

Action Update: *Alberta Utilities Commission Act*

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The *Alberta Utilities Commission Act (AUCA)* was passed by the Alberta Legislature prior to the end of the fall 2007 sitting and was proclaimed in force January 1, 2008.¹ Introduced as Bill 46, the *AUCA* raised a great deal of controversy amongst landowner groups and environmental non-governmental organizations concerned about its impacts on citizen participation in regulatory decision-making processes related to the construction of electricity infrastructure projects such as transmission lines.² The Environmental Law Centre's submissions on Bill 46 and its amendments are available online.³

The creation of the AUC and its jurisdiction

The *AUCA* split the Energy and Utilities Board (EUB) into two separate boards, the Energy Resources Conservation Board (ERCB) and the Alberta Utilities Commission (AUC). Commencing January 1, 2008, the AUC became the provincial regulator with oversight of electric and gas utilities. This regulatory oversight includes approving the need for and the construction of new facilities such as transmission lines under the *Electric Utilities Act (EUA)*⁴ and the *Hydro and Electric Energy Act (HEEA)*.⁵ Applications for electricity facilities projects that were filed with the EUB are to be continued by the AUC.

The ERCB already exists and already makes decisions in respect of applications under the *Oil and Gas Conservation Act (ERCA)*⁶ and many other provincial acts. The ERCB will continue to make decisions under those pieces of legislation.⁷

Participation rights before the AUC

Section 9(1) of the *AUCA* gives the AUC the ability to make decisions or orders within its jurisdiction without giving notice or holding a hearing. However, if it appears to the AUC that the decision or order may directly and adversely affect the rights of a person, that person has certain procedural rights, including notice of the application, a reasonable opportunity of learning the facts bearing on the application and the right to a hearing.⁸

Section 9(3) allows the AUC to avoid holding a hearing on an application if no person requests a hearing and, where an application is for the construction or operation of certain facilities, including a transmission line under the *HEEA*, if the AUC is satisfied that the project proponent complied with all relevant AUC rules respecting each owner of land that may be directly and adversely affected.⁹

These AUC rules are set out as Appendix A to *AUC Rule 007*.¹⁰ Appendix A identifies participant involvement program requirements and discusses, among other things, who to include in such programs and what information to disclose. Appendix A specifies the notification and consultation requirements that are applicable to applications by the Independent System Operator (ISO) for AUC approval of a need identification

document (NID) required under section 34 of the *EUA*. The NID identifies a present or future transmission system constraint and corresponding need for upgrade or enhancement of the transmission system and proposes the ISO's own preferred solution to meet the identified need as well as a range of alternative solutions. The NID application does not identify a specific route for a transmission line; rather the NID application considers, on a more general level, whether a new or improved transmission line is needed, based on current and forecast demands on the whole system.

In the event that the AUC approves this NID, the ISO will direct a transmission facility owner to prepare and submit to the AUC an application under section 14 of the *HEEA* for approval of a specific project. Such a project will have more precise location information such as routing for a transmission line. Appendix A specifies the notification requirements applicable to an application by a facility owner for an approval under the *HEEA* to construct and operate a new facility, including a transmission line.

Notification requirements are different and somewhat broader for the ISO's NID application than those that apply to the transmission facility owner's project application. In the case of the NID approval application, the ISO must notify all occupants, residents and landowners in areas where facilities could be built to implement the ISO's preferred alternative. In addition, the ISO must advertise the NID application in local newspapers in the area where facilities could be installed to implement the preferred alternative or any other alternative solution in the need application.¹¹ These alternative solutions may be in different areas of the province than the ISO's preferred solution.

Appendix A contains requirements respecting personal consultation in relation to a facilities application under the *HEEA*. However, there is no personal consultation required by the ISO in the case of an application for approval of a NID under the *EUA*, the stage at which a determination of general need for a system upgrade is made.¹² This is the case even in the area in which the ISO's preferred solution would be located. Landowners have previously expressed loud dissatisfaction with being shut out of the NID approval process.

That no personal consultation is required with respect to the NID application is curious and troubling. The *AUCA*'s consequential amendments to the *EUA* imported a public interest test into the AUC's determination of the need for system expansion or enhancement under section 34. The *AUCA* also amended the *HEEA* by removing from section 14 of that Act the need for the AUC to consider whether a facility is required to meet present and future public convenience and need. These consequential amendments would seem to work together to locate the discussion of the need for a system expansion or enhancement and the determination of whether such an expansion or enhancement is in the public interest wholly within the NID application under section 34 of the *EUA*. Given that personal consultation is not required with respect to an NID application under this section, it appears landowners' concerns about being shut out of the NID determination and the discussion of whether transmission expansion or enhancement is needed are unlikely to be remedied by the introduction of the AUC.

