

July 11, 2007

Our File:

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

VIA FACSIMILE: (780) 422-0195

Dear Minister Knight,

RE: Bill 46 – Alberta Utilities Commission Act

The Environmental Law Centre (ELC) is a charitable organization incorporated in 1982 to provide an objective source of 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. With that specific goal in mind, the ELC is pleased to provide comments on the Government of Alberta's proposed Bill 46, the *Alberta Utilities Commission Act (AUCA)*.¹

Introduction

Legislation that creates and confers powers upon administrative decision-making bodies should allow for meaningful public engagement where decisions have potential economic, social or environmental impacts. The *AUCA* should, therefore, ensure that the Alberta Utilities Commission ("the Commission") it creates allows for meaningful public engagement. Given that the *AUCA* would confer upon the Commission certain decision-making authority currently enjoyed by the Energy and Utilities Board² ("EUB") pursuant to the *Energy Resources Conservation Act*³ ("ERCA") and the *Hydro and Electric Energy Act*⁴ ("HEEA"), the *AUCA*, when taken together with any regulations and rules created pursuant to it, should ensure that public participation rights are, at a minimum, not less than those given by the EUB pursuant to the *ERCA*.

General comments

Under the proposed *AUCA*, participatory rights are few and are narrower in scope than under the current *ERCA*. The "directly and adversely affected" test traditionally used by the EUB to limit standing is augmented under the *AUCA* by the imposition of a

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materiality test to be applied by the Commission. The *AUCA* also authorizes the Commission to create rules to further limit participation.

The proposed *AUCA* contains consequential amendments to a number of Acts, including the *HEEA*. These consequential amendments have the potential to limit public participation rights.

Restriction on rights of participation

Section 9 of the *AUCA* operates to place potentially significant limits on effective public participation before the Commission. Section 9 achieves this in three distinct ways. The first is the use in subsection 9(2) of the “directly and adversely affected” test for standing. The second is the suite of reasons, set out in subsection 9(3), for which the Commission may decide not to hold a hearing even though it appears to the Commission that the rights of a person may be directly and adversely affected by a decision. The third is the ability of the Commission, reflected in subsection 9(4), to refuse to allow those entitled to make representations to the Commission an opportunity to make oral representations or to be represented by counsel. This submission will comment on each of these three aspects of section 9.

“Directly and adversely affected” test

Section 9(1) of the *AUCA* provides the Commission with the power to make any order or decision it is authorized to make without giving notice and without holding a hearing. This is similar to powers held by the EUB under section 26 of the *ERCA*. Notwithstanding this general power, the Commission is compelled by subsection 9(2) to provide certain participatory rights if “it appears to the Commission that its decision or order on an application may directly and adversely affect the rights of a person.”

The “directly and adversely affected” test for standing has been applied by the EUB for years and has, during those years, significantly limited public participation in regulatory processes and has been the long-term root of extensive litigation in Alberta.⁵ The ELC recommends that section 9(2) of Bill 46 be amended to remove the “directly and adversely affected” test and to grant participation to any person or group who has a legitimate interest that ought to be represented in the proceeding or process, or has an established record of legitimate concern for the interest they seek to represent. This position is consistent with the test for public interest standing developed by the Supreme Court of Canada.

Commission not required to hold hearing even if persons directly and adversely affected

Subsection 9(3) of the *AUCA* provides the Commission with three justifications for not holding a hearing on an application notwithstanding that a directly and adversely affected person has been identified. The first justification, reflected in paragraph 9(3)(a), is that no person requests a hearing in response to the notice of application. This justification is reasonable, assuming that adequate notice was provided in fact.

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Paragraph 9(3)(b) of the *AUCA* provides that the Commission may also refuse to hold a hearing if it appears to the Commission that “no person will be directly and adversely affected in a material way by the decision or order of the Commission.” This wording does not exist in the current *ERCA* or other legislation guiding the EUB; this materiality test is not currently applied by the EUB. This paragraph creates yet another hurdle over which persons striving to participate in Commission proceedings must leap and makes public participation more difficult. The Commission’s determination of whether a direct and adverse affect is “material” is a question of mixed law and fact and cannot necessarily be appealed to the Court of Appeal. The ELC recommends that paragraph 9(3)(b) be deleted from Bill 46.

