



**BRITISH COLUMBIA  
UTILITIES COMMISSION**

**ORDER  
NUMBER A-1-09A**

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

and

**An Application by Smart Energy (BC) Ltd.  
for Renewal of Gas Marketer Licence -  
Requirement for Financial Statements**

**BEFORE:** R.J. Milbourne, Commissioner January 28, 2009  
L.A. O'Hara, Commissioner  
D.A. Cote, Commissioner

**O R D E R**

**WHEREAS:**

- A. By letter dated August 27, 2008 Smart Energy (BC) Ltd. ("Smart Energy") applied to the British Columbia Utilities Commission ("Commission"), for renewal of its Gas Marketer Licence ("Application"); and
- B. The Application included un-audited financial statements for the year ended March 31, 2008; and
- C. Commission Order A-21-08 ("Order") dated October 30, 2008 renewed the Gas Marketer Licence of Smart Energy for the period November 1, 2008 to October 31, 2009 as Licence A-21-08 ("Licence") subject to conditions; and
- D. Condition 2.12 of the Licence required Smart Energy to file its latest audited financial statements and any subsequent un-audited quarterly statements pursuant to item 5 of the Licence Requirements with the Commission by December 31, 2008; and
- E. The Order was amended by Commission Order A-21-08A ("Amended Order") dated December 19, 2008. The amendment was unrelated to Condition 2.12; and
- F. By letter dated December 17, 2008, Smart Energy advised the Commission that preparation of its audited financial statements had been delayed and requested an extension of time to February 28, 2009 to submit the audited financial statements; and
- G. As of December 23, 2008, Smart Energy had not submitted any quarterly un-audited financial statements to the Commission since submitting the un-audited financial statement for its year ended March 31, 2008 with the Application; and

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- H. Subsection 71.1(3) of the Utilities Commission Act (“Act”) provides that a gas marketer must comply with the Commission rules issued under subsection 71.1(10) and the terms and conditions, if any, attached to the gas marketer licence held by the gas marketer; and
- I. Subsection 71.1(5) of the Act provides that if a person is not in compliance with subsections 71.1(1), (3), or (4), the Commission may do one of more of the following:
- “(a) declare an energy supply contract between the person and a low-volume consumer unenforceable, either wholly or to the extent the commission considers proper, in which event the contract is enforceable to the extent specified, and
  - (b) if the person is a gas marketer,
    - (i) amend the terms and conditions of, or impose new terms and conditions on, the gas marketer licence, and
    - (ii) suspend or cancel the gas marketer licence”; and
- J. Rule 10 of the Rules for Gas Marketers provides, in part:
- “If the Commission finds, after notice and opportunity for the Gas Marketer to be heard in an oral or written hearing, that a Gas Marketer has failed to comply with the Act, the Rules, the Code of Conduct for Gas Marketers or conditions in its Gas Marketer Licence, and in addition to any other remedies or actions that may be applied the Commission may:
- (a) Suspend or cancel the Gas Marketer Licence;
  - (b) Amend the terms and conditions of, or impose new terms and conditions on the Gas Marketer Licence until the deficiencies are resolved”; and
- K. The Commission considered the request of Smart Energy to extend the time to file its audited financial statements and by Order G-200-08 dated December 23, 2008 established an oral hearing to be held on Thursday, January 8, 2009” to consider whether:
- the request by Smart Energy to extend the time to submit its audited financial statements to February 28, 2009 should be granted; or
  - its Licence should be suspended or cancelled or have new or amended terms and conditions attached to it

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as a result of the failure to comply with the condition in its Licence to submit its latest audited financial statements and subsequent quarterly statements to the Commission by December 31, 2008”; and

- L. By letter dated December 31, 2008 Smart Energy filed its un-audited financial statements for the 6 months ending September 30, 2008; and
- M. Commission staff filed its evidence January 2, 2009; and
- N. Smart Energy filed its evidence on January 5, 2009; and
- O. The oral hearing took place on January 8, 2009; and
- P. Smart Energy filed its submissions in reply and its undertaking response on January 15, 2009.
- Q. The Commission Panel has considered the evidence and the submissions.

