



### TABLE OF CONTENTS

Introduction	1
Regional	1
Alberta	1
British Columbia	3
Northwest Territories	4
Yukon	4

### INTRODUCTION

Welcome to Lawson Lundell's Energy Law Newsletter. Written and published quarterly by Lawson Lundell lawyers, the newsletter is intended to inform readers of recent energy issues relevant to Western and Northern Canada. For further information about this newsletter or Lawson Lundell, please contact Chris Sanderson (Vancouver office -contact information on back page) or visit our web site at [www.lawsonlundell.com](http://www.lawsonlundell.com).

### REGIONAL

#### Enbridge Proposes Alberta-BC Pipeline

In early October Enbridge proposed a \$1.9-billion (US) plan to build a 30-inch diameter, 400,000 barrel per day oil pipeline from northern Alberta's oil sands to a yet-to-be-determined BC port. The proposal is part of Enbridge's larger "continental self-sufficiency" strategy, addressing concerns that have arisen regarding North American energy security since the September 11, 2001 terrorist attacks in the United States. Under the proposal, oil would be shipped from the coast to markets in California and Asia. The company has said the proposal depends on sufficient support from producers materializing before the end of 2004, but that it could be operational by 2009.

#### Fortis to Acquire Aquila's Canadian Subsidiaries

Aquila and Fortis announced a \$1.36 billion share purchase agreement in

September of this year that would transfer to Fortis the shares of Aquila's Alberta and BC subsidiaries. Completion of the transaction would end Aquila's foray into Canada, which started in 1987 with the purchase of West Kootenay Power and put Newfoundland-based Fortis firmly into Western Canada as an electricity generator, transmitter and retail distributor.

#### TransCanada Mainline Toll Increase

In late July the NEB approved a \$17 million increase in TransCanada's revenue requirement for transportation service on its Mainline for 2003. The new resulting tolls will remain interim pending TransCanada's appeal to the Federal Court of earlier NEB decisions regarding the appropriate rate of return on common equity.

### ALBERTA

#### Bitumen Conservation Requirements and Gas/Bitumen Producer Disputes

On July 22, 2003 the Alberta Energy and Utilities Board (AEUB) issued General Bulletin 2003-28 announcing bitumen conservation requirements for gas production from the Wabiskaw-McMurray in the Athabasca Oil Sands area. Following six years of consultation and review, the AEUB ordered the interim shut-in of Wabiskaw-McMurray gas production in approximately 938 gas wells in the area. Believing that associated gas production presents an unacceptable risk to bitumen recovery using steam assisted gravity drainage, and noting that the energy content

of the bitumen reserves at risk is about 600 times larger than the energy content of the gas in the area the AEUB ordered, all area wells shut-in on an interim basis effective September 1, 2003, unless operators filed a temporary exemption with the AEUB. Wabiskaw-McMurray gas production is exempt on an interim basis provided that a licensee has evidence to show that natural gas extraction does not affect the potential extraction of bitumen, or alternatively, that gas production was approved after July 1, 1998.

To date, affected producers have filed over 600 exemptions to the AEUB's order. Certain producers have also applied to the Alberta Court of Appeal for a stay of the shut-in order. Final decisions respecting the production status of a gas zone will be made following the completion of the AEUB's regional geological study and, if necessary, an AEUB hearing. The AEUB intends to decide the status of all gas production within the area of concern by April 1, 2004.

In another bitumen-natural gas dispute, each of BP Canada, Devon Canada and Paramount Resources have been granted leave to appeal AEUB Decision 2003-023, in which the AEUB concluded that gas production in certain zones within the Chard-Leismer area presents a high risk to future bitumen recovery, and ordered the shutting-in of 39 gas-producing wells located within the high-risk zones. Each of the parties had complained that the AEUB failed to provide proper reasons for its

decision. The Alberta Court of Appeal agreed that the Board may have failed to provide an adequate explanation as to why it reached the conclusions it did. The Court further agreed with Devon and Paramount that there was a serious issue as to the relationship between the Board staff and the Board panel hearing the application – the Board may have erred in using its staff experts to provide explanation, advice and opinion on evidence in the absence of parties to the hearing, and possibly on data not in evidence at the hearing at all. The separate appeals will be heard together.

