LAWSON LUNDELL
BARRISTERS AND SOLICITORS
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INTRODUCTION

Welcome to Lawson Lundell's energy law newsletter, dedicated to keeping our readers informed about developments in the energy sector in Western Canada.

EDITORIAL COMMENT: U.S. POWER INVESTIGATIONS

The fallout from the California energy crisis and the Enron collapse has continued to dominate public perception of the energy industry throughout North America over the past three months and the western region is no exception. FERC's investigation into the business practices of power marketers required a number of prominent Western Canadian companies to file responsive affidavits. Meanwhile, class actions, government-sponsored actions and related U.S. litigation arising out of the California power crisis have all drawn in Canadian companies.

Without commenting on the merits of the various allegations that are being flung about, it is clear that many of them are politically motivated and represent an unfortunate form of after-the-fact regulation. We can only hope that Canadian authorities continue their efforts to make sure our regulatory frameworks are efficient on a prospective basis and that they look to past deficiencies only to learn, and not to witchhunt. We can also hope that Canadian authorities resist any attempt to be drawn into or facilitate U.S. efforts to assign private blame where public institutions demonstrably failed. Given the expanded jurisdiction which both national and provincial energy regulators may feel entitled to claim by virtue of the Supreme Court of Canada's decision in *Global Securities Corporation v. British Columbia Securities Commission*, [2000] 1 S.C.R. 494 (which found cross-border investigation powers of regulatory authorities to be constitutional) it is particularly important that our regulators think carefully before being drawn into foreign political battles.

REGIONAL

Joint Review Panel Jurisdiction to Consider Environmental Effects of Downstream Generation Projects – Georgia Strait Crossing Pipeline (GSX)

On May 31, 2002 the Joint Review Panel considering the Williams Energy / BC Hydro GSX application issued a decision in which it determined that it had the jurisdiction under the *National Energy Board Act* and in a more limited sense the *CEAA* to consider downstream environmental effects of provincially-regulated generation projects contingent on the federally-regulated pipeline project.

Carefully drawing a distinction between "regulating" and "considering", the Panel rejected arguments that it was constitutionally barred from doing the latter. The Panel went on to say that it had the jurisdiction to consider the environmental effects of a proposed gas fired generation plant at Duke Point in Nanaimo because it was "directly linked" to the U.S.-to-Vancouver Island GSX Project. By contrast, the Panel decided it would not consider the environmental effects of Calpine Canada's Island Cogeneration

Project at Campbell River, although it may burn gas transported on the GSX pipeline, because it is complete and will operate at full capacity regardless of GSX.

Aboriginal Consultation – Haida Nation v. B.C. and Weyerhauser

In our last newsletter we reported on the precedent-setting B.C. Court of Appeal decision *Haida Nation v. B.C. and Weyerhaeuser*, which extended the duty of aboriginal consultation to private companies. The Court of Appeal heard further submissions on that controversial aspect of the decision on June 4, 2002, and reserved judgment. More information may be found at: http://www.lawsonlundell.com/resources/Haida%20June%202002.pdf.

FERC Generator Interconnection Notice of Proposed Rule-Making

On April 24, 2002 FERC issued a Notice of Proposed Rulemaking (NOPR) regarding Generator Interconnection, attaching proposed *pro forma* generation interconnection agreements. A Final Rulemaking is expected in the summer or fall of 2002.

The Interconnection NOPR is of interest to Canadian electricity transmission users because of FERC's current belief that interconnection should be standardized, made part of the transmission provider's tariff, **and** be subject to FERC's reciprocity requirements. That is, to the extent that the Canadian entities wish to avail themselves of open-access transmission in the United States, their transmission owning/operating affiliates may have to include the *pro forma* generation interconnection agreements in their tariffs. Indeed, that was the reason that a number of Canadian transmission providers adopted FERC's Order 888 tariff in the mid- to late-1990's.

BRITISH COLUMBIA

Utility Proposals to Dispose of Assets Pass BCUC Scrutiny

Two initiatives to dispose of assets related to retail service functions recently passed the scrutiny of the BCUC. On April 17 the Commission approved BC Gas' disposition of its call handling, billing, metering, payment processing and credit collections assets to an unregulated limited partnership between BC Gas and Enbridge Inc. The limited partnership will operate the assets, and charge-back the two utilities for its services under approved agreements

Also on April 17, the BCUC dismissed for jurisdictional reasons an application brought by the Office & Professional Employees' International Union, Local 378, for a public hearing into BC Hydro proposals to dispose of assets associated with the provision of vehicle services, customer services, and information systems consulting and support. The Union has asked the BCUC to re-consider its decision.

