LAWSON LUNDELL

BARRISTERS AND SOLICITORS

ENERGY LAW NEWSLETTER

WESTERN CANADIAN BUSINESS LAW

Spring 2004

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INTRODUCTION

This is Lawson Lundell's energy law newsletter, our quarterly publication dedicated to keeping readers informed about developments in the energy sector in Western Canada. We trust you will find it topical and informative. For more information regarding the articles in this newsletter, or Lawson Lundell, please contact Chris Sanderson of our Vancouver office at 604-631-9183. Back copies of this newsletter may be found on our website at www.lawsonlundell.com in the Energy Law Group section.

NATIONAL

Greenhouse Gas Emissions Reporting

The federal government has introduced the first phase of a multiphase plan intended to harmonize the current greenhouse gas (GHG) emission reporting systems of federal, provincial and territorial governments. At present, this new reporting requirement will primarily impact operators of major industrial facilities that produce electricity, heat or steam on-site using fossil fuels. These facilities include power generation facilities, integrated steel mills, petroleum refineries and chemical producers. The reporting criteria are set out in a notice issued on March 13, 2004, under the *Canadian Environmental Protection Act* which can be found at http://canadagazette.gc.ca/partI/2004/20040313/html/notice-e.html.

Reports must provide information regarding the GHG producing facility, the quantity of GHG emissions provided by the facility (by source category), and the quantity estimation method used. Operators must submit reports regarding emissions for the 2004 calendar year to the Manufacturing, Construction and Energy Division of Statistics Canada by June 1, 2005.

ALBERTA

Bitumen Conservation Dispute

Phase 3 of the Alberta Energy and Utilities Board (AEUB) bitumen conservation proceedings continued with the submission on January 26, 2004 of an AEUB staff report making shut-in recommendations for certain wells in the Wabiskaw-McMurray region in the Athabasca oil sands area. The report indicates that 447 gas pools are in direct contact with potentially recoverable bitumen, and recommends the permanent shutting-in of wells associated with these pools. Affected parties challenged the shut-in recommendations at an interim hearing held between March 10 and April 1, 2004. The AEUB has not yet issued a decision in respect of the interim hearing. If parties object to the results of the interim hearing, a final hearing will be held.

The AEUB has also initiated a review in relation to other Athabasca oil sands area wells previously approved for gas production in the Chard Area and Leismer Field. In an April 7, 2004 decision, the Board determined, on the basis of previously unavailable geological information, that a review of the previously granted well approvals was warranted. A hearing is expected on the matter later this year.

Meanwhile, the Court of Appeal has granted BP Canada Energy Company, Canadian Natural Resources Limited, Devon Canada Corporation, Paramount Energy Trust and Progas Limited (the Companies) leave to appeal AEUB General Bulletin 2003-28, which sets out the AEUB's bitumen conservation requirements, including the Board's decision to issue shut-in orders in respect of all natural gas wells in contact with potentially recoverable bitumen in the Wabiskaw-McMurray. The applicants argued that the Board failed to comply with principles of procedural fairness and natural justice in issuing the bulletin and shut-in order before holding a hearing in respect of the proposal. The Court granted the Companies' leave to appeal the bulletin and shut-in order, subject to a consideration of whether, at the time the appeal is to be heard, the issue remains a live issue. The Companies' application for a stay of the Phase 1 shut-in order was denied, due to the delay in bringing the application.

AEUB Denies Application to Extract Natural Gas Liquids Off Nova Gas Transmission Line

Solex Gas Processing Corp. applied last year to amend its processing permits at its Harmattan-Elkton gas plant in order to reprocess natural gas from Nova Gas Transmission Ltd.'s Western Alberta System. Seeking to sidestream sweet natural gas from the Nova system by removing natural gas liquids at the plant and returning the processed gas back to the Nova system, Solex applied to construct and operate two 9km natural gas pipelines between the Nova system and the plant.

In Decision 2004-006 issued January 27, 2004, the AEUB denied Solex's application. The AEUB found that while a producer with a share of the common stream has the right to reprocess its proportionate share of the common stream, this right remains subject to the public interest. While straddle plant owners do not have a pre-emptive right to the natural gas liquids in the common stream, the AEUB concluded that maintaining the viability of the straddle plant industry as a whole continues to be in the public interest. Although concerned about parties' complaints regarding the inequities in the existing extraction regime, the Board nevertheless found that, from a provincial perspective, Solex's proposal would have a net negative economic value, encouraging other sidestreaming projects at the expense of the viability of the existing straddle plant system. Given that application approval may adversely impact the straddle plant system and could require a change in current business practices for natural gas liquids extraction with system-wide implications, the Board was not prepared to consider changes without a proper review to ensure that the changes proposed met the needs of industry as a whole.

Court of Appeal Limits Right of AEUB to Allocate Asset Sale Proceeds to Ratepayers

The Court of Appeal determined in a January 27, 2004 decision that the AEUB has no authority to allocate to customers certain proceeds from the sale of assets formerly used for utility purposes. The Court's decision stemmed from ATCO's 2001 application to the AEUB for approval to sell certain assets no longer needed for utility purposes, and requested that the balance of the sale proceeds, after recovery of the original cost, accumulated depreciation, disposition and related costs, be provided to ATCO shareholders. In Decision 2002-37, the AEUB determined that it would be fair and reasonable to allocate a portion of the net gain on the sale of the ATCO assets to customers. ATCO appealed the Board's decision.

