

November 17, 2009

The Honourable Mel Knight
Minister of Energy
#404 Legislature Building
10800-97 Avenue
Edmonton AB T5K 2B6

Dear Minister Knight,

Re: Bill 50 – *The Electric Statutes Amendment Act*

Introduction:

The Environmental Law Centre (ELC) is a charitable organization incorporated in 1982 to provide information on environmental law and policy in Alberta and Canada. The ELC's mission is to ensure that laws, policies, and legal processes protect the environment. One of the specific goals of the ELC is to ensure that people are actively engaged in decisions to protect the environment.

The ELC has a history of participation in utilities regulation in Alberta. The ELC provided comments in 2007 when the Alberta Utilities Commission (AUC) was first created. The ELC has reviewed Bill 50 as part of our mandate to improve environmental considerations in decision-making processes in Alberta and increase accessibility, public participation and involvement in key energy development assessment and approval decision-making processes. The ELC has an interest in ensuring that Bill 50 meets the stated objectives of Alberta's electricity legislation. We have also reviewed Bill 50 from the point of view of whether it promotes the public interest in an open and transparent manner. We are very pleased to provide you with our comments on Bill 50 and thank you for the opportunity to comment on the Bill.

Background:

Alberta's electricity transmission system is planned by the Alberta Electric System Operator (AESO), also called the Independent System Operator (ISO), and regulated by the Alberta Utilities Commission (AUC).

The AUC is the approval body for the need for new transmission projects. The AUC reviews the needs identification documents of the AESO and decides whether or not to approve them. The AUC also approves, varies or denies permits to build and operate transmission lines. It may make decisions based on

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whether the proposed transmission is in the public interest. The AUC may also hold hearings in which directly and adversely affected parties may participate.

Bill 50 the *Electric Statutes Amendment Act*, was introduced for first reading on June 1, 2009.¹ Bill 50 amends the *Alberta Utilities Commission Act*, the *Electric Utilities Act* and the *Hydro and Electric Energy Act*.² The Bill also creates a category of transmission called “critical transmission infrastructure” (CTI) and designates three transmission lines and one substation “critical.” The purpose of the Bill is to meet the needs of Albertans and the economy and enhance the approval process.³

Summary of comments:

The ELC understands that Alberta needs a solution to long-standing problems with assessing the need for transmission infrastructure. However, instead of enhancing the transmission approval process, Bill 50 would make the problem of needs assessment and approval for transmission infrastructure in Alberta worse. The problems with Bill 50 include:

- 1. Cabinet discretion to designate critical transmission infrastructure is too broad:**
 - (a) Cabinet powers to remove transmission from a full planning and approval process should be limited to exceptional circumstances;
 - (b) Bill 50 would ignore the overall legislative objectives of the acts it amends;
 - (c) Cabinet would not have enough information to determine need for CTI.

- 2. Bill 50 would not provide a long-term solution for addressing transmission need issues:**
 - (a) Bill 50 would prevent the AUC from considering need and the public interest for CTI;
 - (b) Alberta should use a process that fully considers the public interest in transmission need decisions.

¹ Bill 50, *Electric Statutes Amendment Act*, 2nd Sess., 27th Leg., Alberta, 2009.

² *Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2; *Electric Utilities Act*, S.A. 2003, c. E.5-1; *Hydro and Electric Energy Act*, R.S.A. 2000, c. H-16.

³ Alberta, 27th Legislative Assembly 2nd sess, *Official Report of Debates (Hansard)*, No. 46 (June 1, 2009), at 1426 (Hon. Mr. Knight).

Recommendations:

1. Bill 50 should not be passed.
2. At a minimum, the provisions of Bill 50 that give Cabinet broad discretion over designating critical transmission infrastructure, and the altered process for approving critical transmission infrastructure should be removed from the Bill.

Discussion:

1. **Cabinet discretion to designate critical transmission infrastructure is too broad:**
 - (a) **Cabinet powers to remove transmission from a full planning and approval process should be limited to exceptional circumstances.**

Bill 50 would add new powers for Cabinet by adding s.41.1(1) to the *Electric Utilities Act*.⁴ This allows Cabinet to designate as “critical” any transmission project contained in an AESO plan that is:

- A connection to another jurisdiction;
- To serve “areas of renewable energy”;
- Designed at or in excess of 240Kv; or
- In Cabinet’s opinion is “critical” to the safe, reliable and economic operation of the interconnected electric system.

