

November 30, 2007

Our File: P-07-997

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 – Government Amendments

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 amendments to Bill 46, the *Alberta Utilities Commission Act (AUCA)*.ⁱ

Introduction

On July 11, 2007, the ELC submitted its comments on Bill 46. In these comments, the ELC identified a number of concerns and provided a number of corresponding recommendations in respect of Bill 46 and potential impacts that it could have on public participation rights before the proposed Commission. That submission framed the ELC's concerns over Bill 46 within a broader context of public participation before the Alberta Energy and Utilities Board and made further recommendations intended to improve citizen access to regulatory decision-making processes that have the potential to affect the environment.

The ELC is pleased to note that certain of the concerns expressed in its July 11, 2007 submission appear to be addressed by the Government's proposed amendments. However, the ELC notes that the amendments fail to address certain other concerns expressed in its submission. Some of these unaddressed concerns relate specifically to the powers of the proposed Commission, while others relate more generally to the use of the "directly and adversely affected" test for standing before the proposed Commission, and the continued use of that test by the Energy Resources Conservation Board (ERCB).

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The ELC considers that legislation that creates and empowers administrative bodies to make decisions that have potential environmental, social and economic impacts should also allow for meaningful public engagement in the bodies' administrative processes.

Recognized Improvements in the Government of Alberta's Amendments

Section 9(3)

Amendment A to Bill 46 would strike out section 9(3) of Bill 46. This amendment removes section 9(3)(b) which would have allowed the proposed Commission to avoid holding a hearing if the decision of the Commission would not directly and adversely affect the rights of a person "in a material way". The ELC expressed concerns about the inclusion of a materiality test in Bill 46 and is pleased to see that the amendment would remove the materiality test.

Section 9(3) of Bill 46 also allowed the Board to avoid holding a hearing if no person requested a hearing (section 9(3)(a)) *or* if the Commission was satisfied that the applicant had met the relevant Commission rules respecting landowners that may be directly and adversely by the decision of the Commission (section 9(3)(c)). The ELC expressed its concerns about section 9(3)(c) and is pleased to see the amendment to allow the proposed Commission to avoid holding a hearing only where the relevant Rules are complied with *and* no person has requested a hearing. This allows a directly and adversely affected person to request a hearing regardless of the applicant's compliance with Commission rules.

Outstanding Concerns with Bill 46

The "directly and adversely affected" test for standing

A key element of the ELC's July 11, 2007 submission on Bill 46 was the use of the directly and adversely affected test by the proposed Commission and the continued use of this test for standing by the ERCB, under section 26 of the *Energy Resources Conservation Act (ERCA)*.ⁱⁱ The ELC's recommendations in respect of the directly and adversely affected test are not reflected in the Government of Alberta's amendments to Bill 46.

The directly and adversely affected test for standing has been applied by the Alberta Energy and Utilities Board (EUB) for years and has served to limit public access to regulatory processes resulting in decisions with potentially significant environmental consequences. In the past months, the ELC has received calls from many Albertans concerned about their rights to participate in energy related hearing processes. The concerns of Albertans are being expressed in a broader context than just Bill 46.

The ELC considers the directly and adversely affected test for standing to be too narrow, particularly in the context of public interest determinations. A more appropriate test would give the Commission the discretion to grant standing 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 ELC recommends that a similar test be used by the ERCB in respect of energy applications as well.

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Content of the right to a hearing

Section 9(2)(c) of Bill 46 requires the Commission, where a decision or order may directly and adversely affect the rights of a person, to “hold a hearing”. Section 9(2) parallels to a degree section 26(3) of the *ERCA*, which enumerates the content of the right to a hearing before the EUB and makes clear that an intervenor will have:

- a reasonable opportunity to furnish evidence;
- an opportunity to cross-examine the applicant if the intervenor will not otherwise have a fair opportunity to contradict or explain the facts or allegations in the application; and
- an adequate opportunity to make representations by way of argument to the EUB or its examiners.

Bill 46 differs in its description of the content of hearing rights. Bill 46 does not define the word “hearing”. It is not clear how that word would be interpreted in a given case but it is certainly foreseeable that applicants, intervenors and the Commission could have different interpretations. The Commission, like all administrative tribunals, would be required to adhere to administrative law duties of fairness and, as such, in a given case, the Commission would be required to interpret “hearing” in such a way that ensures that the process is fair and appropriate for the circumstances. However, this provides little comfort or clarity for intervenors who could potentially be confused by the use of the phrase “hearing” rather than an enumeration of process rights.

The ELC’s recommendations to fully enumerate the procedural rights to be allowed to an intervenor were not reflected in the amendments proposed by the Government of Alberta. The ELC considers that the procedural rights of an intervenor before the proposed Commission should be consistent with those of an intervenor before the ERCB, and should be explicitly stated in Bill 46.

Intervenor Funding

Sections 21 and 22 of Bill 46 provide the proposed Commission with the discretion to grant intervenor funding only to “local” intervenors. The ELC received many comments from Albertans concerned that this limitation on intervenor funding was too restrictive and that the proposed Commission should have the discretion to grant intervenor funding to a wider range of individuals or groups as appropriate. The ELC appreciates that Amendment C put forward by the Government includes a change that allows for the creation of Commission rules that could allow for a wider range of intervenors to receive funding and considers the amendment to be an improvement. However, the ELC considers that this discretion should be provided in the legislation, rather than in Commission rules that can be easily changed with little or no public input.

