ENVIRONMENTAL LAW CENTRE

March 5, 2001 Our File: P-99-881

Guiseppa Bentivegna
Alberta Energy and Utilities Board
640 - 5 Avenue SW
Calgary, AB T2P 3G4

Dear Ms. Bentivegna:

RE: Comments - Draft Alberta Energy and Utilities Board Rules of Practice

I am writing to provide the Environmental Law Centre's comments with respect to the Alberta Energy and Utilities Board's ("the Board") draft rules of practice, as posted on the Board's website. We appreciate the opportunity to provide input to the Board on this important initiative.

About the Environmental Law Centre

The Environmental Law Centre ("ELC") is a non-profit charitable organization incorporated in 1982. It employs 4 experienced full-time lawyers who offer public interest environmental law programming in education, information and referral, research and law reform. These programs are supported by the ELC's public library of environmental law, which contains over 16,000 specialized environmental law materials.

The ELC's goal is to make the law work to protect the environment. In support of this goal, the ELC pursues 3 policy objectives: one, that good environmental laws are enacted by governments; two, that the public has an effective role in environmental regulatory and law-making processes; and three, that these processes offer a level playing field to participants.

Draft Rules of Practice

Our comments on the draft rules of practice are set out in the same order as the rules, with references to specific sections as required.

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Section 8 - Failure to Comply with Rules

In section 8(2), the wording seems to imply that material that is filed late with the Board will generally be accepted unless the Board chooses to disregard it. Is this the intended meaning of section 8(2)? If so, this causes us some concern. While such an approach may seem more flexible, particularly when unrepresented parties are involved, it also runs the risk of abuse by parties seeking to prolong the process and may render time limits imposed by the rules meaningless. If the intended meaning of section 8(2) is not as we have indicated above, that section should be reworded to clarify that late submissions will not be accepted unless specific permission is given by the Board.

Section 11 - Service of Documents

Section 11(6) provides that "The Board may serve or direct that a notice…be served…" It is unclear whether this subsection is meant to give the Board the power to direct a range of forms of service or to direct parties other than itself to serve notices of application or hearing. If section 11(6) is intended to allow the Board to direct various means of serving notices of application or hearing, we would suggest that it be reworded to better achieve this intent by giving the Board discretionary power to direct such means of service as it deems appropriate. By restricting the means of notice to those specified in the subsection, the Board may lose the ability to make use of other effective means of service, such as posting in public places, which may prove more useful in some circumstances.

If section 11(6) is intended to allow the Board to direct parties other than itself to serve notices of application or hearing, then it appears to conflict with sections 22(1) and 23(1) of the draft rules, which designate the Board as the party to serve a notice of application (section 22(1)) or hearing (section 23(1)). Either section 11(6) or sections 22(1) and 23(1) should be reworded to resolve this conflict.

Section 12 - Public Record

Our comments with respect to this section relate specifically to the confidentiality provisions. While we do not deny that there is a need to provide for the confidentiality of certain types of information, we are concerned that the provisions in section 12 seem to err on the side of confidentiality rather than public accessibility of information. In particular, the range of information specified in section 12(4)(a)(ii) is very broad and could conceivably cover almost every type of information filed by any party with the Board.

Given the general legislative trend towards public availability of information and the Board's duty to regulate in the public interest, we believe that the categories of information listed in section 12(4)(a)(ii) should be much more restrictive. For example, section 33(4) of the *Environmental Protection and Enhancement Act* deals with requests for confidentiality of information provided to Alberta Environment under that Act. In that provision, confidentiality may be provided for trade secrets, processes or techniques that the person submitting the information keeps confidential.

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We are also concerned that the wording of section 12(2) appears to make the service of a request for confidentiality on other parties a matter of discretion, rather than a mandatory duty. In the interests of procedural fairness, any request for confidentiality should be served on all parties to a proceeding and all parties should be given the opportunity to make submissions on the request. Any concerns with respect to the maintenance of confidentiality pending a determination by the Board could be dealt with by expanding the application of section 12(5).

Section 16 - Written Evidence

Section 16(6) provides: "In certain circumstances, the Board may permit evidence which has not been previously filed in writing." We find that the phrase "In certain circumstances" is very vague and does not add to the application of this subsection. We suggest that section 16(6) be reworded to either list broad categories of circumstances in which such evidence would be permitted or give the Board general discretion to determine the circumstances in which the evidence would be permitted.