Bill 50 would allow Cabinet to designate a wide variety of transmission infrastructure including any large transmission project, project for renewable energy or any other project that is in Cabinet’s opinion “critical.” The Bill itself would also designate three transmission infrastructure projects critical.⁵

The terminology used in Bill 50 of “critical” transmission infrastructure is confusing. The only restriction on this broad Cabinet discretion is that transmission infrastructure must first be identified in an AESO plan. However, under Part 2 of the *Transmission Regulation* the AESO plans are long-term, general plans for the next ten to twenty years.⁶ The term “critical” is not defined, and it is unclear whether it is synonymous with long-term needs generally, or is intended to apply only to situations of urgency. Bill 50 would allow Cabinet to designate non-urgent transmission infrastructure “critical” and in doing so

⁴ Bill 50, *supra* note 1, cl.2(6).

⁵ *Ibid.* cl. 2(13). These are two transmission facilities between Edmonton and Calgary, one facility in south Edmonton, one substation in Gibbons, and one substation in Calgary.

⁶ *Transmission Regulation*, Alta. Reg. 86/2007, s. 8-14.

circumvent the needs assessment and public interest considerations in the usual approval process.

The ELC feels that any power to direct a transmission infrastructure project out of the full needs assessment and public interest approval process should be narrow and truly exceptional. The process provided for in the *Hydro and Electric Energy Act* is already flexible and expedient. AUC transmission decisions must be made within 270 days.⁷ The additional time advantage of the CTI process is therefore unlikely to be of much significance. It is unclear what, if any other, advantages exist under the CTI designation process.

The powers provided to Cabinet in Bill 50 would be broad powers to take over decision-making on a wide range of transmission infrastructure at any time. This would create confusion about who would ultimately be responsible for approving virtually any future transmission infrastructure listed in an AESO plan. Proponents, the public, and regulatory agencies will not know if or when Cabinet will take responsibility for assessing need instead of the AESO and the AUC. The ELC believes that this may cause considerable delays and problems.

(b) Bill 50 ignores the overall legislative objectives of the acts it would amend.

The degree of discretion Cabinet would exercise under Bill 50 could seriously undermine the objectives of the *Electric Utilities Act*, the *Alberta Utilities Commission Act* and the *Hydro and Electric Energy Act*. Together, these acts ensure that transmission infrastructure is consistent with a fair, competitive and open electricity market, and a “flexible framework” for decisions about the electric industry. These acts also value “economic, orderly and efficient development... in the public interest” of generation and transmission and the control of pollution and ensuring environmental conservation.⁸ These considerations are not requirements of the Cabinet decision to designate transmission infrastructure as critical, nor part of the AUC approval process for CTI under Bill 50. There is no mechanism under Bill 50 to address these objectives with respect to CTI.

(c) Cabinet would not have enough information to determine need.

There is ordinarily a two-step process before the Alberta Utilities Commission (AUC). First the AESO produces a “needs identification document” on transmission and puts it before the AUC. The AUC then determines whether it will approve or refer back the needs assessment to the AESO.⁹ The needs

⁷ *Hydro and Electric Energy Act*, *supra* note 2, s.15.2 provides that the AUC must make decisions in 270 days unless the Minister approves further delay.

⁸ *Hydro and Electric Energy Act*, *supra* note 2, s.2; *Alberta Utilities Commission Act*, *supra* note 2, s.17; *Electric Utilities Act*, *supra* note 2, s.5.

⁹ This takes place under the process set out in sections 34-36 of the *Electric Utilities Act*, *ibid*.

identification document includes many important features, including public participation and impact assessment requirements under AUC Rule 007.¹⁰

Concurrently or subsequently to this process, individual transmission line applications also go before the AUC for approval. The AUC has the power to identify technical details and route issues and has determined whether the applications are in the public interest.¹¹ If it approves the facility, the AUC issues a permit.

