CAC/MSOS - 1012

PUBLIC INTEREST LAW CENTRE
402-294 PORTAGE AVENUE ▲ WINNIPEG, MANITOBA ▲ R3C 0B9
TEL: 204.985.8540 ▲ FAX: 204.985.8544 ▲ E-MAIL: centre@pilc.mb.ca

CAC/MSOS

CLOSING ARGUMENT

JUNE 8, 2004

BOOK OF REFERENCES

1. Inverhuron & District Ratepayers v. Canada (M.O.E.) 39 C.E.L.R. (N.S.) Paragraph 55

2. Re West Northumberland Landfill 19 C.E.L.R. (N.S.) Paragraphs 88, 92, 93 and 94

3. Alberta Wilderness Assn. v. Cardinal River Coals Ltd. (T.D.) Paragraph 80

4. British Columbia Utilities Commission - Resource Planning Guidelines

5. Terms of Reference - Clean Environment Commission Public Hearing on the Manitoba Hydro Wuskwatim Proposals

55 The essence of the environmental assessment process is to predict the environmental effects of a proposed project and then assess their significance. This process must be conducted as early as practicable in the planning stages of a project. By its very nature, then, the process is subject to some uncertainty. As the Court recognized in *Alberta Wilderness Assn. v. Express Pipelines Ltd.*, at 181. No information about probable future effects of a project can ever be complete or exclude all possible future outcomes."[17] It went on to opine that "...given the nature of the task, we suspect that finality and certainty in environmental assessment can never be achieved."[18]

---

[17](1996), 137 D.L.R. (4th) 177 (Fed. C.A.)

[18]*Ibid.* at 183.

88 In the past, the Ministry as required proponents to consider as part of their comparative evaluation the "do nothing alternative", as a benchmark against which to determine whether the undertaking was needed. The importance of determining need is discussed in a long line of board decisions (e.g., *Re Highway 416,*1987, EA-86-01, pp.23-4), and in Ministry publications. For example, the MOEE's July 1989 *Interim Procedures for Environmental Assessment Planning and Approvals* (tab 11 of the Township's authorities book*)* states:

> The concept of need is subjective and its definition may vary depending on the perspective of the participant. The proponent is expected to address "need" from its own perspective.
>
> At the outset of planning the proponent is aware of a perceived need to solve a problem or to take advantage of an opportunity which is subsequently tested in the evaluation of alternatives throughout the planning process. A clear description of the problem or opportunity provides one element of "need".
>
> The proponent addresses "need" in evaluating the advantages and disadvantages of alternatives. The results of the evaluation process serve to clarify, quantify and justify the perceived need.
>
> The need for the undertaking is explicitly established at the end of the planning process when a preferred alternative is selected. It should be evident that the balance of advantages to disadvantages is better, based on the study information for the undertaking than for all the other alternatives considered, including the "do nothing" alternative.
>
> The comparison of the undertaking to the no nothing alternative is a key aspect of demonstrating the "need" for the undertaking. This provides the basis for determining that the advantages of proceeding with the undertaking outweigh the disadvantages to the proponent and the people of the Province.
>
> In the final analysis, the Minister, of the Board will consider the proponent's information on "need" as well as any submissions from other parties, in determining whether the undertaking should be approved. (Par.3.8.2)

92 The Ministry has questioned whether the magnitude and duration of a proposed undertaking is related to the issue of need. Previous board decisions have considered not only the need for creation of the undertaking, but also its size and service life : see *Storrington* at p. 35. We find it difficult to understand how the scale of an undertaking can be ignored when considering whether there is a need for it. This subject came into focus in the evidence and submissions related to the proponent's Issues 4 (landfill capacity) and 5 (minimum site size), which will be dealt with in a separate ruling.

Elements of the Approval Decision

93 This leads us to state our approach to determining the question of approval of the undertaking. After determining that the EA should be accepted, and considering the factors listed in s. 14(2), the decision to approve should, in our view, require the board to be satisfied with respect to the following considerations, among other things:

> (a) The undertaking must be the preferred alternative among an adequate set of reasonable and suitable alternatives, having regard to the purpose of the Act.
>
> (b) The advantages to the environment of the undertaking must outweigh the disadvantages. It must be reasonable and worthy of approval, having regard for the purpose of the Act.
>
> (c) Where the undertaking creates a risk of causing environmental harm, the need for the undertaking must first be clearly established.
>
> (d) Where environmental harm will be created by the undertaking, the harm must be adequately mitigated or eliminated.