Paragraph 9(3)(c), which applies on an application for the construction or operation of a hydro development, power plant or transmission line under the *HEEA* or a gas transmission pipeline under the *Gas Utilities Act*, provides that the Commission is not required to hold a hearing “if the Commission is satisfied that the applicant has met the relevant Commission rules respecting each owner of land that may be directly and adversely affected”. These “rules respecting landowners” are not currently available for review; consequently, the full impact of paragraph 9(3)(c) cannot presently be known. However, given that the proposed paragraph 9(3)(c) is independent of the proposed paragraph 9(3)(b), it would be within the power of the Commission to decide not hold a hearing even if a decision or order may have direct, adverse *and material* effects on a person. A restriction of this sort did not exist under the *ERCA*. The ELC considers that where a person is shown to have met the test for standing, be that test the “directly and adversely affected” test as proposed in Bill 46 or the test recommended by the ELC above, that person should have the opportunity to have its concerns addressed by the Commission through the public hearing process; accordingly, the ELC recommends that paragraph 9(3)(c) be deleted from Bill 46.

Oral hearings and right to counsel

Once it is determined that a directly and adversely affected person is entitled to make representations to the Commission on an application, subsection 9(4) of the *AUCA* may apply to restrict the abilities of that person to effectively participate in the Commission’s processes. Subsection 9(4) provides that the Commission is not required to afford a person an opportunity to make oral representations or to be represented by counsel if the person is afforded an adequate opportunity to make representations in writing.

This section parallels to a degree section 26(3) of the *ERCA*. However, Bill 46 differs from the *ERCA* in that section 26(2) of the *ERCA* specifically requires the EUB to give a directly and adversely affected person a list of enumerated procedural rights. Section 26(2) of the *ERCA* requires the EUB to provide notice of an application and a reasonable opportunity of learning the facts bearing on an application. Section 26(2) also provides intervenors with:

- a reasonable opportunity to furnish evidence relevant to the application or in contradiction or explanation of the facts and allegations in the application,

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- an opportunity to formally cross-examine the applicant if the intervenor will not have otherwise have the fair opportunity to contradict or explain the facts or allegations in the application, and
- an adequate opportunity of making representations by way of argument to the EUB or its examiners.

While Bill 46 parallels the *ERCA* by requiring that the Commission provide notice of an application and a reasonable opportunity of learning the facts bearing on the application, Bill 46 does not specifically enumerate the procedural opportunities given to an intervenor; rather, Bill 46 provides that the Board shall “hold a hearing”. Parties may differ in their interpretation of the meaning and content of the word “hearing” and it is foreseeable that individuals or groups intervening in Commission processes may interpret the content of the word “hearing” to be more expansive than interpreted by the Commission.

Further, the specifically enumerated rights to submit evidence, to cross-examine an applicant and to make representations by way of argument under the *ERCA* are not impacted by the ability of the EUB to determine not to allow oral representations. Under that *Act*, an intervenor would still have the opportunity to submit evidence, cross-examine the applicant and present argument through the use of written submissions, information requests and written arguments.

Because procedural rights are not specifically enumerated in Bill 46, it is not clear whether a determination of the Board not to allow oral representations could impact other procedural rights of an intervenor. The answer would depend on the Commission’s interpretation of “hearing” in each case. This is potentially confusing for participants. The ELC notes also that while Bill 46 makes certain consequential amendments to the *ERCA*, Bill 46 does not amend section 26 of the *ERCA*. This raises the question of whether the process rights to be allowed by the Commission for utilities applications are, by design, different, and potentially fewer, than allowed by the EUB in the context of energy applications.

The ELC recommends that section 9(2) of Bill 46 be amended to fully enumerate the procedural rights to be allowed to an intervenor. This should be consistent with consistent with section 26 of the *ERCA*.

Public interest must be considered

Section 17 of the *AUCA* provides that where the Commission conducts a hearing or other proceeding on an application to construct or operate a hydro development, power plant or transmission line under the *HEEA* or a gas transmission pipeline under the *Gas Utilities Act*, it shall give consideration to whether construction or operation of the proposed hydro development, power plant, transmission line or gas transmission pipeline is in the public interest having regard to the social, economic and environmental effects of the development, plant, line or pipeline on the environment.