### **ATCO Seeks Approval to Sell Certain Retail Assets to Direct Energy**

ATCO Electric and ATCO Gas have requested approval from the AEUB to transfer certain retail natural gas and electricity assets to Direct Energy. The application further requests approval for Direct Energy to perform certain regulated retail functions on behalf of ATCO Electric and ATCO Gas, including being the Default Supply Provider, and providing both a Regulated Rate Tariff for eligible electric consumers and a Default Rate Tariff for eligible natural gas consumers. The AEUB heard the application for approval of the asset sale in August. A decision is expected early in the new year. Direct Energy is also waiting for AEUB approval to perform regulated retail functions before it commences unregulated retail operations in Alberta.

### **EPCOR Exits Residential, Farm and Small Commercial Markets**

As of October 1, 2003, EPCOR no longer offers competitive contracts to residential, farm and small commercial natural gas and electricity customers. Seeking to focus business growth in commercial, industrial and wholesale markets as well as generation, EPCOR will continue to provide service to customers with existing competitive contracts until the residential, farm and small commercial contracts business is sold to a third party.

### **AEUB Jurisdiction re: First Nation Duty to Consult**

The Frog Lake First Nation and the Kehewin Cree Nation (the Bands) have been granted an extension of time to apply for leave to appeal AEUB Decision 2003-013, in which the Board approved certain Canadian Natural Resources Limited (Canadian Natural) well licences and bitumen recovery schemes within the Bands' traditional territory. The Bands had argued that they had not been adequately consulted. In Decision 2003-013, the Board concluded that while the AEUB administers public consultation requirements pursuant to the *Energy Resources Conservation Act* and its own Guide 56, Energy Development Application Guide, there was no process for the AEUB to adjudicate constitutional issues, namely the failure of the Crown to fulfill treaty obligations. The Bands sought leave to appeal the decision after the expiry of the 30 day limitation period. Holding that the time for leave to appeal should be extended, the Alberta Court of Appeal concluded that there is a reasonable chance that



leave to appeal will be granted on the basis that the AEUB may have had jurisdiction to consider whether the Bands had been adequately consulted. On a related topic, the Supreme Court of Canada held on October 3 in *Paul v British Columbia (Forest Appeals Commission)* that provincially constituted administrative tribunals are not constitutionally barred from considering arguments regarding the obligation to consult.

## BRITISH COLUMBIA

### BC Hydro Heritage Contract, Stepped Rate and Retail Access Hearing

The BCUC's recommendations regarding a Heritage Contract, Stepped Rates and Retail Access were publicly released on October 24. The BCUC has recommended to the BC government that it implement BC Hydro's so called "revenue requirement" Heritage Contract proposal, rather than a "fixed priced, fixed quantity" proposal similar to that imposed upon Hydro Quebec and espoused by one of the intervenors. Under the revenue requirement model the actual cost of supplying electricity from BC Hydro's existing generation resources would be passed on to ratepayers through the use of deferral accounts and traditional revenue requirement proceedings.

Regarding "stepped rates" for industrial and large commercial customers, the BCUC has recommended a 2 tier rate as proposed by BC Hydro that is intended to charge the opportunity cost of energy at the

margin while leaving the total bill unchanged for those customers that do not vary their consumption from historical levels. The Commission recommended that the tier 2 rate be reflective of BC Hydro's long term opportunity cost of new supply, and apply to the last 10% of each customer's historical consumption and all increased consumption. The BCUC recommended that the new 2 step rate, or an alternative time-of-use rate incorporating similar principles, be made mandatory for all but a few of BC Hydro's existing customers taking power under its industrial rate schedule.