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Consideration of public interest under section 34 of the Electric Utilities Actⁱⁱⁱ

Bill 46 would amend section 14 of the *Hydro and Electric Energy Act (HEEA)*^{iv} by removing the requirement for the proposed Commission to consider whether a proposed transmission expansion or enhancement is required to meet public convenience and need. The existing regulatory system has a two-step approval process respecting transmission system expansion or enhancement. This regulatory process contemplates a broad consideration of need under section 34 of the *Electric Utilities Act (EUA)* and the ELC recognizes that a subsequent determination of need under section 14 of the *HEEA* is duplicative and confusing. For this reason, the ELC concluded in its July 2007 submission that removal of the public convenience and need test from section 14(3) of the *HEEA* was appropriate but expressed concerns that the resulting legislative scheme left no clear opportunity for individuals and groups to comment on the issue of need, as it is difficult to identify oneself as being directly and adversely affected by the Commission's decision under section 34 of the *EUA* because no specific project is identified in the needs identification document submitted by the independent system operator.

The ELC notes that Amendment O(m)(i) put forward by the Government would consequently amend section 34 of the *EUA* to require that the Commission's determination on a needs identification document include a consideration of whether the system expansion or enhancement is needed to meet the needs of Alberta and is in the public interest. This a positive amendment. These considerations are appropriate at this stage. However, it is still not clear how, or even if, the infusion of the public interest consideration into the Commission's determination of need under section 34 of the *EUA* will allow for broader public participation and input respecting the specific question of need.

Directly and adversely affected individuals and groups are still not identifiable at the needs determination stage, notwithstanding the proposed amendment to section 34(1) of the *EUA*. The gates to the Commission's hearing room are created by section 9(2) of the *AUCA* and the continued use of the directly and adversely affected test. The degree of public participation allowed in a proceeding in respect of an application under section 34 of the *EUA* is not changed by the mere requirement that public interest must be considered.

The Government's amendments propose to amend the *HEEA* to allow for the combining of a needs application under section 34 of the *EUA* with a project application under section 14 of the *HEEA*. This change contemplates the possibility that a project application, under section 14 of the *HEEA*, that has a precise location and identifiable potentially directly and adversely affected persons, could come to the Commission at the same time and be combined with the needs application by the independent system operator in respect of the same transmission line or part of a transmission line under section 34 of the *EUA*.

The extent to which, or even if, individuals or groups would be able to participate in the determination of need where the two applications are combined is uncertain. A person directly and adversely affected by the *HEEA* application may still be found not to be directly and adversely affected by the *EUA* application, taking into consideration the type of evidence and high level information that may be in the *EUA* application. Will the Commission have the discretion to restrict the issues to which an individual or group may speak? The EUB has previously exercised its discretion to permit individuals to speak to only limited aspects of an

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application. One example is found in the EUB's *Decision 2006-087* where the holder of a grazing lease was found not to be directly and adversely affected by the Board's decision in respect of a sour gas project and was, for that reason, not able to intervene; however, the individual was able to provide his comments on the limited issue of the emergency response plan of the operator.^v

The amendment would enable the Commission to make rules respecting the factors to be considered when determining a needs application under section 34 of the *EUA* and to make rules respecting the combining of an application for an approval under the *HEEA* with a section 34 *EUA* application. These rules may shed more light on the ability of individuals and groups to speak to need in cases where applications for Commission approval is sought by the independent system operator and the transmission facility operator under the *EUA* and the *HEEA*, respectively; however, these rules are not available for review and public comment and, in any event, can be easily changed by the Commission with little or no public process.

The ELC considers that the legislation creating the Commission should be more explicit in its description of the public participation rights that will apply when *EUA* and *HEEA* applications are combined as contemplated by Bill 46 and the proposed amendments. The *AUCA* should ensure that an appropriate amount of public participation is included in the determination of whether transmission system expansion or enhancement is needed by Albertans and is in the public interest.

Conclusion

The ELC is somewhat encouraged by the amendments brought forward by the Government of Alberta. However, Bill 46, even with the amendments, continues to be very vague and leaves a great deal of substance to be determined by Commission rules, which can be created at the Commission's discretion and changed with little or no public input. The content of hearing rights and the ability of the Commission to allow intervenor funding to intervenors other than local intervenors should be set out in the legislation, rather than in Commission rules.

The ELC continues to be concerned with the application of the directly and adversely affected test by the proposed Commission. While the ELC considers the test to be too narrow for the *ERCA* and has recommended on previous occasions that it be broadened, it is particularly inappropriate for use in a regulatory approval process that contemplates the making of significant decisions of need before individuals and groups can be identified as being directly and adversely affected. The infusion of a public interest consideration into the determination of need under section 34 of the *EUA* does not necessarily broaden the standing for that proceeding, neither does the potential to combine that proceeding with an application under section 14 of the *HEEA*. The ELC considers that the test for standing that should be applied by the Commission should give the Commission the discretion to grant standing 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.

As mentioned in our letter to Premier Stelmach on November 21, 2007, given the broad-ranging concerns of Albertans that have been raised by Bill 46 and other regulatory processes, we strongly suggest that the Government refer Bill 46 for public review and hearings by the

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Standing Committee on Resources and Environment. Such a step would facilitate a full and open examination of Albertans' views and expectations regarding regulatory processes of the proposed Alberta Utilities Commission and Energy Resources Conservation Board, and would be a strong step towards restoring Albertans' faith in those regulatory bodies and processes.

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

Yours truly,

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ⁱ Bill 46, *Alberta Utilities Commission Act*, 3rd Sess., 26th Leg., Alberta 2007 ("AUCA").

ⁱⁱ R.S.A. 2000, c. E-10.

ⁱⁱⁱ S.A. 2003, c. E-5.1.

^{iv} R.S.A. 2000, c. H-16.

^v EUB *Decision 2006 -087: Dominion Exploration Canada Ltd., Applications for Well Licences Pembina Field September 5, 2006*,.

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