**NOW THEREFORE** for the reasons attached as Appendix A to this order, the Commission orders as follows:

1. Smart Energy is to file its audited financial statements for the year ending March 31, 2008 as soon as they become available to it and in any event, by no later than February 28, 2009.
2. If Smart Energy fails to comply with paragraph 1 of this order, its Licence is cancelled as of March 1, 2009.
3. If Smart Energy complies with paragraph 1 of this order, its Licence is continued to October 31, 2009, subject to the following revision to Condition 2.12 of the Licence becoming effective as of the date of such compliance:

“Smart Energy will file its financial statements with the Commission as follows:

- (i) save and except for the quarter ending December 31, 2008, Smart Energy is to file quarterly financial statements no later than 45 days after the end of the relevant quarter; and,
- (ii) if, for any reason, those statements are to be prepared in an audited form, they are to be filed in that form, otherwise they may be filed on an un-audited (“Notice to Reader”) basis; and

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- (iii) pursuant to (i) and (ii) above, statements for the period ending December 31, 2008 are to be filed no later than 45 days from the date of Smart Energy's compliance with Commission Order A-1-09; and
- (iv) audited annual financial statements for the fiscal year ending March 31, 2009 are to be filed no later than 60 days after that date."

**DATED** at the City of Vancouver, in the Province of British Columbia, this      28<sup>th</sup>      day of January 2009.

BY ORDER

*Original signed by:*

R. J. Milbourne  
Commissioner

Attachment

An Application by Smart Energy (BC) Ltd.  
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**REASONS FOR DECISION**

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**1.0 BACKGROUND**

The factual background to the proceeding is summarized in part in Recitals A through G and K through P of the Order issued concurrently with these Reasons.

**2.0 REGULATORY FRAMEWORK**

The regulatory framework within which the Commission Panel has reviewed the request by Smart Energy (BC) Ltd. ("Smart Energy") to extend the time to submit its audited financial statement to February 28, 2009 and Smart Energy's failure to comply with condition 2.12 of its Licence to submit its latest audited financial statement and subsequent quarterly statements to the Commission by December 31, 2008 and made its determinations is summarized in Recitals H through J of the Order issued concurrently with these Reasons.

**3.0 CONDUCT OF THE PROCEEDING**

The oral hearing took place on January 8, 2009 and lasted approximately 1 hour. The Commission was represented by its Counsel, Mr. Paul Miller of Boughton Law Corporation; Smart Energy was represented by its witness, Mr. David Mah, a Director of Smart Energy. Smart Energy was not represented by counsel at the oral hearing.

As preliminary matters, Commission Counsel first advised that Smart Energy had filed un-audited statements for the 6 months ending September 30, 2008 as part of Exhibit B-1. Commission Counsel also advised that the Commission staff had no further evidence to file (the evidence having been previously filed) and the only further evidence would be that which would arise as a result of the oral testimony of Mr. Mah. Smart Energy had also previously filed evidence.

No preliminary matters in respect of the jurisdiction of the Commission were raised.

Mr. Mah gave evidence-in-chief, was cross-examined by Commission Counsel, gave further evidence following cross-examination, and responded to questions from the Commission Panel.

Commission Counsel made submissions as to the statutory discretion the Commission Panel had in making its determinations, and outlined the options available to it, but provided no specific recommendations as to what those determinations should be. Mr. Mah made certain oral submissions in reply, however, given the circumstances, Smart Energy was also afforded the opportunity to reply in writing.

By agreement, Smart Energy undertook to provide written reply submissions, if any, by January 15, 2009, and to include with those submissions a response to an undertaking in respect of a question from the Commission Panel.

Smart Energy filed its reply submissions and undertaking January 15, 2009 closing the record of the proceeding.

#### **4.0 EVIDENCE OF THE PARTIES**

For clarity, the relevant aspects of the evidence are presented in generally chronological form as follows:

August 27, 2008: by letter of that date Smart Energy applied to the Commission for renewal of its licence to market natural gas, with an enclosed copy of its "Annual Financial Statement as of March 31, 2008."  
(Exhibit A-3)

October 27, 2008: in an e-mail exchange the Commission inquired "...if Smart Energy has an audited statement for the previous year and, if so, please provide as soon as possible. Otherwise please advise if Smart Energy has any intentions of having March 31<sup>st</sup> statements audited. If so, when?" In response, Smart Energy stated, in part, that "We are not a publicly traded company. Our accountants have advised us to file statements under Notice to Readers with the Registrar of Companies. However, with new supply agreements in place we are having our financials audited as of December of this year." (T1:27)