Sumas Energy 2 (SE2)- EFSEC Recommends Approval to Governor Locke

On May 24, EFSEC (the Washington State Energy Facility Evaluation Council) recommended approval of SE2, a controversial 660 megawatt combined cycle gas turbine plant proposed for Sumas, Washington, near the Canada – U.S. border. After considering petitions for reconsideration EFSEC will forward its final recommendation to Governor Locke, probably sometime this summer. The Governor will then have 60 days to approve or reject the SE2 proposal or to direct EFSEC to reconsider certain aspects of the draft Site Certification Agreement.

On June 4, on the basis of the EFSEC recommendation to the Governor, counsel for SE2 asked the NEB to reconvene its hearing with respect to the international power line application in Canada. The NEB hearing had been adjourned in February of 2001 at SE2's request pending the EFSEC's consideration of the project. The proposed power line is to enable SE2 to transmit power from the Sumas plant across the international border to the main electric grid that serves British Columbia, Alberta and 11 western U.S. states.

Class Action Against BC Hydro Stayed

On April 5, 2002 the BC Supreme Court dismissed a proposed class action against BC Hydro brought by residential strata corporations. An appeal from the decision was filed and subsequently withdrawn. The plaintiff had alleged that BC Hydro had overcharged it and other residential condominiums for electricity used in the common areas of their buildings. The Court accepted the arguments of BC Hydro that since the matter had

been addressed by the BC Utilities Commission, the Court lacked or should decline jurisdiction to consider it again. This decision is significant for all public utilities because it prevents persons dissatisfied with the decision of a public utilities tribunal from seeking to develop alternate law in the courts.

Changes to BC Oil &Gas Commission Act

Recent changes have been made to the BC *Oil and Gas Commission Act*, the Act which establishes the BC Oil and Gas Commission (OGC) and empowers it to grant the majority of the provincial permits and approvals necessary to conduct oil and gas exploration and production activities in BC. The changes allow the OGC to grant "general development permits" (GDPs) which are approvals in principle for oil and gas activities and pipelines in an area of BC. Under the new provisions, a GDP must state the terms and conditions, including siting considerations, that must be included in approvals, licences, permits or other authorizations subsequently issued under the *Petroleum and Natural Gas Act*, the *Pipeline Act* or any of the specified enactments under which the OGC can grant approvals. These terms and conditions must then be included in subsequent approvals unless otherwise amended, although the granting of a GDP does not relieve a person from the requirement to obtain other approvals. The OGC has the power to amend a GDP; place limitations on the rights of GDP holders; and impose restrictions on the transfer of GDP's. These new provisions, intended to reduce regulation and streamline the application process, will come into force on a date specified by Cabinet.

ALBERTA

Re-Structuring in Alberta – Electricity Transmission

In a speech to the AGM of the Industrial Power Consumers and Cogenerators Association of Alberta (IPCCAA) on May 9, 2002, the Alberta Minister of Energy announced a new round of restructuring of Alberta's electric industry. The restructuring entails moving from the independent, for-profit transmission administrator model to a non-profit ISO model for transmission service in Alberta. The role of the ISO is expected to encompass the current power pool, transmission administrator and system controller functions. ESBI Alberta Ltd.'s contract as the for-profit transmission administrator will not be renewed.

The move to an ISO model will require legislative amendments. Depending on how the model is implemented, it could also require people with contracts with the existing transmission administrator that have not received AEUB approval to be binding on successor transmission administrators to re-negotiate those contracts with the ISO. Moreover, the regulatory agenda will have to be substantially revised to reflect the change in industry structure. While the long-term result may be reduced regulatory requirements, in the short-term significant additional processes can be anticipated to deal with these changes.

Market Achievement Plan (MAP)

Following the initial Power Purchase Arrangement (PPA) Auction in August 2000, unsold generation capacity has been managed by the Balancing Pool. In December 2000, some of that capacity was sold under short-term contracts in the MAP auction. The Balancing Pool intends to transfer control of 2,200 MW of PPA capacity through the "MAP II" process. That process is to consist of three stages. Holding restrictions are intended to ensure that no one participant can unduly influence the market.