Under Bill 50, the consequence of designating transmission as CTI would be that the usual needs identification and facility approval process would not apply. Bill 50 adds s.41.2 to the *Electric Utilities Act*, which provides that sections 34, 35 and 36 of that Act would not apply to CTI.¹² Accordingly, the AESO would no longer prepare a needs identification document explaining the need for CTI. Without a needs identification document the public participation and impact assessment requirements under AUC Rule 007 for evaluating need would not apply. Under Bill 50, the AESO would also no longer direct a transmission owner to submit a proposal to the AESO to meet the need identified.¹³ Instead of this, Bill 50 would include a consultation requirement in AESO planning.¹⁴

The AESO plans are 10 and 20 year plans under the *Transmission Regulation* and are not at the same level of detail as needs identification documents. Unlike AUC Rule 007 the consultation requirement for the AESO under the *Electric Utilities Act* regulations is limited to market participants.¹⁵ The result is that there would be no public consultation requirement for CTI need under Bill 50.

Under the proposed s. 41.1(2) of the *Electric Utilities Act*, Cabinet would have discretion regarding issues such as voltage, capacity, and other technical issues for CTI. Cabinet would also have discretion over the approximate route, and could vary these details from the AESO plan.¹⁶

The ELC is concerned that Cabinet may not have enough information from the AESO plan to determine whether infrastructure is required or in the public interest. The AESO plan will also not provide sufficient guidance on technical issues. Accordingly, transmission projects might proceed without addressing feasibility and technical issues. CTI projects may also fail to meet future needs due to the limited nature of the need evaluation process for CTI. This may cause problems and delays.

¹⁰ Alberta Utilities Commission (Rule 007), *Rules Respecting Applications for Power Plants, Substations, Transmission Lines, and Industrial System Designations* (April 21, 2009).

¹¹ The second stage takes place under sections 14-23 of the *Hydro and Electric Energy Act*, *supra* note 2.

¹² Bill 50, *supra* note 1, cl. 2(6) adding s.41.2 to the *Electric Utilities Act*, *supra* note 2.

¹³ *Ibid.*

¹⁴ *Ibid.*, cl. 2(5) amending s.33 of the *Electric Utilities Act*, *supra* note 2.

¹⁵ *Transmission Regulation*, *supra* note 6, s.2-4.

¹⁶ Bill 50, *supra* note 1, cl. 2(6).

2. **Bill 50 would not provide a long-term solution to transmission need issues.**

The underlying assumption of Bill 50 appears to be that the ordinary transmission planning and approval process will fail in the future to plan and approve the transmission infrastructure that Alberta needs. This failure would be remedied by Cabinet stepping in and approving the need for CTI.

The ELC suggests that if the ordinary transmission need process is not working to this extent it requires considerable, overarching reform. However, no reforms are included in Bill 50 for other transmission line approvals. Accordingly we suggest that the government should reconsider its overall approach to enhancing the needs process so that it prevents the occurrence of situations where Cabinet needs to step in altogether. Even if some projects are exempted from the approval process in the short-term, Alberta must find a long-term solution to the need identification and approval process.

(a) **Bill 50 would prevent the AUC from considering need and the public interest for CTI.**

Under Bill 50, Cabinet's discretion over whether a transmission facility is "critical" would eliminate AUC jurisdiction over the public interest and need. As mentioned earlier, the proposed s.41.2 of the *Electric Utilities Act* would remove the need identification and approval process, including public consultation under AUC Rule 007. Bill 50 would also amend s.17 of the AUC's governing legislation eliminating the AUC's powers to consider if CTI is in the public interest.¹⁷ The proposed amendments to s.13.1 of the *Hydro and Electric Energy Act* would remove any powers for the AUC to consider whether a transmission application is required or in the public interest.¹⁸ Accordingly, under Bill 50 the only consideration is whether in Cabinet's opinion transmission infrastructure is "critical". Once it is critical, it is deemed to be required and in the public interest by Bill 50.¹⁹

The AUC would continue to consider applications for permits to operate CTI under the *Hydro and Electric Energy Act*. However, Cabinet's powers under the proposed s.41.1(2) of the *Electric Utilities Act* significantly overlap with the AUC's powers under s.19 of the *Hydro and Electric Energy Act*. It is therefore unclear if the AUC could use its powers under s.19 of that Act to vary the Cabinet designation under the *Electric Utilities Act*. Bill 50 would amend s.19 of the *Hydro and Electric Energy Act* by adding s.19(1.1) that provides that the AUC shall not refuse a transmission facility or part of a transmission facility designated critical on the basis that it is not required or in the public interest.²⁰ Since the AUC will no

¹⁷ *Ibid.* cl. 1(3).