Section 20 - Applications

Section 20(4) deals with incomplete applications. It is not clear from this subsection whether the Board will notify an applicant if an application is incomplete and whether the applicant will be given an opportunity to remedy the problem before an application will be dismissed. We suggest that section 20(4) be clarified to address this uncertainty.

Sections 29 - 32 - Information Requests and Responses

We applaud the inclusion of these sections to establish a process for information exchange. However, we believe that a gap in the rules still exists with respect to those requests. While section 31 provides a process to be followed by a party who is unable or unwilling to respond to an information request, there are no provisions that indicate what will happen in instances where a party fails to respond in any fashion to an information request. In those instances, will the party seeking the information be obliged to bring a motion under section 32, or will the Board be given powers to deal with the failure to respond by imposing sanctions or dismissing the uncooperative party's application or submission? We feel this is a gap that should be addressed by the rules to prevent the possibility of parties seeking to use a loophole to avoid providing information requested by other parties.

Sections 33 - 35 - Pre-hearing Technical and Settlement Meetings

All of these sections make reference to "recommending the procedures to be adopted". It is unclear what such "procedures" would relate to. Are these to be procedures for those particular meetings or for future hearings? We suggest that the meaning of this phrase be made clearer in sections 33 - 35.

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Section 35 - Settlement Meetings

While we agree that settlement of matters should be sought wherever possible, we question whether this section is required given the creation by the Board of the appropriate dispute resolution (ADR) process. It appears to us that the substance of section 35 could be achieved by simply giving the Board the power to require parties to participate in the ADR process rather than setting up an similar but parallel process. To maintain section 35 as it is currently worded may also have the effect of confusing participants in Board processes.

Section 39 - Notice to Attend

The wording of section 39(2) is somewhat confusing. It is unclear whether this subsection requires that conduct money must always be provided with a notice to attend or that it must only be provided when directed by the Board. This section should be clarified.

Section 42.1 - Hearings in Absence of the Public

We find that section 42.1(2) is very wordy and quite confusing. We strongly suggest that this subsection be revised, perhaps by breaking it into different clauses, to make it easier to read and understand.

Section 43 - Participation of Crown

It is unclear from the rules whether the Crown is automatically a party to every matter before the Board or must file a submission in order to participate. We suggest that this be dealt with as part of section 43.

Section 46 - Written Hearings

While written hearings are referred to in various sections of the rules, we have not found any provisions that establish criteria for determining when written hearings will be held. We suggest that such criteria be included as part of section 46.

Part IV - Review, Variation or Rehearing

We note that sections 47 - 50 do not establish any timelines for filing of applications for review, variation or rehearing. We suggest that the Board consider adding time requirements for such applications, to provide some measure of certainty and finality to its processes.

The rules are not clear about the process to be followed where the Board grants an application for review or rehearing. Is it intended that the process for hearings will apply to reviews and rehearings? Will reviews and rehearings be treated as hearings de novo or will they be limited to the matters raised in the application for review or rehearing? The

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Board may wish to add some provisions to the rules setting out the process for reviews and rehearings.

General Comments

While we appreciate the opportunity to comment on the draft rules of practice, we feel we must also comment on the inadequacy of both the notice and the time period provided for comments. While the notice was posted on the Board website, there was not a clear link to the draft rules of practice, which could only be found by some sleuthing around the website. The date of posting on the website was stated to be February 20, 2001, while the deadline for comments was March 2, 2001. This gave any interested party only nine working days to review the draft rules and provide a response, assuming that they found the notice and rules immediately after their having been posted. We find this totally unacceptable and quite surprising in light of the Board's willingness to provide ample time for public consultation on many of its other initiatives.

On February 9, 2001, the writer participated in a meeting between Board members, Board staff and representatives of environmental organizations (ENGOs). At that time, the ENGOs requested an update on the intervenor costs initiative and were advised by Board staff that costs matters would be incorporated into the draft rules of practice. However, we find that the draft rules contain no mention of intervenor costs. We would appreciate receiving a detailed update on the status of and intended future steps related to the intervenor costs initiative.

We would like to thank the Board for allowing us to provide comments on the draft rules of practice. We look forward to reviewing future drafts of the rules of practice. Please contact the writer should you have any questions about our comments or require clarification.

Yours truly,

Cindy Chiasson
Staff Counsel

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