October 30, 2008: by Order A-21-08 of that date the Commission issued Smart Energy a Gas Marketer Licence for the period November 1, 2008 to October 31, 2009 subject to, among other things, condition 2.12 that "Smart Energy will file with the Commission by December 31, 2008 its latest audited financial statement and any subsequent unaudited quarterly statements, pursuant to item 5 of the licence requirements." (Exhibit A-5, p. 3)

In its evidence, Smart Energy confirmed that it understood that the "latest audited financial statement" was for March 31, 2008:

**Mr. Miller:** Okay. When was Smart Energy aware that it was required to file an audited financial statement?

**Mr. Mah:** Just after we received the renewal to - - for the new licence.

**Mr. Miller:** And that was end of October?

**Mr. Mah:** Yes.

**Mr. Miller:** So as of October - -

**Mr. Mah:** Around October 30th, I believe.

**Mr. Miller:** October 30th, correct. On that date, then, or reasonably soon after that date -

**Mr. Mah:** Yes.

**Mr. Miller:** you were aware you were required to file an audited financial statement.

**Mr. Mah:** That's right.

**Mr. Miller:** For the year ended March 31, 2008.

**Mr. Mah:** That's right.  
(T1:9)

and further:

**Commissioner O'Hara:** Mr. Mah, just coming back to some of the cross-examination by Mr. Miller, here.

**Mr. Mah:** Yes.

**Commissioner O'Hara:** What I understand is that it was end of October when you and your company accepted you had to file - -

**Mr. Mah:** A: That's right.

**Commissioner O'Hara:** - - audited financial statements. There was no further confusion about that at that time.

**Mr. Mah:** That's right.  
(T1:24)

December 15, 2008: by e-mail of that date, Smart Energy advised the Commission that "It appears that due to our Auditor's heavy workload the Audited financials will be delayed...We expect them to complete sometime in February 2009." It attached an e-mail from its Auditors dated November 28, 2008 which states that, among other things, "[A member of Commission staff] referred us to your previous agreements which state that you will provide the most recently audited financial statements by December 31, 2008. You needed to tell us about this sooner to be able to meet that time frame." and "We have started the work, but as I told you earlier, we won't be able to meet the December 31 deadline. It will be closer to mid to end of January 2009." (Exhibit A-7, emphasis added)

December 17, 2008: by letter of that date, pursuant to an e-mail exchange with the Commission, Smart Energy applied for an extension on the submission of its audited financial statements to February 28, 2009, citing as its reasons delay by its auditors due to their heavy workload. (Exhibit A-8)

December 31, 2008: by attachment to its e-mail of that date to the Commission, Smart Energy filed its un-audited financial statements for the 6 months ending September 30, 2008. (Exhibit B-1)

January 2, 2009: by letter of that date, the Commission acknowledged receipt of the above statements and "confirm[ed] that Smart Energy has not fully met the requirement of its Gas Marketer Licence to submit its latest un-audited quarterly financial statements to the Commission and has not met the requirement of its Gas Marketer Licence to submit its latest audited financial statements to the Commission, all by December 31, 2008." (Exhibit A-9)

## 5.0 SUBMISSIONS OF THE PARTIES

As noted in Section 3 above, Commission Counsel made no specific recommendations to the Commission Panel as to any determinations it should make.

Smart Energy gave evidence and made submissions to the effect that its efforts to comply with the Commission's conditions for renewal of its Licence were reasonable in the circumstances, that the extension to February 28, 2009 for filing its audited financial statements for its latest year should be granted, that no further conditions should be attached to its Licence, and that any action by the Commission to suspend or cancel its Licence would have serious consequences for its business.

In particular, Smart Energy pointed to its difficulties in resolving with the Commission whether or not audited financial statements were required, and its efforts to secure an auditor in a timely fashion once that confusion was resolved. On this latter point, in its oral testimony Smart Energy referred to a canvas of potential auditors it conducted in October 2008 (T1:25). In response to an inquiry from Commissioner O'Hara as to the nature of that activity, Smart Energy provided by way of an undertaking response, a copy of a Fax inquiry dated November 19, 2008 for an audit quotation for its March 31, 2008 financial statements as part of its reply submissions of January 15, 2009 (Exhibit B-6).