Intervener funding

Section 22 of the *AUCA* provides the AUC the authority to make rules respecting the costs to a "local intervener" for participation in any AUC hearing or proceeding. A "local intervener" is defined in the *AUCA* to be a person or group who has an interest in and is

in actual possession of or is entitled to occupy land that may be directly and adversely affected by the AUC's hearing or proceeding on an application to construct or operate facilities such as a transmission line. This restrictive definition precludes the AUC from being able to grant intervener funding to other groups, such as environmental groups, that are not tied to the land. This was a source of concern amongst landowner groups and environmental non-governmental organizations.

Amendments to Bill 46 provided the AUC with the ability to make rules respecting the payment of costs to an intervener other than a local intervener.¹³ Section 21(2) of the *AUCA* now provides the AUC with the authority to make rules allowing it the discretion to award intervener funding to those other than "local interveners" within the meaning of the legislation. This was a positive amendment; however, the AUC is not required to create the rule and, in fact, appears not to have created such a rule yet.

There are two separate rules issued by the AUC with respect to intervener costs. *Rule 009: Rules on Local Intervener Costs* authorizes the AUC to award advance intervener funding, interim awards and costs awards following a proceeding and also sets out requirements for cost claims that incorporate the established intervener cost regime used by the ERCB. However, *Rule 009* refers only to local interveners as specifically defined in section 22 of the *AUCA*. It is not applicable to other interveners.

The other AUC rule dealing with costs is *Rule 022: Rules on Intervener Costs*, which governs costs orders under section 21 of the *AUCA*. While this section allows for the creation of rules respecting expanded authority to provide costs beyond local interveners, *Rule 022* specifically states that it is applicable to hearings or proceedings for rate applications or utilities under the jurisdiction of the AUC or related to rate applications. It is not applicable to intervention in NID or facilities proceedings. *Rule 022* is similar to *Rule 009* in that it authorizes advance funding, interim funding and final costs awards; however, this is only in respect of rate hearings or proceedings.

Whether additional rules will be issued expanding intervener funding to include those other than local interveners for their participation in facilities or NID proceedings remains to be seen. The Commission is undertaking a review of *Rule 022* and is holding public consultations as a part of that review.¹⁴ The AUC has invited submissions on a wide range of issues regarding the implementation of *Rule 022*. Written submissions are due by April 15, 2008.

¹ S.A. 2007, c. A-37.2.

² There were also concerns expressed by consumers' groups about potential impacts on stakeholder participation in rate setting hearings. Regulations and rules relating to, or stakeholder concerns about, public utility rate setting are beyond the scope of the ELC's focus, formed no part of its submissions to the Minister, and are not dealt with in this article.

³ Online: Environmental Law Centre, *Comments on Bill 46-Alberta Utilities Commission Act* <<http://www.elc.ab.ca/ims/client/upload/Bill%2046%20-%20Alberta%20Utilities%20AUC%20Act.pdf>>; *Comments on Bill 46-Alberta Utilities Commission Act-Government Amendments* <<http://www.elc.ab.ca/ims/client/upload/Bill%2046%20-%20Knight%20letter%20re%20amendments-Bill%2046.pdf>>.

⁴ S.A. 2003, c. E-5.1.

⁵ R.S.A. 2000, c. H-16.

⁶ R.S.A. 2000, c. E-10.

⁷ The *AUCA* does not amend section 26 of the *ERCA*, which grants participation rights at hearings before the ERCB on matters within its jurisdiction.

⁸ Section 9(2) provides for the directly and adversely affected test for standing. For reasons set out in the ELC's submissions to the Minister, *supra* note 3, the ELC considers this test to be too narrow.

⁹ Section 9(4) provides that while a directly and adversely affected person is entitled to a hearing, it is not required to be an oral hearing. Neither is a person necessarily entitled to be represented by a lawyer.

¹⁰ *AUC Rule 007: Rules Respecting Applications for Power Plants, Substations, Transmission Lines, and Industrial System Designations* (Calgary: Alberta Utilities Commission, 2008).

¹¹ *Ibid.* at 47.

¹² *Ibid.* at 48.

¹³ *AUCA*, *supra* note 1, s. 21(2).

¹⁴ Alberta Utilities Commission, Bulletin 2008-01, *Consultation Rule 022, Rules on Intervenor Costs* (20 March 2008), online: <<http://www.auc.ab.ca/aucdocs/documents/bulletins/Bulletin-2008-01.pdf>>.

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