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### INTRODUCTION

In this edition of Lawson Lundell LLP's energy law newsletter we summarize the recent Federal Court of Appeal decision regarding a rate dispute between **Flint Hills Resources** and **Enbridge**; review AEUB decisions regarding conduct of **Alberta's Market Surveillance Administrator** and the public utility status of the **Ventures Pipeline**; update readers on the negotiated settlement of significant applications to the **BCUC** brought by **BC Hydro** and **BCTC**; review **BC Hydro's residential time of use rate pilot**; and discuss recent developments regarding **BC electricity transmission projects**.

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Lawson Lundell LLP is also very pleased to announce the recent arrival in our Calgary office of partner **Lewis Manning**. Lewis has long had an extensive practice focused on energy-electricity matters, and oil & natural gas matters. Lewis' experience includes rate applications, toll design, facilities applications, cost of capital and related matters before the AEUB and the NEB. He has appeared at all levels of the Alberta courts in relation to various

energy related matters, the Ontario Energy Board, the Manitoba PUB and the Federal Court and Federal Court of Appeal, and represented clients in arbitrations and energy related contract disputes. Lewis also participated actively in all matters relating to the restructuring of the gas transmission and distribution sectors in Canada and the electric industry in Alberta. Lewis is recognized by Lexpert as a leading practitioner in the energy law/electricity area. He can be reached at 403-781-9458.

### REGIONAL

#### **Federal Court Dismisses Flint Hills' Appeal of NEB's Enbridge Toll Decision**

In *Flint Hills Resources, Ltd. v. National Energy Board et al.*, 2006 FCA 320, the Federal Court of Appeal dismissed Flint Hills Resources' appeal of a 2005 decision of the National Energy Board (NEB). In that decision the NEB approved the recovery by Enbridge of US\$100 million through tolls applicable to users of Enbridge's Canadian mainline system, even though the incremental revenue is to be used by Enbridge to support the upgrade of two U.S. pipelines.

Flint Hills is a shipper on Enbridge's Canadian mainline, and makes no use of the two U.S. pipelines. It appealed on the basis that the NEB lacked jurisdiction to allow recovery through tolls of costs unrelated to the project to which the tolls relate.

In its decision the Federal Court confirmed that the NEB's discretion to set tolls is

bound only by the obligation under the *NEB Act* that tolls are just and reasonable, and non-discriminatory. In addition, the NEB must not stray outside the boundaries established by the Constitution by, for example, establishing tolls that become taxes. In a decision from the Bench rendered October 4, 2006, the Federal Court concluded that the NEB may lawfully establish pipeline tolls designed to recover costs of infrastructure unrelated to the tolls, and dismissed the appeal.

## ALBERTA

### MSA Conduct Declared Inappropriate

On September 19, 2006, the Chair of the Alberta Energy and Utilities Board (AEUB) issued a significant decision with respect to a complaint regarding the conduct of Alberta's Market Surveillance Administrator (MSA). The MSA has the mandate to carry out surveillance and investigation in respect of, among other things, the generation, transmission, and trading of electricity in Alberta. Under section 73 of the *Electric Utilities Act* (UCA), a person may complain to the Chair of the AEUB regarding conduct of the MSA. The decision is the AEUB's first in relation to section 73 of the CUA and includes several significant determinations about the section 73 complaint process and the AEUB's jurisdiction in relation to the MSA.

In response to a 2005 complaint regarding publication of a report prepared by the MSA that contained confidential information, the Chair concluded that he lacked jurisdiction to determine if the MSA acted outside its statutory authority. The Chair found that when considering such a complaint, the Chair's authority is limited to a consideration of the conduct of the MSA – whether the complainant was treated fairly. The Chair further determined that, unlike the extensive powers granted to the Chair under the legislation relating to complaints regarding the conduct of the Independent System Operator, the Chair had no authority to amend, modify, revoke or overturn policy directions, guidelines, views or decisions of the MSA. In this case, while the Chair refused to make any determinations regarding the substance of the complaint, he found that the MSA had not followed its own process, and that the MSA's conduct was inappropriate.

### AEUB Declares Ventures Pipeline a Gas Utility

In an October 24, 2006 decision, the AEUB determined that the Ventures Oil Sands Pipeline located in northeastern Alberta is a gas utility under the *Gas Utilities Act*. Earlier this year, Suncor Energy Inc. (Suncor) applied to the AEUB for an investigation of the services and tolls applicable to the pipeline that are currently implemented by NOVA Gas Transmission Ltd. and

TransCanada Pipeline Ventures Ltd. (Ventures Ltd.). When Ventures Ltd. challenged the AEUB's jurisdiction to regulate tolling on the Ventures pipeline, the AEUB decided to address the preliminary question of whether the Ventures Pipeline was a "gas utility" as defined in the *Gas Utilities Act*.

The AEUB found that just because Suncor is a sophisticated party does not mean that it is not entitled to the benefits and protection of the *Gas Utilities Act*. Suncor is part of the "public" that the AEUB is empowered to protect under the *Gas Utilities Act*. Based on this reasoning, the AEUB concluded that the Ventures Pipeline is a "gas utility" pursuant to the legislation. Significantly, the AEUB noted that the existence of a monopoly is not a pre-condition to AEUB regulation.

Having found that the Ventures Pipeline constitutes a gas utility, the AEUB concluded that the *Gas Utilities Act* authorized it to conduct an investigation into the Ventures Pipeline and the affairs of its owner. Pursuant to that authority, the AEUB decided that it would conduct an investigation to determine whether the rates charged are unjust or unreasonable or unjustly discriminatory. Ventures Ltd. was directed to submit information to the Board regarding, among other things, the costs incurred for the construction, expansion and operation of the pipeline, contract terms and



conditions, market area forecasts, and the configuration of facilities and operations. Thus, the final decision on Suncor's complaint remains pending.