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This section is similar in spirit to section 3 of the *ERCA*, through which provision the EUB is required to consider the public interest when reviewing applications under the *HEEA*. The ELC considers that the public interest is best represented when broad public standing is allowed so that the widest range of interests can be represented before decision-makers. The ELC considers that the Commission's duty to consider public interest is made more difficult to fulfill given the potential restrictions on public participation proposed by the *AUCA*. Amendment of section 9(2) of Bill 46 in the manner recommended by the ELC above would help the Commission achieve its public interest mandate.

Amendments to the *Hydro and Electric Energy Act*

Section 96(14)(c)(ii) of Bill 46 proposes to amend the *HEEA* by removing from that Act subsection 14(3). Section 14(3) requires the EUB to determine whether a proposed transmission line for which an approval is sought is and will be required to meet "present and future public convenience and need." This effect of this amendment to the *HEEA* would be that the newly formed Commission would not be required to consider public convenience and need when considering an application for a permit to construct a transmission line. In order to better understand the consequences of removing section 14(3) from the *HEEA*, a brief description of the regulatory context and history of the section may be helpful.

This language, which is similar to language found in other public utility legislation, operates in conjunction with the permitting requirement that is a prerequisite to transmission line construction and operation. This wording was added to the *HEEA* in 1995 during the initial phase of electricity deregulation. Prior to deregulation, electric utilities were owned and operated by vertically integrated companies that had a monopoly on electricity service in their respective regions of the province. Vertical integration means, in this sense, that generation, transmission and distribution functions were all owned by a single company. Prior to deregulation, all of these functions were rate-regulated by the EUB.

The deregulation of the generation function meant that generation was no longer rate-regulated; rather, generators would produce and bid electricity into the market and the price would be set by the market. In order to ensure that all electricity generators had the a reasonable opportunity to get their electricity onto the Alberta grid, the *Electric Utilities Act, 1995*⁶ (*EUA 1995*) created an independent body, the Transmission Administrator, to be the sole provider of system access service. That Act also created an Electric Transmission Council, the members of which included owners of transmission facilities, major municipalities, the Alberta Association of Municipal Districts and Counties, as well as groups representing power suppliers and various types of consumers. This Electric Transmission Council could advise and make recommendations to owners of transmission facilities or to the Transmission Administrator regarding proposed modifications of or additions to the transmission system as well as regarding planning for future modifications of or additions to the transmission system.⁷ Another effect of the *EUA 1995* was to amend the *HEEA* to require the EUB to assess present and future public convenience and need when determining whether to approve a transmission project.⁸

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Later steps of deregulation included the creation of an Independent System Operator (the ISO), which replaced the Transmission Administrator. Under sections 17 and 33 of the current Act, the *Electric Utilities Act, 2003*⁹ (*EUA 2003*), the ISO has the duty to and is responsible for forecasting the need for and planning transmission system expansion to ensure that sufficient system capability exists so that the transmission system will provide efficient, reliable and non-discriminatory system access service. When the ISO identifies a system constraint, the ISO is required under section 34 of the *EUA 2003* to present to the EUB a “needs identification document” that identifies the constraint and describes the means by which or the manner in which the ISO proposes to address the need. This needs identification document requires approval of the EUB before the ISO can direct that a transmission facility operator prepare and submit an application under the *HEEA* for a specific transmission line expansion or enhancement.

The roles of the ISO and the EUB under sections 17, 33 and 34 of the *EUA 2003* cover off, in a sense, the certain aspects of the determination of “present and future need and convenience” previously made under the *HEEA*. However, section 14(3) of the *HEEA* was not removed after the *EUA 2003* delegated transmission system planning to the ISO. Accordingly, under the current regulatory regime, the EUB is required by the *EUA 2003* to determine need when considering whether to approve the needs identification document and the EUB is then required to again determine need under the *HEEA*. This duplication of processes has led to confusion in the context of applications for transmission line expansion currently before the EUB. For this reason, it may be appropriate that section 14(3) be removed from the *HEEA*.

That being said, the ELC has some concerns about the consequences that removing this subsection will have on the rights of the public to be engaged in Commission decision making processes to approve transmission facilities. These concerns stem from the basic fact that the needs identification document prepared by the ISO under section 34 of the *EUA 2003* and an application for approval of a specific transmission facility project under the *HEEA* are fundamentally different and have the potential to affect different groups of people.

