Energy (Electricity)

RECENT DEVELOPMENTS OF IMPORTANCE

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Overview

Electricity sector developments in Alberta and British Columbia (BC) continue to break new ground particularly in view of the recent prominence of renewable energy, greenhouse gas (GHG) emissions issues and export market development initiatives for the export of electricity from clean or renewable sources.

In BC, the passage of the *Clean Energy Act* in the spring 2010 legislative session effected the integration of BC Hydro and its sister utility, the British Columbia Transmission Corporation, seven years after the latter was created from the former. The reintegrated BC Hydro is by far the largest load serving entity in the province, serving customers throughout most of BC with a portfolio of hydro-electric generation assets and storage reservoirs. To serve load growth, BC Hydro upgrades its existing generation assets and acquires new supply from Independent Power Producers (IPPs) within BC under long-term contracts. The *Clean Energy Act* also sees BC Hydro moving ahead on Site C, the large hydro storage project in the northeast of the province. BC Hydro will also continue to provide wholesale transmission services under a Federal Energy Regulatory Commission (FERC) style *pro forma* tariff. The *Clean Energy Act* also marks a significant public policy shift in BC, contemplating as it does the construction of infrastructure for export purposes, and a central role for BC Hydro in that new initiative.

In Alberta, the market structure is characterized by a competitive power generation sector, with facilities owned by a number of largely privately owned companies. The Alberta Electric System Operator (AESO) operates the wholesale power market in the province, with generation dispatch authority as well as responsibility for a unique wholesale transmission tariff. The Alberta government proposes to take more responsibility for identifying the need for critical transmission infrastructure, leaving detailed routing to the transmission facility owners and the Alberta Utilities Commission (AUC).

Not surprisingly, Alberta's Progressive Conservative government has no plans to abandon Alberta's fossil fuel heritage. The government there prefers carbon capture and storage to reduce Alberta's GHG emissions rather than reducing fossil fuel production. The government plans are set out in its December 2008 policy titled *Launching Alberta's Energy Future — Provincial Energy Strategy* (Alberta Energy Strategy). The ultimate goal is to make Alberta a "global energy leader that is recognized as a world-class energy supplier, energy technology champion, and a responsible energy consumer and environmental citizen."

British Columbia

Green Energy Advisory Task Force

To further its energy objectives, in November 2009, the BC government appointed a Green Energy Advisory Task Force to recommend strategic action for turning BC's clean power potential into economic, environmental and social benefits for British Columbians. The task force members included clean energy and climate experts, First Nations and community representatives, and environmentalists. The Task Force identified strong market prospects for BC's clean energy resources and recommended a strategic approach to take advantage of these opportunities. It also suggested additional actions to position BC as a clean energy powerhouse by increasing clean energy supplies as well as enhancing regulatory regimes and crown corporation organizational structures.

Clean Energy Act

Building on previous statements of provincial energy policy, such as the 2007 *BC Energy Plan*, as well as the recommendations of the Green Energy Advisory Task Force, the new *Clean Energy Act* became law on June 3, 2010. The *Clean Energy Act* establishes the long-term legal framework for BC's energy policy. To this end, it sets out 16 energy policy objectives to guide utilities, BC Hydro and the BC Utilities Commission (BCUC).

The energy policy objectives focus on electricity self-sufficiency, increased demand side measures, the reduction of GHG emissions, and the export of electricity from clean or renewable sources.

In furtherance of its energy policy objectives, the *Clean Energy Act* integrated BC Hydro and the British Columbia Transmission Corporation into a single entity. The newly integrated BC Hydro provides a single point of planning for all aspects of generation, transmission and distribution reversing a seven year old decision to establish a legally independent transmission entity.

The *Clean Energy Act* mandates that BC Hydro is to become self-sufficient by 2016, and have an additional 3,000 GWh per year of insurance by 2020. With respect to generation resource options, the *Clean Energy Act* provisions regarding self-sufficiency specify that the amount of electricity necessary to achieve self-sufficiency must come solely from electricity generating facilities within the province. A further restriction on generation resource options is the energy policy objective to generate at least 93 per cent of the electricity in BC from clean or renewable resources, such as run-of-river hydro, wind or bio-energy. It is not surprising under these circumstances that BC Hydro is no longer permitted to rely on the gas-fired Burrard Thermal generating station for energy and capacity.