## 6.0 COMMISSION DETERMINATIONS

The Commission Panel views the proceeding as requiring two separate determinations. Firstly, did Smart Energy's failure to comply with Commission Order A-21-08 and the Amended Order A-21-08A in respect of condition 2.12 of its Licence breach s.71.1(3) of the Act and Rule 10 of the Rules for Gas Marketers, and secondly, what, if any, consequences should flow from the outcome of that first determination.

The Commission Panel finds that the evidence before it clearly establishes that Smart Energy did not file its audited financial statements for its fiscal year ending March 31, 2008 by December 31, 2008, thus failing to comply with condition 2.12 of its Licence. **Accordingly, the Commission Panel determines that Smart Energy is in breach of subsection 71.1(3) of the Act and Rule 10 of the Rules for Gas Marketers.**

In its consideration of the type of sanction it might impose under subsection 71.1(5) of the Act for Smart Energy's failure to comply with condition 2.12 of its Licence, the Commission Panel is mindful of the Commission's broad mandate under section 71.1 of the Act to oversee the integrity of the gas market for low-volume customers (aka "the Residential Commodity Unbundling Program") through the licencing and supervision of those persons who require a gas marketer licence to operate in that market. The transactions in the low-volume gas market are directly with consumers, and necessitate that persons licenced to market to those consumers are not only compliant with the terms and conditions, if any, that the Commission attaches to the licence but also conducts all of their affairs in such a manner as to comply with the Commission's Rules for Gas Marketers issued pursuant to subsection 71.1(10).

The Commission Panel gives little weight to Smart Energy's evidence and submissions that the lack of clarity in the Commission's condition as to the nature of the financial statements it was required to file by December 31, 2008 was one of the reasons for the delay. While the Commission Panel recognizes the potential ambiguity in the wording of condition 2.12, it finds that it did not play any role in Smart Energy's failure to comply with that condition by December 31, 2008. Smart Energy's own evidence on this point is crystal clear, as recorded in Section 4 above.



The Commission Panel gives little weight as well to Smart Energy's evidence and submissions that its failure to comply was a consequence of its Auditor's workload. The evidentiary record plainly demonstrates that Smart Energy clearly understood what was required of it by way of the audited financial statements on October 30, 2008 or reasonably soon afterwards. As of November 18, 2008, more than two weeks later, however, it was still seeking quotations for the audit, and, as of November 28, 2008, almost a month after its understanding of what was required, its Auditor was in contact with the Commission questioning the nature of the statements required (Exhibit A-7 page1/1).

The record also shows that as of November 28, 2008 Smart Energy knew with certainty that it could not comply with condition 2.12, yet it did not approach the Commission with its request for relief from the condition until December 15, 2008, more than two weeks later (Exhibit A-7).

Accordingly, the Commission Panel finds that Smart Energy did not make reasonable efforts to comply with condition 2.12 to its Licence in a timely fashion, which calls into question its capability and/or willingness, to comply with the statutory scheme established under the Act for the regulation of gas marketers participating in the market for low-volume gas customers. In respect of what, if any, consequences should arise from this finding, the Commission Panel has considered the options open to it within the statutory framework of the Act and its obligation to ensure the integrity of gas marketing to low-volume consumers and those it licences to participate as gas marketers, as well as to protect the interests of the participating consumers. The factors the Commission Panel has considered include:

- the seriousness of the licensee's conduct,
- the harm suffered by consumers as a result of the licensee's conduct,
- the damage done to the integrity of the low volume gas markets in British Columbia by the licensee's conduct,
- the extent to which the licensee was enriched,
- factors that mitigate the licensee's conduct,
- the licensee's past conduct,
- the risk to consumers and the integrity of the low-volume gas markets posed by the licencees' continued participation in that market,
- the licencee's fitness to be a licensee or to bear the responsibilities associated with being one,
- the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the low-volume gas markets,
- the need to deter those who participate in the low- volume gas markets from engaging in inappropriate conduct, and

- orders made by the Commission in similar circumstances in the past.

The Commission Panel addresses those that bear on the particulars of this proceeding as follows.

