Alberta's PPA Litigation Thankfully Comes to an End

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Settlement of Litigation

On Friday the Government of Alberta and ENMAX announced that they have settled the Alberta Power Purchase Arrangement (PPA) litigation that was commenced by the province in 2016 against ENMAX and certain other buyers under Alberta's PPAs. ENMAX was the last of these buyers to settle its PPA litigation with Alberta. AlbertaPowerMarket.com suggested last October that it was time for Alberta to reconsider its position and settle the dispute with ENMAX, especially given that a provincial election is due to be held in 2019. That settlement has now occurred, and it thankfully brings the whole Alberta PPA litigation saga to an end.

History of Litigation

For readers who have not followed the PPA litigation, the following is the Coles Notes version of events:

1. The PPAs were created in 2000, when Alberta restructured its electricity market. They are generally 20 year contracts (statutory arrangements) that left the ownership and operation of generation plants in the hands of their owners, but gave buyers, who purchased the PPAs in an auction and who are obligated to pay the plant owners their fixed and operating costs, the right to sell the power from those generation plants in Alberta's power market.
2. The PPAs contain a change in law protection clause that permits a buyer to terminate its PPA, and effectively assign its rights and obligations to a provincial government agency called the Balancing Pool whose losses are backstopped by electricity consumers, if there is a change in law that makes the PPA unprofitable (or perhaps more unprofitable) for the buyer over the remaining term of the PPA.
3. After being elected in 2015, the Government of Alberta increased the carbon levy that was being paid by thermal generators of electricity in Alberta, including for certain coal plants that were the subject of PPAs.
4. First ENMAX in 2015, and then TransCanada, AltaGas (as a partner of TransCanada in one PPA) and Capital Power in 2016, proceeded to terminate their PPAs, and turn their rights and obligations as buyers under the terminated

PPAs over to the Balancing Pool, on the basis that the increase in the carbon levy (change in law) made their PPAs unprofitable or more unprofitable over the remaining term of those PPAs. The change in law essentially provided the buyers with a right to get out of what had become money losing arrangements, where the costs of the payments being made by the buyers to the plant owners exceeded the revenues that the buyers were then earning in the Alberta power market. PPAs for the Battle River 5 (by ENMAX), Keephills (by ENMAX), Sundance (by TransCanada, AltaGas and Capital Power) and Sheerness (by TransCanada) coal plants were all terminated by the buyers using the change in law protection clause in those PPAs.

5. Before a PPA termination can occur, legislation requires that the Balancing Pool first determine that a change in law has indeed occurred that permits a termination of the PPA by its buyer. In January 2016, the Balancing Pool advised ENMAX that it agreed that ENMAX had a right to terminate its Battle River 5 PPA as a result of a change in law.
6. However, in July 2016, before the Balancing Pool made any more such determinations, Alberta commenced litigation against the buyers and the Balancing Pool to overturn the Balancing Pool's acceptance of ENMAX's termination of the Battle River 5 PPA, and to have a court determine that no change in law had occurred that permitted any of the buyers to terminate any of the other PPAs.
7. In late 2016, Capital Power, TransCanada and AltaGas, but not ENMAX, settled their PPA litigation with Alberta. In all cases the PPA terminations were accepted by Alberta (the money losing PPAs of these buyers were turned over to the Balancing Pool who became the buyer under the PPAs) in exchange for some cash payments and transfers of carbon offset credits by the buyers to the Balancing Pool.
8. After ENMAX succeeded in getting an Alberta court to force the Balancing Pool to rule on the validity of ENMAX's termination of its Keephills PPA, the Balancing Pool confirmed in December 2017, as it had earlier done for ENMAX's termination of the Battle River 5 PPA, that ENMAX had a right to terminate its Keephills PPA in 2016 as a result of a change in law.

Settlement Terms

Given the foregoing, Alberta's settlement with ENMAX announced on Friday was not a surprise – many would say it was long overdue. As in the case of the other PPA litigation settlements, ENMAX's termination of both the Battle River 5 PPA and the Keephills PPA have been accepted by Alberta. In addition, the settlement provides for a transfer of 166,667 carbon offset credits by ENMAX to the Balancing Pool, and for a payment of equivalent value to ENMAX from the Balancing Pool for previously disputed and unpaid dispatch services and PPA transition matters. The announcement did not tell us about how the settlement dealt with the no doubt significant legal costs that were incurred by each party in the litigation.

Many market participants are rightly asking whether this PPA litigation should have been commenced by Alberta in the first place. AlbertaPowerMarket.com has its own views, but will leave it to others to conclude whether the province got anything out of these settlements that justified the cost and time spent on the litigation, let alone the hard feelings caused and personal reputations that were unfairly impugned in the litigation process. Indeed, Alberta's Minister of Energy's statement on Friday suggested

that the PPA litigation was about politics: “The Government of Alberta took legal action to fight to protect Albertans, and many parties, including ENMAX, were regrettably caught up in our action against the past government.” This fight was not Alberta’s finest hour and, like many others, AlbertaPowerMarket.com is very happy the PPA litigation is now behind us.

On to IPPSA/Podcast

We now get ready for the annual IPPSA Conference in Banff next week. I am sure the PPA litigation settlement will be discussed at the IPPSA Conference over coffee (and other libations), but so will things like capacity market design and the next rounds of the Renewable Electricity Program.

Kent Howie is the head of the Electricity Markets Group in the Calgary, Alberta office of the national law firm Borden Ladner Gervais LLP. He is also the editor of AlbertaPowerMarket.com. Any views expressed in this article are the personal views of the author and are not the views of Borden Ladner Gervais LLP.

By

Kent D. Howie

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BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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