The *Clean Energy Act* requires BC Hydro to submit to the government for approval of a long-term Integrated Resource Plan (IRP), which is to describe BC Hydro's plans to further the energy policy objectives, including self-sufficiency and export market development. In particular, the IRP must address the expected export demand and the actions BC Hydro has taken to seek suitable opportunities for the export of electricity from clean or renewable resources. BC Hydro will have to submit the first IRP by the end of 2011.

While promoting longer term export sales, the *Clean Energy Act* also expressly requires the BCUC to ensure that "expenditures for export" are not included in domestic rates. The *Clean Energy Act* also reinforces existing prohibitions on the sale of ratepayer-funded, BC Hydro-owned assets, extending the prohibition to the recently purchased 1/3 undivided interest in the Waneta Dam, as well as the proposed Site C dam and Northwest Transmission Line projects.

The *Clean Energy Act* also changed the role of the BCUC in the regulation of the public utilities under its jurisdiction, including BC Hydro. Under the new regulatory regime, the BCUC will continue to regulate domestic supply and rates. However, the *Clean Energy Act* designated a number of key BC Hydro projects that are now exempt from approval by the BCUC. These strategic projects include construction and extension projects such as the Northwest Transmission Line, the addition of two 500 MW turbines at the Mica Dam, the addition of a 500 MW turbine at the Revelstoke Dam, and Site C, the proposed 900 MW hydro-electric dam project on the Peace River. They also include projects relating to smart metering and the smart grid – required to be in place by the end of 2012 – as well as programs to procure IPP power from clean and renewable resources. Future projects, specifically for the purpose of supplying export markets, may also be exempt from BCUC review.

Another key energy objective in the *Clean Energy Act* concerns the reduction of GHG emissions in BC. By 2012, GHG emissions are to be reduced to at least 6 per cent less than the level of emissions in 2007 and by 2016, to at least 18 per cent less than 2007 levels.

Calls for Power

To achieve self-sufficiency and the development of the government's export policy BC Hydro has been issuing a series of calls for power from new IPP projects in BC. Most of these calls proceed by way of formal tender process or request for proposals.

The Bio-energy Call for Power Phase 1 Request for Proposals (RFP) is now complete. Bio-energy includes energy generated from timber infested by the mountain pine beetle, sawmill residue (hog), forestry waste (slash) and residues from pulp and paper production (black liquor). The resulting four electricity purchase agreements were accepted by the BCUC on July 31, 2009. The Bio-energy Call for Power Phase 2 RFP is a new call for larger scale biomass projects. The target is to acquire up to 1,000 GWh per year of cost-effective electricity through this RFP. Any form of biomass is eligible, as long as it meets the province's Clean or Renewable Electricity Definitions. Eligible projects must be new facilities with a minimum 5 MW generating capacity. The Bio-energy Phase 2 Call for Power is a key project designated by the *Clean Energy Act* as exempt from BCUC approval.

The recent Clean Power Call resulted in the award, in late 2009 and early 2010, of 25 projects, for a total of 3,265 GWh per year.

BC Hydro has also established a Standing Offer Program for energy from small (less than 10 MW) renewable, clean or high-efficiency cogeneration projects.

Demand Side Management/ Conservation Rates

The energy policy objectives set out in the *Clean Energy Act* require taking demand-side and energy conservation measures, including the objective for BC Hydro to reduce its expected increase in demand for electricity by 2020, by at least 66 per cent.

In July 2009, the BCUC accepted BC Hydro's plan to spend C$418 million on energy efficiency programs over the three year period ending March 31, 2011. A new DSM plan responding to the IRP requirement provisions of the *Clean Energy Act* is expected this year. BC Hydro and the BCUC are also responding to the DSM requirement by implementing new conservation rate structures for BC Hydro's customers. Transmission service customers moved onto conservation rate structures in 2006 and residential customers in 2008. On January 1, 2011, new conservation rates are coming into effect for commercial customers as well. The new commercial rates include an innovative "two-part" energy rate structure that charges higher amounts for energy to customers when their consumption exceeds their established historical consumption levels and provides credits to customers when their consumption is lower than their historical consumption. BC Hydro expects annual savings of about 1,800 GWh by 2015 for its new commercial conservation rates.

