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BARRISTERS AND SOLICITORS

ENERGY LAW NEWSLETTER

WESTERN CANADIAN BUSINESS LAW

Winter 2003

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INTRODUCTION

Happy New Year from the Energy Law Practice Group at Lawson Lundell! With oil prices at a 2 year high, a new provincial energy policy in BC and continuing evolution of the electricity markets in Alberta, we expect significant activity in the Western Canada energy sector in 2003. In this quarterly newsletter we will keep you apprised of significant legal and business developments as they occur.

For further information about this newsletter or Lawson Lundell, please contact one of our lawyers identified on the back page, or visit our web-site at www.lawsonlundell.com.

REGIONAL

NEB Approves Duke's Grizzly Expansion and Weejay Lateral

Following public hearings in June in Chetwynd, BC, and a Ministerial decision in November that the project does not require further assessment under the *Canadian Environmental Assessment Act*, the NEB issued an approval of Duke's $66M Grizzly Expansion and the Weejay Lateral projects on November 14. The 100 km Grizzly Expansion pipeline and the 5 km Weejay lateral will carry raw gas from the Ojay/Weejay area of northeast BC to Alberta.

TransCanada Pipelines 2003 Tolls

TransCanada filed an application November 13 for 2003 tolls. The applied-for-rates were approved by the Board on December 6, on an interim basis, effective January 1, 2003. In its application TransCanada seeks approval of a revenue requirement of $2.19 billion, an increase of $268M over 2002. The application also seeks approval of a new Southwest tolling zone, among other things. The application is set down for hearing commencing February 24 in Calgary.

NEB Hearings Into Supply Demand Scenarios to 2025

Commencing in Toronto on January 28 and concluding in Vancouver on February 8, the Board will hold a series of workshops to aid in the development of its 2003 report on energy supply and demand scenarios to 2025. A consultation paper intended to facilitate participation in the workshops was released on January 7. The NEB website (www.neb-one.gc.ca) has more information regarding participation at the workshops.

RTO's and Single Market Design

On December 20, 2002, the FERC issued an Order that provided further guidance for the proposed Pacific Northwest regional transmission organization, RTO West. The Order concerned requests made by the RTO West Filing Utilities, and various stakeholders, for rehearing of FERC's Stage 2 Declaratory Order on the RTO West proposal, issued September 18, 2002.

FERC confirmed its strong support for the RTO West proposal and accepted nearly every rehearing request made by the Filing

Utilities. However, FERC emphasized an overriding consideration that regional differences must not lead to the creation of "seams" between adjacent RTOs that create barriers to trading across the regions or otherwise interfere with efficient inter-regional coordination.

It is clear that FERC's goal is seamless trading across the three RTOs contemplated in the Western Interconnection – RTO West, West Connect, and the California ISO. To that end, FERC directed the Filing Utilities to continue their efforts through the Seams Steering Group of the Western Interconnection ("SSG-WI") to identify and work towards a successful resolution of any seams issues on a west-wide basis.

FERC also tried to explain the relationship between the previous RTO West Orders (Stages 1 and 2) and FERC's pending Standard Market Design ("SMD") rule. FERC said it does not intend to undo solutions developed by RTO West, and previously approved by FERC, in order to replace them with solutions developed in the SMD rulemaking. However, FERC also said the Filing Utilities have an obligation to address any seams issues that may be created where different solutions are proposed by different RTOs in the Western Interconnection, even if those solutions were previously approved by FERC.

Filed Rate Doctrine Pre-Empts Class Action

On January 6, 2003 the US District Court in San Diego dismissed proposed class actions against defendant-sellers of electricity into California in 2000 – 2001 on the basis of the "filed rate doctrine". Under that legal doctrine the rates approved by a regulator are the only lawful rates that may be charged, and preclude any action for damages based on what a plaintiff says ought to have been the lawful or fair rate. Firmly established in US jurisprudence, the doctrine has a less certain status in Canadian law. Counsel for the plaintiffs argued that the doctrine could not be applicable where the rate was set not on a cost-of-service basis but was instead set by the market, through processes administered by the (now defunct) California Power Exchange and the California Independent System Operator. Noting that these market processes were prescribed in lengthy tariffs approved by the FERC, the Court dismissed this argument summarily.

ALBERTA

NGTL Fort Saskatchewan Extension Denied

In Decision 2002-058, the AEUB denied the application of NOVA Gas for a license to construct and operate a natural gas pipeline and four sales meter stations in the Fort Saskatchewan area. Noting that ATCO has served the Fort Saskatchewan area over the last 50 years with no service interruption, the Board stated that it would be unreasonable and contrary to promoting cost efficiencies for rate base regulated entities to build duplicate facilities in order to enhance the desired level of security of supply of selected customers at the expense of all ratepayers. Finding the potential market speculative, the proposed extension oversized, and the cost advantage non-existent, the AEUB determined that the proposed facilities were not needed at this time, and would violate its policy on proliferation if approved.

Congestion Management Principles Established

On November 5, 2002, the AEUB issued Decision 2002-099 with respect to managing congestion on Alberta's electricity transmission system. The decision outlines 24 principles intended to guide the Transmission Administrator ("TA") in its management of electricity congestion. Specifically, the decision provides that system costs and the cost of building new transmission facilities within Alberta will continue to be shared equally between electricity generators and consumers, and that the cost of any additional transmission facilities required for exports will be paid entirely by those wishing to export electricity. In order to encourage electricity generators to build in areas that will minimize the delivered cost of energy, the decision provides that zones will be created based on the need for power generation in those zones, and that generators in zones with excess generation capacity will be

subject to higher transmission charges than those in zones with insufficient generation capacity. The Board further directs the TA to plan for and ensure the timely development of required transmission system enhancements, and initiate system enhancements that will reduce the TA's revenue requirement. The TA must submit a tariff application that reflects the approved congestion management principles by April 1, 2003.