At the needs identification stage, the ISO, when indicating the means by which or the manner in which the identified system constraint or condition could be alleviated, is compelled by section 5 of the *Transmission Regulation* to include technical and economic comparison of the options considered, including a comparison of environmental and other considerations.¹⁰ Further, section 5.1.2 of the EUB’s *Directive 28* requires the ISO to describe, in the needs identification document, economic and technical consideration of the different options for transmission line corridors, including “high-level landowner and/or agricultural issues”.¹¹ Specific routing of a proposed transmission line expansion is not included in the needs identification document.

Once a needs identification document has been approved and a transmission facility operator has been directed by the ISO to prepare and submit for *HEEA* approval a transmission facility application that meets the needs identified in the needs identification

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document, a transmission facility operator will propose a specific line, with specific routing and corresponding specific landowner and environmental impacts.

Given that the needs identification document may contain one or more broad corridor options but no specific routing, it is difficult to discern whether or to what extent individuals are impacted by the decision to approve the needs identification document; there may be many potential routes within the one or more corridors and thousands of potentially impacted people. Environmental impacts can perhaps be broadly estimated for each of the proposed corridor selections but the nature and extent of specific environmental impacts will not yet be known. Because no specific route is set at the needs identification stage, no specific landowners can be identified as being directly and adversely affected, though it would be known which municipalities the proposed corridors cross. For this reason, determining the appropriate level of public participation at the needs identification stage is difficult. It is likely not practical or reasonable to allow for any and all potentially impacted individuals in all potential corridors to actively participate in this determination of need.

On the other hand, once a transmission facility operator includes in a *HEEA* application a specific proposed route for a transmission line, the impacted individuals become more certain. However, by the time a *HEEA* application is filed, the need has already been determined and the proposed means through which the ISO proposes to meet the need has been approved. Yet, individuals or groups who may be specifically impacted by the transmission line have not had the opportunity to address the issue of need at the needs identification stage and, with the *AUCA*'s proposed amendment to the *HEEA* in effect, will no longer have the ability to question need for the project at the *HEEA* stage. The question becomes at what stage in the regulatory process are Albertans able to address need for transmission expansion? The ELC cautions against removing section 14(3) of the *HEEA* without first ensuring that the opportunity for effective public participation is made available at the needs identification stage.

The ELC considers that a meaningful discussion of high-level landowner and environmental impacts at the needs identification stage requires the active engagement and participation of groups representing landowners as well as environmental non-governmental organizations. The current use of the directly and adversely affected test by the EUB and the proposed continued use of this test by the Commission presents an obstacle to this meaningful discussion.

The ELC suggests that adoption of a standing test similar to that suggested above could address this obstacle. By granting participation in the proceeding to approve a needs identification document to any person or group who has a legitimate interest that ought to be represented in the proceeding or process, or has an established record of legitimate concern for the interest they seek to represent, the Commission can better balance the need to dispose of applications efficiently with the need to be sufficiently inclusive to obtain the information it requires to make the best decisions and to be regarded with legitimacy by Albertans.

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Broad environmental impacts of the different options may be spoken to by environmental groups. High-level landowner and agricultural impacts in the different corridors can be spoken to by groups from each corridor. Perhaps the Commission can look to the nature of the Electricity Transmission Counsel under the *EUA 1995*, as a starting point to develop this type of working group. In any event, the Commission and the ISO can work with and assist in developing these groups in the most effective manner in each case. The ELC recommends that meaningful formal public participation be statutorily mandated for the needs determination stage. Further, current intervenor funding rules would have to be adjusted to reflect the different nature of this participation. This is because the currently applied "local intervenor" requirement, which is proposed to be applied to the Commission, would be inappropriate where a specific route has not been identified.¹²

It should also be noted that the *AUCA* amendment of the *HEEA* is designed to have retroactive effect. Upon the coming into force of the *AUCA*, the section that removes section 14(3) of the *HEEA* will be deemed to have come into effect on June 1, 2003, the date that the *EUA 2003* came into effect, and the date that responsibility to assess need for and plan system expansion was delegated to the ISO.¹³ The retroactivity of this provision will impact any pending legal challenges of EUB decisions that relate to the interpretation of section 14(3) of the *HEEA*. In the event that such an appeal is heard after the coming into force of the *AUCA*, the *HEEA* will be deemed to have not contained the provision at all during the dates material for the appeal. To the extent that such an appeal is an attempt to require the EUB to address need at the *HEEA* stage, upon proclamation of the *AUCA*, the question of the EUB's interpretation of section 14(3) will become a moot point as the Commission will no longer be required to address public convenience and need in the context of the *HEEA* applications.