In *ATCO Gas v. AEUB,* 2004 ABCA 3, the Court of Appeal allowed ATCO's appeal and set aside the Board's decision, confirming that where a utility owner seeks approval for a sale of property owned by the utility but sold outside the ordinary course of business and where the application is not part of a general rate application proceeding, the Board has no authority to redistribute the proceeds from the sale on equitable grounds. Once no harm is found, there is no authority for the Board to allocate a utility's property to another person on the basis that it would be fair and reasonable to do so. While a utility's ratepayers pay for a service, they do not receive by such payment a proprietary right in the assets of the utility. As the Board had concluded that the public interest was not in need of protection in this case, it was not authorized to order ATCO to share its profits from the sale with ATCO's customers. On March 30, 2004, the AEUB complied with the Court's direction, amending AEUB

Decision 2002-37 to provide ATCO shareholders with the balance of the sale proceeds.

BRITISH COLUMBIA

NEB Denies Sumas Energy 2 CPCN Application

On March 4, 2004, the National Energy Board (NEB) denied Sumas Energy 2, Inc. (SE2)'s application for a certificate of public convenience and necessity to construct and operate an international power line. The proposed 8.5 kilometre power line would have connected SE2's proposed 750MW gas fired generation facility in Washington State with BC Hydro's Clayburn substation, thereby connecting the plant to the grid that serves British Columbia, Alberta and 11 western states.

In considering SE2's application, the NEB weighed the burdens and benefits of the proposed power line in Canada, and concluded that on balance the benefits to Canadians would be minimal, and the proposed power line was not in the Canadian public interest.

SE2 filed an application for leave to appeal with the Federal Court of Appeal, requesting that the court review the NEB decision. SE2 has publicly stated that it believes the NEB's decision "went beyond its proper jurisdiction, committed errors of law and was parochial because it put local opposition ahead of national interest and failed to recognize the regional nature of the electric power market."

Terasen Gas Commodity Unbundling

The provincial *Energy Plan* places an increased emphasis on "commodity unbundling"—the delinkage of natural gas commodity costs from associated delivery costs—for commercial and residential customers. Amendments to the *Utilities Commission Act* in May 2003 created a gas marketing licensing regime that extends direct commodity sales to "low-volume consumers," leaving that term to be defined by the BCUC through a rule-making process. In a series of workshops, consultation sessions and decisions over the last year, the BCUC has been working with Terasen Gas Inc. to phase in the unbundling option. Commercial customers will have such an option commencing November 1, 2004.

On December 23, 2003, the BCUC issued Order G-90-03, in which it set out its rules for gas marketers. Among other things, it defined "low-volume consumers" to be those with normalized consumption of less than 2,000 gigajoules per year or those who have chosen the unbundled option, whatever their consumption. Subsequently, Terasen filed its Cost Allocation Application for Commodity Unbundling and Customer Choice Phase 1, which was largely approved by the BCUC on March 11, 2004 by Order G-25-04. One request the BCUC did not grant was Terasen's proposal that marketers be charged a 0.3% bad debt deduction on gross sales to their customers. The BCUC cited a lack of evidence that bad debt risk would increase, and instead asked Terasen to record in a deferral account the dollar difference between actual bad debt of the relevant rate schedules and 0.3% of the gross revenue received from those customers, with a view to establishing an appropriate bad debt factor at a later date.

BC Hydro Net Metering Tariff

On March 10, 2004, the British Columbia Utilities Commission (BCUC) approved BC Hydro's application for a net metering tariff. Net metering is a tool for promoting small-scale, grid-connected generation at homes and businesses. In its simplest form, a single meter runs forward when the utility customer's consumption exceeds the customer's generation and runs backward when the customer's generation exceeds consumption. Customers pay only for their net consumption, so the electricity they generate and use on site is effectively valued at retail rates. BC Hydro developed this tariff pursuant to the province's November 2002 *Energy Plan*, which envisages electric utilities developing net metering and other policies to achieve a voluntary goal of acquiring 50 percent of new electricity supply from clean energy sources. The net metering tariff applies to generation of 50 kW or less from renewable energy sources.

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BC Supreme Court Dismisses Challenge to Outsourcing Legislation

On March 30, 2004, the BC Supreme Court released its decision in *Office and Professional Employees' International Union* v. *BC Hydro*, 2004 BCSC 422, a legal challenge to provincial re-structuring legislation. The challenged legislation restricted the BCUC's review role in respect of an agreement between BC Hydro and Accenture Inc. to out-source certain of B.C. Hydro's support services.

The challenge alleged that the legislation violates the freedom of speech provision contained in the *Charter of Rights and Freedoms*, and various administrative law principles. It also sought orders that would permit a public hearing into the Accenture transaction to be conducted by the BCUC.

The Court rejected these claims, and confirmed that the legislation does not violate the petitioners' right to free speech, nor any administrative law principles. It observed that the legislation was just one segment of a comprehensive provincial scheme to reform BC's energy sector.

The petitioners also challenged similar legislation related to the creation of the BC Transmission Corporation, the independent Crown corporation now responsible for BC Hydro's transmission system. Those aspects of the petition were adjourned during the hearing.

NORTHWEST TERRITORIES

Premier Joe Handley, the Minister responsible for the Northwest Territories Power Corporation (NTPC), is promoting a plan that would see changes made to the *Northwest Territories Power Corporation Act* to allow the NTPC to more actively pursue business opportunities in the energy sector. The government's plan is based on the recommendations of a three-year old review of the NTPC. Premier Handley says hydro development is key to lowering the cost of living in smaller communities in the North and he wants to free up NTPC to pursue hydro development.

MacKenzie Valley Pipeline (correction)

As many of you may have noticed, the Winter 2004 newsletter erroneously reported that the Preliminary Information Package (PIP) regarding the MacKenzie Valley Pipeline is to be filed this summer. The PIP was of course filed in June 2003, and it is the application for a CPCN pursuant to section 52 of the *NEB Act* that is anxiously anticipated this summer. We apologize for any confusion or inconvenience arising from the error.

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