

sending the right signals to Alberta. The JIESC argues that there is strong demand for capacity for transmission within BC. (JIESC Argument, p. 2)

TCE takes the position in response to TransAlta that no additional capacity is properly available in BC and that selling additional capacity that is not properly available to the detriment of existing customers is unreasonable, unfair and unreasonably discriminatory and gives preferential treatment to new customers, who gain financially by having access to capacity that should not have been made available to them in the first place. (TCE Reply, pp. 25-26)

Commission Panel Discussion

It is clear that the North American electrical energy industry is a first come, first served industry where existing customers have priority over potential new customers. There is no suggestion in any of the evidence that FERC principles or the pro forma tariff consider that existing customers are to have their transmission service curtailed, interrupted or otherwise degraded in order to accommodate potential new customers. Rather, potential new customers may be able to take transmission capacity given up by an existing customer, or may be able to trigger an upgrade to the transmission system, for which they must pay.

This, in the Commission Panel's opinion, answers TransAlta's claim that it will be subject to undue discrimination if BCTC does not increase its transmission capacity to the full WECC path rating. Clearly, in this industry, existing customers are entitled to what may amount to "preferential treatment" over potential new customers – this may be discriminatory in a sense, but, in the Panel's view, does not amount to *undue* discrimination within the meaning of FERC principles, or in this jurisdiction.

The Commission Panel disagrees with the JIESC. The Commission Panel accepts the evidence of NorthPoint that having transmission to the border is of no value to a customer if the energy cannot flow across the border. (NorthPoint Evidence, T3: 287) The Commission Panel finds as a fact that there is no actual demand for point-to-point transmission service strictly within BC on the BC> AB

path and that the power must be able to flow over the intertie into Alberta for the transmission service to be useful or valuable in any practical, realistic sense. The Commission Panel also notes that, notwithstanding the formal contract documents which denote a POD and POR within BC, the transmission capacity is marketed by BCTC for "wheeling to Alberta" and, as noted above, is purchased solely for that purpose. (See, for example, BCTC's November, 2007 System Impact Study–Exhibit B1-11, Attachment 3 at p. 6)

The Commission Panel is also not persuaded that limiting the sale of transmission capacity in BC on the BC>AB path until such time as Alberta is in a position to accept increased energy imports will result in excessive discretion on the part of BCTC. AESO publishes its energy import limits on its website in real time and on a forecast basis up to six months out. (AESO Evidence, T2: 254; Exhibit B2-7, BCTC 1.16.0) TransAlta is therefore in a position to monitor the situation on the intertie to the extent that it sees fit. Further, BCTC increases its revenues by selling transmission capacity. In this case, it is accused of overselling. BCTC has no incentive to withhold available capacity to benefit the more expensive generation of its affiliate, to the detriment of electricity customers in the US, the wrong which FERC is seeking to right. In the Commission Panel's view, the capacity is not properly "available" if the energy cannot flow to its intended destination. Nor is the Commission Panel concerned that there is any risk of a negative precedent given that, in the Panel's view, the unique circumstances of this case, which involve a single destination for the energy transmitted, support the restriction of transmission capacity. The Commission Panel does not agree that limiting the transmission capacity to what can reasonably flow will result in transmission service which is not comparable to that in the US under the jurisdiction of FERC.

4.3.2 Current 785 MW

BCTC argues that limiting Firm sales to the current level of 785 MW represents a "principled and practical solution to the problem presented by the current system conditions in Alberta". (BCTC Argument, p. 6) BCTC states that this approach has a "principled outcome because it preserves the existing level of Firm transmission capacity that has been identified through BCTC's System Impact Studies undertaken consistently with the existing OATT. It also honours all Transmission Service

Agreements entered by customers in good faith based on the existing terms of service." (BCTC Argument, p. 64) BC Hydro/Powerex support BCTC's "compromise position". (BC Hydro/Powerex Argument, p. 2)

Commission Panel Discussion

BCTC's argument supporting the use of a level of Firm transmission capacity which was identified through its most recent System Impact Studies, presupposes that the System Impact Studies were properly undertaken in the first place. This premise, in the Commission Panel's view, is suspect. BCTC testified that, at the end of 2007, when it made the decision to sell increased incremental long term firm capacity up to 785 megawatts, it knew that its existing long term firm customers would experience increased curtailment (T3: 377) and that that was "not something that's of concern to BCTC in terms of what those impacts or implications are." (T3: 379) The Commission Panel notes that the assumption in the 2007 studies that Alberta was capable of accepting all the energy which BCTC could transmit was false, to the knowledge of BCTC. Further, the Commission Panel finds that the increase in the sale of long term firm transmission capacity to this level has resulted in significant curtailment to the transmission service of existing customers and, in fact, triggered the TCE Complaint.