First Nations

An appeal from the British Columbia Court of Appeal decision in the Carrier Sekani Tribal Council case by Rio Tinto Alcan and BC Hydro was heard by the Supreme Court of Canada on May 21, 2010. Judgment was reserved. The case arose from the issue of whether the BCUC was required to assess the adequacy of Crown consultation, before BC Hydro entered into an energy purchase agreement to buy electricity from Rio Tinto Alcan Inc. The two most

significant issues before the Court concerned the role of administrative tribunals such as the BCUC in determining whether Crown consultation has been adequate, and whether the duty to consult applies to historical grievances arising from alleged infringements associated with existing facilities.

This latter issue has become prominent in a number of situations where BC Hydro or other Crown agents seek to expand their own existing facilities (for example, the Interior to Lower-Mainland transmission line project considered in the Kwikwetlem First Nation's case) or acquire a benefit from previously authorized activities of third parties (for example, the Carrier Sekani Tribal Council case and BC Hydro's acquisition of an interest in the Waneta Dam, the latter more fully discussed below).

Meanwhile, pending the Supreme Court of Canada decision regarding the Carrier Sekani Tribal Council case, the BCUC has issued Crown filing guidelines setting out the informational requirements Crown applicants must include in their applications regarding consultation. BC Hydro has already filed evidence relating to consultation in a number of proceedings before the BCUC. Perhaps most noteworthy was BC Hydro's filing to the BCUC for acceptance of an C$850 million expenditure to acquire a 1/3 passive interest in the 50 year old Waneta Dam in south eastern BC. The BCUC found that BC Hydro's consultation had been adequate and maintained the honor of the Crown in connection with the transaction. Applications for reconsideration of this finding were refused. Three separate Aboriginal groups have sought leave to appeal the BCUC's decisions to the British Columbia Court of Appeal.

For the moment, the decisions in the Kwikwetlem First Nation's case and Carrier Sekani Tribal Council case have added significant complexity and uncertainty to any activity in the electricity sector that involves Crown actors. The long run implications of these decisions will not be known until the Supreme Court of Canada renders its decision in connection with Carrier Sekani Tribal Council case.

Alberta

Generation

Unlike BC, where BC Hydro is responsible for serving most of the province's load using resources it owns or has under long-term contracts, Alberta has a competitive generation market and power pool.

Also unlike BC, where the government has a strong preference for clean and renewable generation (and a strong dislike for thermal generation), the Alberta Department of Energy has stated that it does not prefer one type of generation over another, but rather allows competitive market forces to determine the appropriate generation mix. The Alberta Department of Energy does not support market refinements that will create an uneven playing field or be detrimental to the development of renewable resources.

The Alberta Energy Strategy flatly rejects a carbon tax on energy consumers, and the government remains wary of "cap and trade" mechanisms to address GHG emissions. Alberta's strategy to reduce GHG emissions is less focused on reducing consumption of fossil fuels and more focused on carbon capture and storage. Alberta wants 70 per cent of its GHG reductions to come through carbon capture and storage. Four projects have signed Letters of Intent to receive a portion of the C$2 billion in carbon capture and storage funding set aside by the Alberta government. All of the funding has now been committed. The first round of commercial scale projects is expected to achieve annual carbon dioxide reductions by 2015 equivalent to taking approximately one million vehicles, or about a third of all registered vehicles in the province, off of the road.

With respect to non-fossil fuel options for electricity generation, nuclear power remains on the table in Alberta. Nuclear power has been strictly off the table for BC since 2002. The Alberta government continues to review the potential challenges and opportunities that nuclear offers, and intends to develop a position on the subject in consultation with the public.

Wind power continues to present opportunities and challenges for Alberta. Part of the framework envisioned under the *Electric Utilities Act* is to have a robust transmission system in place to accommodate between 95 and 100 per cent of anticipated in-merit electric energy available from Alberta generators. The competitive power pool is attracting new wind power projects in droves, but there are issues with respect to the anticipated increase in wind generation.