ISO Transition

The transition towards an Independent System Operator ("ISO") continues to progress. On October 25, 2002, the Power Pool Council purchased the shares of ESBI Alberta Ltd., and amalgamated it with a new company, called the Transmission Administrator of Alberta Ltd. The new company will work with the ISO's interim CEO to oversee ISO development and ensure a smooth transition once the ISO is ready to be operational. Legislative amendments to the *Electric Utilities Act* have been prepared, and are expected to be enacted in Spring 2003. The ISO will incorporate the current duties of the TA, System Control, the Pool Administration function (wholesale market operations) and Load Settlement.

ILRAS Procurement Consultation Process

The Interruptible Load Remedial Action Scheme ("ILRAS") is an ancillary service procured by the TA to increase import capability through the Alberta-BC Interconnection. As the current provider of the ILRAS service has expressed concerns about being the sole provider, the TA has prepared a discussion paper and initiated a consultation process in order to evaluate the options available with respect to procurement of ILRAS service. A stakeholder meeting was held on December 16, 2002, and stakeholder comments are to be submitted to the TA by January 15, 2003.

Climate Change and Emissions Management Legislation

In response to the Federal government's push to ratify the Kyoto Protocol, the Alberta Government introduced Bill 32: *Climate Change and Emissions Management Act* in November, 2002. Emphasizing provincial jurisdiction over natural resources, the proposed legislation declares carbon dioxide and methane as non-toxic natural resources, inextricably linked with the management of other renewable and non-renewable natural resources. Bill 32 further specifies gas emission targets for Alberta, and declares the targets established under the legislation to be the only emission targets in effect in Alberta. While the proposed legislation also provides for the establishment of a system of emission trading and an emissions management fund, the bulk of the substantive detail is left to be determined by regulation. Bill 32 has not yet been passed by the Alberta Legislature. The Federal government ratified the Kyoto Protocol on December 16, 2002.

In the Courts (Alberta)

The Alberta Court of Appeal recently granted Atco leave to appeal Decision 2001-30 of the AEUB (*Atco Electric Ltd. v. Alberta (Energy and Utilities Board)*, 2002 ABCA 245). In Decision 2001-30 the AEUB rejected Atco's application for an order allowing it to bill Suncor Industrial System on a net energy basis for a specified period in 2000. The Board found that while the legislation would suggest net billing, Atco chose to contract outside of the applicable legislative and policy regime and agreed to provide electricity billed on a gross rather than net basis. Granting Atco leave to appeal the decision, the Court agreed with Atco's arguments that the Board may have erred on two grounds, first in directing Atco to bill Suncor on a gross energy basis and second, in finding the existence of contract terms for which there was no evidence before the Board.

BRITISH COLUMBIA

Sumas Energy 2 – NEB to Enquire into Environmental Effects of US Facility

On December 9, 2002, almost three and a half years after receiving an application for approval of an 8.5 km international power line to connect the proposed Sumas II generating station in Washington State with the BC Hydro transmission grid, the NEB has ruled that it may and will consider the environmental effects in Canada arising from the proposed generating facility.

The NEB's decision, prompted by a motion brought by opponents of the project, was based on its jurisdiction under both the *Canadian Environmental Assessment Act* and the *National Energy Board Act*. Under the former, the NEB decided it did not have jurisdiction to consider the environmental effects in Canada of the generating station on the whole since it was not included in the scope of the power line project. However, the NEB decided it did have jurisdiction under CEAA to examine any potential cumulative effects of the power line with any other projects that have been or will be carried out. As no evidence had been presented on the issue to date, the NEB decided it would therefore examine the potential cumulative effects of the generating station upon the power line.

Under the *National Energy Board Act* the NEB has the obligation to consider anything that appears to it (in good faith) to be relevant. Noting that the proposed US generating facility and the proposed power line are interlinked to the extent that without the former there would be no need for the latter, and noting that no review of the environmental effects in Canada of the generating facility has or will otherwise be conducted, the Board concluded that it ought to consider those effects. In doing so it dismissed arguments that it was effectively regulating a US project, relying in part on a decision earlier in the year when it decided to enquire into environmental effects of a generating facility on Vancouver Island as part of its enquiry into the Georgia Strait Crossing pipeline project (see www.lawsonlundell.com/resources/energytest.pdf). In both cases the Board concluded, without a great deal of analysis, that considering the effects of a project outside its jurisdiction (and "directly linked" to a project within) was not regulation.

NORTHWEST TERRITORIES

NWT Power Corporation General Rate Application

As reported in our Autumn 2002 edition of this newsletter, the NWT government spoke out against the "flat rate" proposal of the Northwest Territories Power Corporation (NTPC) soon after it was filed on September 6. NTPC is a territorial Crown corporation. Subsequently, the Board of the NTPC refused to withdraw the "flat rate" application, and was dismissed on October 16. Under a new government-appointed board the NTPC withdrew the flat rate proposal, and filed a new application on November 12 seeking approval of "community-based rates", reflective of the particular cost of service for each of the communities it serves. A 4-day hearing into the application is currently scheduled for mid-April, in Yellowknife and Inuvik

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