

January 16, 2009

TO INTERESTED PARTIES

**ENMAX POWER CORPORATION (EPC)
2007 - 2016 DISTRIBUTION AND TRANSMISSION GENERAL TARIFF
APPLICATION / FORMULA-BASED RATEMAKING APPLICATION
APPLICATION NO. 1550487
PROCEEDING ID. 12**

UCA LETTER OF DECEMBER 12, 2008

On December 12, 2008 the Office of the Utilities Consumer Advocate (UCA) filed a letter with the Alberta Utilities Commission (Commission) claiming that EPC had abused the process of argument and reply argument with the result that the UCA and other intervenor parties had been prejudiced by EPC's actions. The UCA noted at page 1 of its letter that it had stated in its Reply Argument:

Surprisingly, EPC's Argument does little to address the significant amount of evidence and information responses filed by intervenors, the UCA being the most notable with hundreds of pages of evidence and information responses. Any attempts by EPC to comment in Reply Argument on intervenor evidence et al when it chose not to address the issues in Argument is neither fair nor appropriate. EPC should have in its Argument commented on the significant evidence submitted by the UCA and other intervenors. If EPC chooses to save its position and comment in Reply on intervenor evidence, the UCA may be requesting the AUC to ignore such submissions or provide the right to respond.¹

EPC responded in a letter to the Commission on December 15, 2008. On page 1 of that letter EPC stated:

EPC's approach to argument and reply in this proceeding is the same as it has been in each of EPC's prior tariff applications. In EPC's respectful submission, the purpose of an applicant's argument is to summarize its application, to set out the relief that it seeks, and to support that relief with evidence from the record. Simply put, the purpose of argument is to permit a party to make its best case (based on the evidence) for the relief that it requests. A party is not obliged to guess or speculate about what another party's argument is likely to be, before that argument is delivered. In EPC's submission, that is not now, and never has been, the purpose of argument.

¹ UCA Reply Argument page 1.

EPC went on to state at page 2:

The simple fact is that a party does not know what arguments another party is going to make, based on the evidence (whatever its volume), until that argument is delivered. A party's position (and thus, its argument) often changes during the course of a proceeding as a result of the manner in which the evidence unfolds. That position will be made clear in argument, and not before. Reply evidence provides parties an opportunity to respond to the evidence of other parties. Reply argument permits parties to reply to the arguments of other parties. That is what EPC's reply argument does."

The UCA reiterated its position in a December 16, 2008 letter to the Commission and stated at page 1:

While EPC might not know all the arguments to be taken by the UCA until it sees the actual Argument, EPC is able and must address in its Argument the evidence that was put on the record, especially evidence adverse to its position. Specifically, if EPC does not accept or wish to challenge any evidence, it should do so when there is a chance for the parties to respond to EPC's reasons.

The UCA has suggested that the Commission should reject EPC's Reply Argument in all areas where it did not specifically address intervenor evidence in Argument, or provide the UCA with the opportunity to "file Sur-Reply Argument on EPC's comments on Reply Argument that should have been included in Argument". The UCA also requested the Commission to provide its guidance on the purpose of having parties submit simultaneous argument and reply argument.

The writer has been authorized by the Commission to provide the within ruling.

Ruling

The Commission has generally, but not always, provided for the simultaneous filing of written argument and reply argument in most contested proceedings before it. The Commission has generally found this format to be fair, efficient, helpful to the Commission in understanding the position of parties and of assistance in clarifying the strengths and weaknesses of the evidence. The approach of the applicant filing argument, followed by intervenors filing argument and then applicant filing a reply argument limits intervenors to one submission and has led on occasion to concerns by intervenors, where applicants do not disclose the arguments in support of their position until reply argument. The Commission will continue to maintain its flexibility to utilize the form of argument and reply argument, both oral and written, that it considers appropriate to the circumstances of each proceeding before it.

Just as the Commission is reluctant to direct a party what evidence it must file in a proceeding in order to best make its case, so too is the Commission reluctant to provide guidance on how a party must argue the import of that evidence. The Commission will occasionally provide direction to parties on the issues it would like to see addressed or provide guidance on how argument should be organized, but the principles of natural justice, including procedural fairness, require that each party must be free to determine how best to argue its case to the Commission based on the record of the proceeding. Each

party must determine for itself the best manner to structure its submission so as to clarify its position, describe the relief or outcome sought and to summarize and explain how the evidence supports the requested relief or outcome. In short, Argument is the opportunity for a party to tie the evidence and the logic of a party's position together in a cogent manner in an effort to persuade the Commission to grant a particular outcome. How a party sets about to accomplish this objective is best left to the determination of that party. Success or failure of the effort rests, therefore, on the persuasiveness of the argument as supported by the evidence when compared to the argument submitted by other parties.

Although the Commission will not direct parties on the specifics of argument, it is trite to state that Argument and Reply Argument must be drawn from the evidence on the record of the proceeding. Parties must be able to advance their position and know the case they have to meet in order to do so, based on the record of the application including the interrogatory process and the hearing process. Argument and Reply Argument cannot introduce new evidence, deliberately misinterpret the evidence or mislead the Commission, or suggest an outcome to the proceeding that is not supported by the evidentiary record. Reply Argument should be confined to responding to the argument of other parties and again must be supported and grounded by the evidence on the record of the proceeding.

The Commission has reviewed the Arguments and Reply Arguments of EPC, the UCA and of the other interveners. EPC's Argument summarized EPC's evidence, clarified its position and the relief sought and presented its argument in favor of the relief sought by using extensive references to the evidence. EPC's Reply Argument was confined to responding to the arguments of the UCA and those of the other interveners and referred to the record of the proceeding in countering the intervener positions. The Commission did not find that EPC referred to new evidence in its Argument or in its Reply Argument. The positions espoused were generally supported by references to the evidence and did not suggest outcomes not previously advanced or addressed in cross examination by EPC. Had the Commission found otherwise, it would have been prepared to strike portions of the EPC Argument or Reply Argument or to grant an opportunity for further submissions by the interveners.

In this case the Commission is not convinced that EPC's approach to Argument and Reply Argument has resulted in unfairness to the UCA.

The UCA's request to reject EPC's Reply Argument in areas where it did not specifically address intervener evidence in Argument or to file Sur-Reply Argument is denied.

Questions may be directed to Brian McNulty at (403) 592-4502 or Brian.McNulty@auc.ab.ca.

Yours truly,

(electronic notification)

Brian McNulty
Commission Counsel