As of June 2010, there were approximately 13,400 MW in the AESO generation interconnection queue. Of this amount, approximately 7,800 MW is in relation to wind projects in the south, 3,400 in central Alberta, and 1,700 elsewhere. To put this in perspective, Alberta Department of Energy statistics indicate there is currently 657 MW of installed wind generation out of a total generation capacity of 12,834 MW operating in the province. In 2009, peak demand in Alberta was 10,236 MW.

The operational integration issues regarding wind projects are considerable. The AESO's July 2009 long-term transmission plan forecasts an additional C$2.4 billion of transmission upgrades to accommodate future wind projects in the southern part of the province alone.

The AESO has established a revised interconnection queue business practice and a market and operational framework for wind integration to manage the issues presented by wind power (*e.g.*, potential for extremely fast ramp up/down, output variability, and production uncorrelated to load) which include:

- requiring wind generators to provide improved forecasting of their power output (*e.g.*, next day, two hours prior to the start of the delivery hour);
- increasing regulating reserves to provide fast responding resources that can be used in real time to help maintain the supply demand balance;
- acquiring load/supply following services intended to respond to longer term variability in wind ramping when wind ramps in the opposite direction of system load; and
- requiring wind generator power management to manage power output and ramp rates.

Transmission

Specific transmission-related actions of the Alberta Energy Strategy include enhancing the capability of the electricity system by planning comprehensive upgrades and updating the transmission siting approval process. Other proposals include adoption and implementation of a policy to build interties to other electricity markets, the promotion of smart metering, smart grids and improved energy consumption information.

To expedite approval of critical transmission infrastructure the Alberta government amended the *Electric Utilities Act* in November 2009, to allow for an expedited process. Once the AESO provides its transmission plan, the government is now responsible for designating critical transmission infrastructure just like it does for other public infrastructure such as roads, schools and hospitals. Critical transmission infrastructure includes interties, double circuit 240kV and higher voltage lines, and transmission needed to serve areas of renewable energy. Once a project is designated as a critical infrastructure project the project is exempt from the requirement to obtain regulatory approval for the "need" of the project from the AUC. This is a marked departure from the structure that has been in place and operating effectively for many years, which required the AESO to identify the need for transmission and then obtain approval from the AUC with public input and participation in a formal hearing process. Once need is established, or where a transmission project is designated to be "critical transmission infrastructure" a second detailed routing proceeding is held before the AUC to finalize the precise routing of the proposed line. Critical infrastructure projects are not exempt from the statutory line routing requirements which are intended to allow directly affected landowners the right to address the details of line routing and obtain fair compensation.

At the same time as the critical transmission infrastructure amendment to the *Electric Utilities Act* was made, the government designated a number of critical infrastructure projects, including the Edmonton to Calgary upgrade, and an Edmonton to Fort McMurray upgrade.

In the meantime, the AESO continues to deal with congestion management on the transmission system. The AESO considers that transmission rights are not a feature of the market framework in Alberta. In other words, there are to be no transmission rights and no preferential treatment to incumbents — all generation is to be treated equally, and incumbents have no greater call on transmission capacity than new generation. In practical terms new generation is brought on stream on a firm basis only if there is available transmission capacity.

Market Compliance

Effective October 1, 2009, Harry Chandler took over the post of Alberta Market Surveillance Administrator (MSA). Chandler is the former Deputy Commissioner of Competition at Canada's Competition Bureau and, more recently, was Director of Market Assessment and Compliance with Ontario's Independent Electricity System Operator.

The MSA monitors Alberta's electricity and natural gas markets for fairness and balance in the public interest. Market surveillance is meant to keep a close watch on the overall performance of Alberta's electricity and natural gas markets, checking that they operate in a "fair, efficient, and openly competitive" (FEOC) manner.

After a long and involved stakeholder consultation process, the Alberta Department of Energy has taken the next step in the evolution of market trading guidelines and recently codified the type of behavior that may be considered offensive to the FEOC principles enshrined in Alberta's energy legislation. The FEOC regulation is new, and it remains to be seen how the industry will adapt to it and how it will be interpreted by the relevant authorities.