4.3.3 Earlier 480 MW

TCE and NorthPoint argue that the appropriate limit for LTF PTP transmission service on the BC>AB path is the previously-determined 480 MW. TCE submits this level "is appropriate, as it is the last level of long-term firm point-to-point transmission service determined by BCTC that was consistent with the amount of power that could actually flow over the Intertie on a firm basis." TCE further submits that BCTC's 2004 determination of 480 MW "was effectively correct, even though BCTC indicates it was calculated without regard to Alberta conditions." (TCE Reply, p. 7)

Commission Panel Discussion

As noted earlier in this Decision, the sale of additional Long Term Firm Point-to-Point transmission capacity on the BC>AB path to 785 MW was expected to and did result in significant curtailment to the usable transmission capacity of BCTC's existing customers. The earlier limit of 480 MW (545 MW TTC less 65 MW TRM) which was in effect from August 01, 2004 until December 01, 2007 was, according to a 2004 BCTC Bulletin actually available 93 percent of the time from 1999 to 2004. The increase to 785 MW was also only able to be accomplished theoretically through the use of an open loop configuration for the 138 kV ties, at the expense of some amount (albeit small) of reliability to certain areas in eastern British Columbia.

4.4 Remedy

As mentioned earlier, all parties are agreed that BCUC has jurisdiction to amend the OATT. BC Hydro/Powerex take the position that BCTC's OATT is filed as a "rate" pursuant to s. 61 of the Utilities Commission Act RSBC 1996, c. 473 as that is the only lawful basis upon which BCTC can charge for transmission service, pursuant to s. 61(3), and that it is that section which affords the Commission the jurisdiction to amend the OATT. TransCanada argues that a number of other sections serve to provide jurisdiction. The Commission Panel agrees it has the jurisdiction to amend the OATT under s.61 but does not agree that this section provides the jurisdiction exclusively. The Commission Panel does not consider it necessary to make a finding on which particular sections do and do not provide jurisdiction, given that it is common ground that the jurisdiction exists.

In its Complaint, TCE indicated that it was not seeking compensation, but argued for a retroactive adjustment to the Firm transmission capacity available for sale to 480 MW until conditions in Alberta change. TCE asked the Commission Panel to annul or set aside the LTF PTP service agreements entered into in December, 2007 and January, 2008 or alternatively, convert them to a different form of service. (TCE Argument, p. 3; TCE Reply, p. 4)

As noted above, the Commission Panel has determined that BCTC complied with the letter of its existing OATT and dismissed the Complaint. TCE acknowledges, however, that "[t]o the extent that BCTC has followed the provisions of its tariff, those provisions must be amended ... to bring them into compliance with FERC principles." (TCE Reply, p. 2)

It is clear from its argument that TCE supports a reduction in Firm transmission capacity on the BC>AB path to 480 MW. TCE argues that such a result would not be unfair to customers who purchased capacity after December 1, 2007 as they purchased capacity which was not properly available for sale, at the expense of existing customers.

NorthPoint also argues for a reduction in the Firm capacity for sale on the BC>AB path to 480 MW, but does so on a "going forward" basis. NorthPoint submits that as "no new LTF capacity will actually be available until the requisite upgrades in Alberta are completed, ...there is no real justification for prolonging or exacerbating the hardship already borne by the original LTF customers, which would be the inevitable result of maintaining the status quo or, worse, releasing even more non-existing LTF service to the market." NorthPoint suggests that all capacity awarded over 480 MW should be treated as "Conditional Firm Service" and any further capacity above 785 MW be offered on a basis akin to non firm. (NorthPoint Argument, p. 11)

BCTC argues that [i]f the concerns expressed by TCE and NorthPoint are to be addressed, they must be addressed prospectively." (BCTC Argument, p. 61) BCTC argues that "[r]educing the Firm TTC on BCTC's Transmission System below 785 MW [sic]...is not appropriate" and considers that the "...result of that approach would be unfair and discriminatory to customers whose confirmed contracts for LTF PTP transmission service would have to be annulled or modified." (BCTC Argument, p. 62)

The JIESC argues that giving effect to the TCE complaint (i.e. reducing capacity to 480 MW would be unfair to subsequent purchasers who relied upon the existing tariff. (JIESC Argument, p. 3)
BC Hydro/Powerex also argue that the parties who received the incremental capacity (following the increase in capacity for sale from 480 MW to 785 MW) would bear all the burden of the reduction

when pre-existing holders would bear none, which would be "manifestly unfair" when all the capacity holders are "equally blameless" and "equally worthy of the transmission capacity rights. " (BC Hydro/Powerex Argument, p. 4)

Commission Determination

The Commission Panel determines, on the basis of the totality of the evidence presented, that a reasonable limit for long term firm point-to-point transmission capacity on the BC>AB path at this time is the previously-determined 480 MW. This amount is consistent with the last amount determined by BCTC's engineers (in 2004) to be the appropriate amount prior to the increase to 785 MW in issue. BCTC has admitted that the recent increase in issue was accomplished by using an open loop configuration for the two 138 kV ties and that that configuration did result in reduced reliability to certain areas in Eastern British Columbia. The 480 MW number, although arguably too high, is acceptable to both TransCanada and to NorthPoint, two parties who have had their existing firm transmission service curtailed.