## **BRITISH COLUMBIA**

### **Settled:**

#### **BCTC's Application for Network Economy Terms and Conditions**

#### **BCTC's F2007 Revenue Requirement Application**

#### **BC Hydro's F2007 and F2008 Revenue Requirements Application**

In a recent flurry of negotiation and settlement activity, BC Hydro and BCTC reached agreement with intervenors on three significant applications before the BC Utilities Commission (BCUC).

The first was BCTC's application for BCUC approval of terms and conditions relating to the use of "network economy" service under BCTC's open access transmission tariff (OATT) (see our Spring 2006 newsletter at <http://www.lawsonlundell.com/news/index.asp?AOP=9> for full details). Although set down for an oral hearing on October 10, the application was resolved after the BCUC approved a settlement agreement on October 19, reached after three days of formal negotiations between BCTC, BC Hydro (the sole user of "network economy" service), the Alberta Electric System Operator and various Alberta parties with competitive interests in access to the BCTC system.

The second was BCTC's F2007 revenue requirement application. On October 25 a negotiated settlement reached between BCTC and various intervenors was made public, and forwarded to the BCUC for its consideration. At this time there has been no order approving the negotiated settlement. Highlights of the BCTC settlement include a reduction in operating expenses of \$3.3 million, and a commitment by BCTC to report on the relationship between infrastructure spending, reliability targets, and customer impacts.

Finally, BC Hydro and intervenors in its F2007-F2008 revenue requirements application reached a negotiated settlement of that application after three days of formal negotiations during the week of October 16. The settlement agreement that arose from those negotiations provides for lower rate increases than BC Hydro had applied for (1.54% and 3.64% in F2007 and F2008, respectively, rather than 4.65% and 0.63% as applied for). Other notable features include a 2% deferral account rate rider (included in the 3.64% rate increase for F2008) and agreement on BC Hydro's proposed capital plan review process, which establishes bi-annual compliance filings and BCUC reviews of projects with gross capital costs in excess of \$50 million. In addition, BC Hydro will initiate a regulatory reform workshop to address, among other things, timing and form of BC Hydro applications,

performance based ratemaking, and pre application technical workshops. The settlement agreement, made public on November 6, has not yet been approved by the BCUC.

The BCUC's Negotiated Settlement Process (NSP) provides a formal mechanism for applicants and intervenors to engage in "without prejudice" discussions. Commission staff play a facilitative and advisory role in those discussions, and do not communicate with the Commission panel charged with reviewing the application. On the basis of these three recent settlements, it seems clear that NSPs are increasingly the "process of choice" in B.C. for resolution of disputed applications to the BCUC.

### **BC Hydro Residential Time-of-Use Rate Pilot**

The BCUC approved an application by BC Hydro to implement a set of optional time-of-use (TOU) rates for residential customers in the Lower Mainland, Fort St. John and Campbell River. The TOU rates are optional and will be offered for only two years. The objective of the rates is to analyse customer pricing preferences and response to pricing signals. The pilot will also allow BC Hydro to test new electronic metering infrastructure.

The various TOU rates have seasonal and daily on-peak and off-peak pricing periods that reflect the demands on the BC Hydro system in the three



regions. Prices are higher during the evening starting from 4pm and ending at 9pm on weekdays, November through February. The rates for Campbell River include a morning peak period as well because of the greater use of electric space heating on Vancouver Island.

As part of this program, BC hydro is also testing the effectiveness of differing levels of educational material provided to TOU rate subscribers. An interim evaluation of the TOU rates is expected after the 2006/07 winter season.

### **National Energy Board Approves Juan de Fuca Cable Project**

On September 7, 2006, the NEB approved an application by Sea Breeze Victoria Converter Corporation (Sea Breeze) to construct the Juan de Fuca Cable (JdFC) Project, following an oral public hearing in June 2006.

When built, the JdFC Project will consist of a high voltage direct current merchant transmission line between Vancouver Island and the Olympic Peninsula, in Washington State. Rated at 574 MW, the line will be approximately 48 km long and connect the Port Angeles substation in Washington State to an existing BC Hydro substation in Greater Victoria, B.C. Of the Canadian portion of the JdFC Project, approximately 12 km of the line will be installed underground and about 19 km will be a submarine cable under the Strait of Juan de Fuca. A further 16 km of submarine cable and associated facilities will lie outside of Canadian jurisdiction.

The NEB's approval of the JdFC Project is subject to a number of conditions, including the receipt of all required Canadian and U.S. permits as well as the development of environmental protection measures. Sea Breeze plans to bring the JdFC online by Fall 2008.

### **Vancouver Island Transmission Project**

As noted in our Summer 2006 newsletter (<http://www.lawsonlundell.com/news/index.asp?AOP=9>), on July 7, 2006, the BCUC granted BCTC a certificate of public convenience and necessity (CPCN) to reinforce the electric transmission system serving Vancouver Island and the Southern Gulf Islands. Since then, four applications seeking reconsideration of the BCUC's decision have been filed. Three of those reconsideration applications have been denied and the BCUC is currently considering the fourth application, which was filed on October 11, 2006.

In addition, four intervenors have applied to the B.C. Court of Appeal for leave to appeal the BCUC's decision. Leave from that Court is required under the *Utilities Commission Act* before any decision of the BCUC can be appealed. On November 7, 2006, Justice Levine dismissed all of the issues raised by the applicants, except the limited issue of whether a set of right-of-way agreements over Tsawwassen permit the construction of new overhead lines. The Court has not yet scheduled a date to hear an appeal into that issue.

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