Effective September 1, 2009, the FEOC Regulation (AR 2009/259) (Regulation) is in force in Alberta. The Regulation addresses four key areas:

1. Conduct not supporting fair, efficient and open competition;
2. Preferential sharing of records that are not available to the public;
3. Restrictions on trading using outage records that are not available to the public; and
4. Market share offer control.

Section two of the Regulation provides a non-exhaustive list of prohibited market participant behaviors that do not support the operation of a FEOC market. The prohibited behaviors include misrepresentation of generator operational status, misrepresentation of a market participant's financial condition, withholding, creating congestion, and otherwise manipulating the market away from a competitive market outcome.

A new market share offer control test under section five of the Regulation will limit the amount of aggregate (including related entities) offer control a market

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participant may hold to 30 per cent of the total maximum capability of all generating units in Alberta (not including tie-line activity). The Regulation sets out the formula that the Alberta MSA is required to use in calculating the market share offer control and requires that the Alberta MSA do so at least annually and make a public report of the results.

On the enforcement side, the AUC is charged with adjudicating cases involving market participant behavior. The AUC carries out a quasi-judicial role in the context of market oversight and enforcement of certain statutes, decisions of the Alberta MSA and rules of the Independent System Operator. The AUC can impose sanctions and fines of up to C$1 million per day, and can require payment of a one-time amount to address economic benefit where the AUC is of the opinion that the person derived an economic benefit, directly or indirectly, as a result of the contravention.

During 2009, there was a significant increase in compliance activity before the Alberta MSA in which 100 files were opened and seven remained under review at the end of the year. Of the 101 files addressed during 2009, 57 resulted in notices of specified penalty (lesser penalties) and 35 files resulted in forbearance or a finding of no breach. No notices were disputed. The Alberta Market Surveillance Administrator decided to seek more significant administrative penalties pursuant to Section 51 of the *Alberta Utilities Commission Act* in relation to nine files. ■

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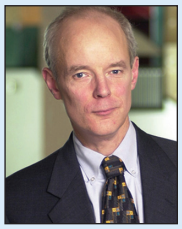

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Chris is a partner in the Vancouver office. His practice focuses on government relations and regulation in the energy and resource sectors throughout western Canada. He advises utilities, independent power producers, marketers, mine and energy project developers and governments. Chris appears frequently before regulatory boards in energy and environmental matters in British Columbia, Alberta and the Northwest Territories. He represents clients in judicial proceedings arising in the regulatory context or, more generally, from the relationship between business and government heard by all levels of court in British Columbia and Alberta and in the federal court system, including the Supreme Court of Canada. Recognized in Woodward/White's *The Best Lawyers in Canada* for energy regulatory, and natural resources law; and by *International Who's Who Legal* for oil and gas law. Called to the British Columbia Bar in 1978, the Alberta Bar in 1988 and the Northwest Territories Bar in 2001. Appointed Queen's Counsel in British Columbia in 2001.

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Lewis is a partner in the Calgary office whose practice has focused on regulatory/administrative energy matters since 1985. He has extensive experience in energy-electricity matters, and oil & natural gas matters including rate applications, toll design, facilities applications, cost of capital and related matters before the Alberta Utilities Commission (previously the Alberta Energy Utilities Board) and the National Energy Board. He has a strong civil litigation background and has conducted a number of civil trials in relation to various commercial matters. Lewis is recognized by *Lexpert*® as a leading lawyer in the energy (electricity) area. Called to Alberta Bar in 1982.

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Jeff is a litigation partner in the Vancouver office with a practice focused on energy and regulated utilities. He appears regularly before administrative tribunals such as the BC Utilities Commission. Jeff has represented a BC electric utility in numerous proceedings before the Commission involving revenue requirement, conservation rate design, cost of service, wholesale transmission services and facility approvals. He has advised US financiers on regulatory proceedings in BC related to US acquisitions of BC utilities, ratepayer groups in proceedings before the Northwest Territories Public Utilities Board, and utilities in export permit proceedings before the National Energy Board. Jeff was a member of the Green Energy Task Force, established by the BC provincial government in 2009 to advise Cabinet on energy policy matters. Jeff is recognized by Woodward/White's *The Best Lawyers in Canada* in the area of energy regulatory law, and by *Lexpert*® in the energy (electricity) area. Called to BC Bar in 1994 and the Northwest Territories Bar in 2001.

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