¹⁸ *Ibid.* cl. 3(2) amending the *Hydro and Electric Energy Act*, *supra* note 2.

¹⁹ *Ibid.* cl. 3(2), 3(3) amending s.13 and s.19 of the *Hydro and Electric Energy Act*, *ibid.*; cl. 1(3) amending s. 17 of the *Alberta Utilities Commission Act*, *supra* note 2; and cl. 2(6) adding s.41.2 to the *Electric Utilities Act*, *supra* note 2, which states that s.34, 35 and 36 do not apply to critical transmission infrastructure.

²⁰ *Ibid.*, cl. 3(3).

longer consider the public interest or need for CTI it may play no meaningful role in the approval. It is unclear if the AUC actually has any remaining jurisdiction to deny or vary a CTI permit application under the *Hydro and Electric Energy Act*.

(b) Alberta should use a process that fully considers the public interest in transmission need and approval decisions.

Bill 50 would remove the public interest and need considerations from the AUC approval of CTI. The ELC believes that this will not make the transmission needs identification process in Alberta more expedient, efficient or effective.

Those who participate in AUC hearings have been long frustrated that the AUC (and its predecessor the EUB) does not allow them to fully discuss need issues at the stage when they are likely to be participating for the first time. This has resulted in significant delays and problems with EUB and AUC facility approvals in the past. The ELC understands that Alberta should avoid a dysfunctional facility approval process.

The ELC cautions that Bill 50 may cause further disruptions and problems before the AUC for CTI. The proposed narrow transmission permit approval proceeding before the AUC for CTI would allow persons who are directly and adversely affected by CTI to make submissions to the AUC. However, the AUC would have no mandate to consider the public interest or need for CTI. Such a process is likely to exacerbate rather than defuse tensions between differing interests in AUC proceedings. It is also likely to place increasing pressure on Cabinet to be the arbitrator of a variety of interests through lobbying before, after and during those proceedings. This pressure may ultimately lead to Cabinet having difficulty making transmission designation decisions.

Environmental considerations are a fundamental element of the public interest in need and transmission approval decisions before the AUC. The principles underlying the concept of the public interest require a decision-maker to take into account a wide range of competing views, interests and values. A decision that fails to do this will not be in the public interest. Participatory rights are necessary to give all genuinely interested parties access to a decision-maker with a full mandate to consider their views and interests.

A clear and effective process that allowed those genuinely interested to have their views heard before the AUC on need early in the process would promote the public interest, including environmental interests. It would also lead to more effective and efficient decision making in the later stages of the approval process. If those genuinely interested have a meaningful forum to participate, they are more likely to “buy-in” to the ultimate decision. The ultimate decision will also be better for Alberta’s transmission system because it takes into account the full variety of factors in Alberta’s electricity legislation. Maintaining the role of the AUC as a thoughtful, independent decision-maker could also ensure that

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unwanted political controversy about transmission will not delay decision-making about important transmission infrastructure.

This is why for many years the ELC has asked for broadened standing at utilities proceedings and a clearer hearing process for needs issues. We note that these innovative solutions have not been tried in Alberta.

Recommendations:

1. Bill 50 should not be passed.
2. At a minimum, the provisions of Bill 50 that give Cabinet broad discretion over designating critical transmission infrastructure, and the altered process for approving critical transmission infrastructure should be removed from the Bill.

Conclusion:

The ELC is very encouraged that Bill 50 amendments are a possibility. The ELC thanks you very much for the opportunity to comment on Bill 50. Although the ELC has identified problems with the way Bill 50 would change the need identification and facility approval process for critical transmission infrastructure, we remain hopeful that alternative approaches to address need issues will be considered. The ELC remains very concerned that Bill 50 would eliminate public consultations on need and AUC approval in the public interest. We would be very pleased to speak with you further at any time about our proposed alternative process for need identification and facility approval.

Sincerely,

[Original signed]

Laura Bowman
Staff Counsel
Environmental Law Centre

Cc: Rachel Notley, NDP Environment Critic.
Brian Mason, NDP Energy Critic.
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