Finally, the Commission has recommended that implementation of retail access for industrial and large commercial class customers be implemented after the newly-formed BC Transmission Corporation files its first tariff application, and after BC Hydro has filed applications for the stepped rate, time of use rate, and generation access principles. The full text of the recommendations may be downloaded from the BCUC website at <http://www.bcuc.com>.

### Georgia Strait Crossing Pipeline and Vancouver Island Generation Project

On July 30, the NEB / CEEA Joint Review Panel (JRP) released its 100-page report following a public hearing into the application by Georgia Strait Crossing Pipeline Limited (GSX) for a certificate of public convenience and necessity to construct the Canadian portion of the GSX Project.

The GSX Project is a proposed natural gas pipeline from Sumas, Washington to Vancouver Island. It is a joint undertaking by BC Hydro and Williams Gas Pipeline Company. The JRP concluded that the GSX Project would *not* likely result in adverse environmental effects, assuming implementation of the JRP's recommendations and appropriate mitigation by GSX as identified during the review. The environmental effects considered by the JRP included those of the proposed downstream Vancouver Island Generation Project (VIGP), a point of some contention in the hearing. The Government of Canada will now consider and respond to the JRP's recommendations.

Meanwhile, on September 8, the British Columbia Utilities Commission (BCUC) issued a decision denying a CPCN for the VIGP. The VIGP is a 265 MW combined cycle gas turbine generation plant that a BC Hydro subsidiary proposed to build at Duke Point, near Nanaimo. The VIGP, proposed by a BC Hydro subsidiary, would depend on the GSX Project for gas supply.

The BCUC accepted that the reliability of Vancouver Island's electricity supply must be improved by 2007, and the appropriateness of on-Island generation as the next resource. However, the BCUC determined that the reliability gap was less than BC Hydro's estimate and was unable to find the VIGP to be the most cost-effective solution for addressing it. Accordingly, the BCUC denied the application, recommended that

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BC Hydro issue a call for tenders for on-Island capacity and energy, and said it would consider another application for CPCN approval or energy purchase agreements on an expedited basis. BC Hydro will be permitted to consider the VIGP project as part of the call for tender process.

## BC Hydro Green Energy Call

In September of this year BC Hydro and its sole shareholder, the Province of British Columbia, jointly announced the results of BC Hydro's most recent "Green Power" energy call: 1,800 gigawatt hours of energy per year are to be purchased through 10 and 20 year contracts from 16 different IPP projects. The original plan called for incremental purchases of up to 800 gigawatt hours of new supply per year, but as explained by BC Hydro, the prices offered in the procurement process and the need for new, reliable supply made the larger acquisition economic. The 16 projects are expected to yield about \$800 million in private investment into BC's IPP sector.

## Terasen BC Gas Rates

Terasen's BC retail gas rates, established through a negotiated settlement process, were approved by the Commission in late July. Rates were approved for a 3 year period based on a performance-based ratemaking plan.

## NORTHWEST TERRITORIES

### NWT PUB Approves Rate Increase

The NWT PUB approved the NTPC's General Rate Application Phase II final rates on October 10, 2003 (Decision 8-2003). The new rate schedule comes into effect on November 1, 2003, increasing many users' rates. The NWT PUB also approved new terms and conditions of service for NTPC. Notably, the PUB also confirmed its own authority to determine whether the NTPC effectively consults with communities whose rates may significantly increase following a NTPC capital expenditure in the community.

## THE YUKON

### Alaska Highway Gas Pipeline -- Progress on Aboriginal Issues

Two Yukon First Nations whose traditional territories include the route of the Alaska Highway gas pipeline have made important steps forward in resolving their land claims. On October 18, 2003, the Kluane First Nation, located in the southwest Yukon, signed a land claim agreement and self government agreement with the Government of Canada and the Government of the Yukon. Under the agreements, the Kluane First Nation will hold approximately 913 square kilometres of land as settlement lands, including 647 square kilometres of subsurface lands, along with financial compensation and economic development payments totalling approximately \$20.94 million. The agreements are expected to be brought into force early in 2004.

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