The Commission Panel determines that 480 MW will be the limit on a prospective basis until such time as AESO is able to accept additional energy from British Columbia. To accomplish this, it is suggested that a sufficient number of contracts which contain the subject condition concerning "a further order of the British Columbia Utilities Commission", (which total 350 MW), be cancelled and/or changed to a form of conditional period - conditional firm or non-firm service, up to 305 MW, which is the reduction required to bring the total MW of firm transmission service available for sale back to 480 MW. The Commission Panel is of the view that this is not an unfair result in the particular circumstances of this case, as the affected parties, of which there are two, (namely NorthPoint and BC Hydro) not only already have conditional contracts in respect of the additional 350 MW of capacity and so have not been misled in terms of this result, but are also pre-existing customers who continue to have earlier, unencumbered contracts in place and thus they will also benefit from the reduction in curtailment of those contracts.

The Commission Panel will leave it up to BCTC and its affected customers to determine how the 305 MW capacity reduction is to be allocated to those customers with conditional contracts.

The customers whose conditional long term firm contracts are affected shall have the right to be placed at the top of the existing queue in an order so as to maintain the pre-existing priorities.

BCTC has confirmed that it will continue to continue to co-ordinate with AESO at both planning and operational levels to increase the imports into Alberta over time. (Exhibit B1-1, p. 120) BCTC has also suggested that it will continue to monitor the situation in Alberta and evaluate whether it makes sense to increase the sale of transmission capacity on the BC>AB path and will report to the Commission on any material changes in the interim. (BCTC Evidence, T3: 334) The Commission Panel supports this plan. **The Commission Panel directs BCTC to continue the temporary suspension of the facilities study on the BC>AB path in the interim.**

BCTC is directed to amend Attachment C to its OATT to include the following:

> **"Notwithstanding any other provision in this tariff, the Transmission Provider shall limit sales of Firm Point-to-Point Transmission Service on the BC>AB path to 480 MW."**

DATED at the City of Vancouver, in the Province of British Columbia, this 10th day of September 2009.

Original signed by:
ALISON A. RHODES
PANEL CHAIR/COMMISSIONER

Original signed by:
LIISA A. O'HARA
COMMISSIONER

Original signed by:
PETER E. VIVIAN
COMMISSIONER

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BRITISH COLUMBIA UTILITIES COMMISSION

ORDER NUMBER G-103-09

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IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

An Application by the British Columbia Transmission Corporation
to Amend the BCTC Open Access Transmission Tariff

and

A Complaint by TransCanada Energy Ltd.
Re BCTC Firm Transmission Sales to Alberta

BEFORE: A.A. Rhodes, Panel Chair
L.A. O'Hara, Commissioner
P.E. Vivian, Commissioner

September 10, 2009

O R D E R

WHEREAS:

A. On June 3, 2008, the British Columbia Transmission Corporation ("BCTC") applied to the British Columbia Utilities Commission ("BCUC", "the Commission") to suspend the release for sale of additional Firm Available Transfer Capacity ("Firm ATC") on the British Columbia to Alberta path (the "BC>AB Path") and to suspend the Facilities Study relating to requests for additional service on the BC>AB Path; and

B. On July 3, 2008, the Commission issued Order G-110-08 (the "Suspension Order"), granting BCTC's June 3, 2008 application. In granting the Suspension Order, the Commission directed BCTC to address certain issues raised in that application in the context of BCTC's next Open Access Transmission Tariff ("OATT") Application or Rate Design review, and to provide a Tariff provision to address the issues; and

C. The OATT includes the rates, terms, and conditions (including tariff supplements) of the non-discriminatory, open access transmission service offered by BCTC. OATT is modeled on a pro forma tariff established by Federal Energy Regulatory Commission ("FERC") Order No. 888 (the pro forma tariff), which was recently amended by FERC Order No. 890; and

D. On July 14, 2008, BCTC held a consultation session concerning the implementation of FERC Order No. 890. The consultation included discussion of: the potential impact of incremental sales of firm transmission on existing firm transmission service on the BC>AB Path, the simultaneous submission window, and performance metrics and operational penalties; and