AEUB Jurisdiction to Exempt Hydroelectric Projects – Glacier Power's Dunvegan Project

On April 29 the AEUB decided it had the jurisdiction, under section 5(1)(b) of the *Hydro and Electric Energy Act*, to exempt certain hydroelectric projects from the necessity of obtaining legislative approval, subject to determining that the project is in the public interest. However, it declined to exercise that discretion in favour of Glacier Power and its run-of-the-river project at Dunvegan on the basis that since it had not yet heard and considered Glacier Power's project approval application, the exemption application was premature.

The hearing of Glacier Power's project approval application before the AEUB and the Natural Resources Conservation Board has been delayed. A new date is expected to be set shortly.

NOVA Gas Transmission Load Retention Service

The AEUB has approved a third load retention service for NGTL. The newest service allows NGTL to retain transportation volumes which would otherwise have moved to Petro-Canada's Medicine Hat Pipeline, which has NEB approval but is not yet built. In its decision the Board re-confirmed the criteria for load retention service which are: it must be required to respond to a credible bypass threat; its rate must exceed the long run incremental cost of service; its rate must be no more attractive than is reasonably required to retain the load; and, its cost must be appropriately shared between other utility customers and shareholders.

NGTL General Terms and Conditions: Interpretation of Article 3 as it Relates to CO_2

On May 7, 2002 the AEUB issued Decision 2002-44 in a proceeding initiated by several NGTL (Alberta) delivery customers. The Applicants sought a Board decision on the proper interpretation of the portions of Article 3 of NGTL's Tariff relating to the CO_2 content of natural gas accepted at receipt points on the NGTL system.

The Board interpreted the disputed elements of Article 3 as giving NGTL the discretion to accept or reject gas at receipt points that contains more than 2% CO_2 by volume. The Board also found that there is no express limit on the period of time over which NGTL may accept gas that does not conform to the Tariff specifications.

The Decision is of interest because the Board found that NGTL's Tariff has in law the characteristics of both a contract and an enactment, requiring it to employ principles of both statutory and contractual interpretation. The Decision is also of interest because the Board indicates that notwithstanding its Decision, it intends to initiate further processes to deal with the issue of CO_2 management on the NGTL system.

NORTHWEST TERRITORIES

The Northwest Territories Power Corporation (NWTPC) has reached agreement with the Town of Inuvik to proceed with a micro turbine cogeneration demonstration project at the Town's recreation complex.

YUKON

In April, the Yukon government announced that the Yukon Utilities Board would issue a call for proposals from utilities interested in developing and operating a piped propane distribution system within the City of Whitehorse. The proposals will be subjected to a public review process, following which the Board will make its recommendations to the Yukon government for a final decision on the grant of the franchise.

Currently the scope of the request for proposals is for piped propane, as there is no supply of natural gas to Whitehorse. However, if the Alaska Highway gas pipeline is built, the piped propane gas distribution system could be converted to distribute natural gas.

VANCOUVER
1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2

CALGARY
3700, 205 – 5th Avenue SW
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7

YELLOWKNIFE
702 Northwest Tower
5201 Franklin (50th) Avenue
Yellowknife, NWT
Canada X1A 3S7

The information provided in this newsletter is provided for general information purposes only and should not be relied on as legal advice or opinion. If you require legal advice on the information contained in this newsletter, we encourage you to contact any member of the Lawson Lundell Energy Law Team.

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VANCOUVER

Jeff Christian 604.631.9115
jchristian @lawsonlundell.com
Gordon Craig 604.631.9155
gcraig@lawsonlundell.com
Chris Sanderson, Q.C. 604.631.9183
csanderson@lawsonlundell.com
Diana Valiela 604.631.6724
dvaliela@lawsonlundell.com

CALGARY

A.W. (Sandy) Carpenter 403.781.9458
scarpenter@lawsonlundell.com
Cecilia Low 403.781.9456
clow@lawsonlundell.com
John Olynyk 403.781.9472
jolynyk@lawsonlundell.com
Keith Templeton 403.781.9455
ktempleton@lawsonlundell.com

YELLOWKNIFE

Keith B. Bergner 867.766.5326
kbergner@lawsonlundell.com