Conclusions

The ELC is concerned that Bill 46 contains provisions that would appear to have the effect of limiting public participation in Commission decision-making processes. The rules of practice of the Commission may contain provisions that alleviate these concerns; however, these rules have not been made available for public review and comment.

Through the consequential amendments to the *HEEA*, Bill 46 is removing what may be seen as a duplicative regulatory approval consideration, and one that has contributed to some present confusion for the EUB and interested parties to existing applications. However, given the whole regulatory scheme created through the *EUA 2003* and the *HEEA*, and the different potential impacts on potentially different groups at each decision-making stage, it is important that the proposed amendment of the *HEEA* be undertaken only with a full understanding of the consequences for public participation. The ELC recommends that meaningful formal public participation be statutorily mandated for the needs determination stage.

Electricity planning and approval processes have been the subject of much heated controversy in the recent past and some damage has been done to the trust that stakeholders have in the current process, energy regulators, and the government of

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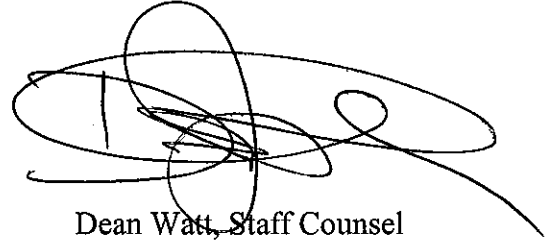
Alberta. Given that Bill 46 appears to place further restrictions on the rights of Albertans to be actively engaged in decision-making processes respecting transmission system planning, the ELC considers that Bill 46, as currently drafted and in the absence of an explanation of how Commission rules may address some of the concerns raised in this submission, will not go far in restoring that trust.

We thank you for the opportunity to provide comments on Bill 46. If you have any questions regarding our comments, please do not hesitate to contact us at (780) 424-5099.

Yours truly,



Cindy Chiasson, Executive Director



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Cc: Hugh MacDonald, Liberal Party Energy Critic
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¹ Bill 46, *Alberta Utilities Commission Act*, 3rd Sess., 26th Leg., Alberta, 2007 (“AUCA”).

² This submission refers frequently to the EUB. The EUB was formed through the merger of the Energy Resources Conservation Board (ERCB) and the Public Utilities Board (PUB), each of which continue to exist. The membership of the EUB is comprised of the members of both the ERCB and the PUB and the EUB has, pursuant to the *Alberta Energy and Utilities Board Act*, all of the jurisdiction and powers of the ERCB and the PUB. The EUB is granted decision-making authority pursuant to several pieces of legislation. Some pieces of legislation, such as the *Electric Utilities Act*, grant powers to the EUB by name. Other pieces of legislation grant powers to the constituent boards: the *Hydro and Electric Energy Act* grants power to the ERCB, the *Gas Utilities Act* grants powers to the PUB. To avoid confusion, this submission will refer only to the EUB as a whole, though in each case, reference might otherwise more specifically be made to the appropriate constituent board.

³ R.S.A. 2000, c. E-10.

⁴ R.S.A. 2000, c. H-16.

⁵ See Cindy Chiasson & Jodie Hierlmeier, *Public Access to Environmental Appeals: A Review and Assessment of Alberta's Environmental Appeals Board* (Edmonton: Environmental Law Centre, 2006), for a discussion of “directly affected” in the context of the Environmental Appeals Board.

⁶ *Electric Utilities Act*, S.A. 1995, c. E-5.5 (“EUA 1995”).

⁷ *EUA 1995*, Part 3.

⁸ *EUA 1995*, s. 82(d).

⁹ *Electric Utilities Act*, S.A. 2003, c. E-5.1.

¹⁰ Alta. Reg. 174/2004.

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¹¹ EUB, Directive 28, Applications for Power Plants, Substations, Transmission Lines, and Industrial System Designation, 2003.

¹² *AUCA*, s. 22.

¹³ *AUCA*, s. 98(2).