E. On October 9, 2008, TransCanada Energy Ltd. ("TCE") filed a complaint (the "Complaint") with the Commission with respect to BCTC's decision to release additional Long-Term Firm Point to Point transmission capacity for sale on the BC>AB Path in December of 2007; and

F. By letter dated October 17, 2008, the Commission requested comment from BCTC on its views on a process to review the Complaint; and

G. By letter of October 31, 2008, BCTC responded to the Commission, stating that BCTC anticipated filing its OATT amendment application by November 21, 2008, and that the application would address the issues raised by TCE; and

H. On November 13, 2008, the Commission issued Letter L-53-08, advising TCE that the Commission would, after receipt of the OATT amendment application, issue a procedural letter or order to solicit submissions on the appropriate process or processes for reviewing the Complaint and the application, including the appropriate degree of separation between the reviews of each; and

I. On November 21, 2008, BCTC filed its application to amend the OATT (the "OATT Amendment Application"), pursuant to subsections 58, 59, and 60 of the Utilities Commission Act ("UCA", the "Act"); and

J. BCTC indicated that the OATT Amendment Application included its response to the Complaint; and

K. As part of the OATT Amendment Application, BCTC sought an interim order, pursuant to section 89 of the Act, and section 15 of the Administrative Tribunals Act, requiring that specified new Service Agreements indicate that they are subject to a further Commission order on the OATT Amendment Application. The requirement would apply to transmission service rollover requests by British Columbia Hydro and Power Authority ("BC Hydro") on the BC>AB Path and any queued requests for Firm ATC coming available on the BC>AB Path on January 1, 2009; and

L. Commission Order G-175-08, dated November 27, 2008, required BCTC to indicate on two specified BC Hydro rollovers, and any contracts for Firm Available Transfer Capacity coming available on the BC>AB Path on January 1, 2009, that:

> "This Service Agreement is subject to a further order of British Columbia Utilities Commission in the matter of the British Columbia Transmission Corporation Application to Amend the Open Access Transmission Tariff"; and

M. By Order G-195-08, the Commission established a Procedural Conference for January 8, 2009 to address procedural matters; and

N. At the Procedural Conference, the Commission Panel heard submissions on the scope of the regulatory review, the review format for the principal issues, and whether the OATT Amendment Application and the Complaint could be properly dealt with in a combined proceeding or if separate proceedings were required; and

O. Following the Procedural Conference, the Commission issued Order G-3-09 whereby it ordered that BCTC's OATT Amendment Application, other than the parts of Part 6 thereof dealing with TCE's Complaint, would be reviewed through a Written Hearing Process, to be termed the "OATT Amendment Hearing"; the Complaint and those parts of Part 6 of the OATT Amendment Application in response, would be reviewed through an Oral Hearing Process termed the "TCE Complaint Hearing"; there would be a common evidentiary record for both the OATT Amendment Application and the Complaint; and established a Regulatory Timetable; and

P. The TCE Complaint Hearing Proceeded for two days commencing April 29, 2009; and

Q. The Commission Panel has now considered the evidence and the written submissions of BCTC and TCE and Registered Intervenors for both the OATT Amendment Application and the Complaint.

NOW THEREFORE the Commission, for the reasons stated in its Decision on the TCE Complaint Hearing, orders as follows:

1. The TCE Complaint is dismissed.

2. Long Term Firm Point-to-Point Transmission Capacity for sale on the BC>AB path shall be limited to 480 MW (545 MW Total Transfer Capability less 65 MW Transmission Reliability Margin) on a prospective basis until such time as the Alberta Electric System Operator is able to accept additional energy flowing from British Columbia.

3. Contracts for Firm Service on the BC>AB path bearing the subject condition concerning a further order of the British Columbia Utilities Commission, up to the 305 MW necessary to reduce the capacity offered for sale to 480 MW, shall be cancelled or amended to a form of conditional period-conditional firm or non-firm service. BCTC and its affected customers may determine the allocation of the 305 MW to be removed. Affected customers shall have the right to be placed at the top of the existing queue in an order which is consistent with their pre-existing priority rights.

4. The temporary suspension of the Facilities Study for the BC>AB path granted in Order G-110-08 is continued.

5. BCTC is directed to amend Attachment C to its OATT to include the following clause:

> "Notwithstanding any other provision in this tariff, the Transmission Provider shall limit sales of Firm Point-to-Point Transmission Service on the BC>AB path to 480 MW."

DATED at the City of Vancouver, in the Province of British Columbia, this 10th day of September 2009.

BY ORDER

Original signed by:

Alison A. Rhodes
Panel Chair/Commissioner