- Smart Energy's conduct is serious. The Commission relies on, among other things, a review of a licensee's financial statements to ensure that the licensee has the financial capability required to enter into contracts with consumers in the low gas volume market. Failure to produce those statements in a timely fashion compromises the Commission's ability to fulfill its statutory obligations under the Act.
- There is no evidence at this time that the integrity of the low-volume gas markets has been damaged as a result of Smart Energy's failure to comply with condition 2.12 in a timely fashion. That notwithstanding, if such compliance failures without consequences become an accepted norm among the licensee community, the integrity of the markets could suffer material harm.
- Smart Energy has submitted that its failure to comply stemmed from, and is mitigated by, the ambiguity of the Commission's wording in respect of the required financial statements and by its efforts to find an Auditor, and its selected Auditor's workload. The Commission Panel has given little weight to those arguments based on the evidentiary record and finds that they are not mitigating factors. In particular the Commission Panel rejects Smart Energy's submissions regarding its Auditor's workload, as that is not cited by its Auditors in the e-mail attached to Exhibit A-7; rather, the Auditors cite Smart Energy's failure to inform them in a timely fashion of its understanding with the Commission as to the requirement for audited statements.
- The risk to consumers and the integrity of the low volume gas markets posed by Smart Energy's continued participation in that market, as well as its fitness to be a licensee or to bear the responsibilities associated with being one, in the Commission Panel's view turn on Smart Energy's demonstration, going forward, of its compliance with the requirements of its Licence, in order to establish that it has the necessary systems and procedures, as well as attitudes and behaviors throughout its organization to ensure compliance with the requirements of its Licence. The Commission Panel finds that Smart Energy's failure to address the concerns it had with the condition which the Commission placed on its Licence, and its failure to seek resolution or relief from those concerns in a timely fashion, casts some doubt on its capability and fitness to bear the responsibilities associate with being a licensee.
- The need to deter inappropriate conduct, and demonstrate the consequences of it to those who participate in the low- volume gas markets are fundamental to the Commission's obligations in respect of the integrity of those markets and the protection of consumers. As noted earlier, should compliance failures without consequences become an accepted standard among the licensee community, significant harm would ensue.
- Neither party made any submissions as to orders made by the Commission in respect to similar circumstances in the past.

The Commission Panel accepts that Smart Energy knew on or before December 17, 2008 that it would be unable to comply with condition 2.12 of its Licence and applied to the Commission for an extension to February 28, 2009, which resulted in this proceeding. In order to deny Smart Energy its requested extension to satisfy Condition 2.12 of its Licence, the Commission Panel finds that it would have to determine, on the balance of probabilities, either that Smart Energy's demonstrated failure to comply with condition 2.12 in a timely fashion was deliberate, or that in all the circumstances the potential harm to the low-volume customers in granting Smart Energy its request for an extension to file the audited financial statements would outweigh the potential harm to Smart Energy in suspending or revoking its Licence. **The Commission Panel finds that the evidence is insufficient to support either ground and accordingly determines that, subject to its further determinations below, Smart Energy's Licence is continued, and that it is to file its audited financial statements for the year ending March 31, 2008 as soon as they become available to it and in any event no later than February 28, 2009. If Smart Energy fails to comply with the foregoing, its Licence is cancelled as of March 1, 2009.**

**The Commission Panel determines that if Smart Energy complies with the above part of this determination and its Licence is continued to October 31, 2009, then it is in the public interest to ensure that the information required by the Commission to enable it to effectively supervise those it licences is provided in a timely and complete fashion and amends condition 2.12 of that Smart Energy's Licence effective the date of such compliance to read:**

**"Smart Energy will file its financial statements with the Commission as follows:**

- (i) save and except for the quarter ending December 31, 2008, Smart Energy is to file quarterly financial statements no later than 45 days after the end of the relevant quarter; and,**
- (ii) if, for any reason, those quarterly statements are to be prepared in an audited form, they are to be filed in that form, otherwise they may be filed on an un-audited ("Notice to Reader") basis; and,**
- (iii) pursuant to (i) and (ii) above, financial statements for the period ending December 31, 2008 are to be filed no later than 45 days from the date of Smart Energy's Compliance with Commission Order A-1-09; and,**
- (iv) audited annual financial statements for the fiscal year ending March 31, 2009 are to be filed no later than 60 days after that date."**