94 We agree with Mr. Moran that this determination involves value judgments, and that there is no absolute best or preferred choice. It is the task of the board to rely on its judgment and experience, as well as the evidence and submissions, in making this decision. In view of the purpose of the Act, public input may be a critical consideration in the approval decision.

80 While the alternative means of underground mining is generally considered in the Joint Review Panel's report, the effects of this alternative means, as compared to the effects of open-pit mining, are not considered in any meaningful way. I agree with the applicants' argument that simply identifying potential "alternative means" without discussing their comparative environmental effects fails to provide any useful information to decision makers, and fails to meet the requirements of paragraph 16(2) (b) of CEAA.

BRITISH COLUMBIA UTILITIES COMMISSION

Resource Planning Guidelines

Issued: December 2003

TABLE OF CONTENTS

PURPOSE AND SCOPE OF THE RESOURCE PLANNING GUIDELINES

The Commission's mandate to direct and evaluate the resource plans of energy utilities is intended to facilitate the cost-effective delivery of secure and reliable energy services. The Resource Planning Guidelines (the "Guidelines") outline a comprehensive process to assist the development of such plans.

The Utilities Commission Act ("UCA") was amended in 2003 to provide the Commission with a mandate to implement the policy actions of the Provincial Government's November 2002 energy policy, "Energy For Our Future: A Plan For BC" ("Energy Plan"). Amendments to Section 45 of the UCA expand upon and clarify the planning requirements of utilities and the Commission's role to review filed plans to determine whether expenditures are in the public interest and whether associated rate changes are necessary and appropriate. The additions to Section 45 of the UCA are as follows:

45 (6.1) A public utility must file the following plans with the commission in the form and at the times required by the commission;

(a) a plan of the capital expenditures the public utility anticipates making over the period specified by the commission;

(b) a plan of how the public utility intends to meet the demand for energy by acquiring energy from other persons, and the expenditures required for that purpose;

(c) a plan of how the public utility intends to reduce the demand for energy and the expenditures required for that purpose.

(6.2) After receipt of a plan filed under subsection (6.1), the commission may:

(a) establish a process to review all or part of the plan and to consider the proposed expenditures referred to in the plan;

(a) determine that any expenditure referred to in the plan is, or is not at that time, in the interests of persons within British Columbia who receive, or who may receive, service from the public utility, and

(b) determine the manner in which expenditures referred to in the plan can be recovered in rates.

On the basis of subsection 6.1, the Commission will require that any resource plans filed under paragraph 6.1, (a), (b) and (c) be prepared in accordance with the Guidelines.

The Commission requires consideration of all known resources for meeting the demand for a utility's product, including those which focus on traditional and alternative supply sources (including "BC Clean Electricity" as referred to in the Energy Plan), and those which focus on conservation of energy and Demand Side Management ("DSM").[1] Resource planning is intended to facilitate the selection of cost-effective resources that yield the best overall outcome of expected impacts and risks for ratepayers over the long run. The process aids in defining and

[1] *Demand Side Management* may be defined as a deliberate effort to decrease, shift or increase energy demand. Utilities develop DSM programs to encourage customers to enact DSM measures. Because of measurement difficulties and uncertainty about consumer behavior, DSM programs should be evaluated before and after implementation to determine their full impacts.

assessing market-based costs and benefits, while also entailing the assessment of tradeoffs between other expected impacts that may vary across alternative resource portfolios. Such impacts may be associated with objectives such as reliability, security of supply, rate stability and risk mitigation, or specific social or environmental impacts. In sum, a resource planning process that assesses multiple objectives and the tradeoffs between alternative resource portfolios is key to the development of a cost-effective resource plan for meeting demand for a utility's service.

In most circumstances, Certificates of Public Convenience and Necessity ("CPCN") applications should be supported by resource plans filed pursuant to Section 45 of the UCA. The Commission expects that resource plans will help facilitate the review of utility revenue requirements and rate applications.

The Guidelines do not alter the fundamental regulatory relationship between the utilities and the Commission. The Guidelines do not mandate a specific outcome to the planning process, nor do they mandate specific investment decisions. The Guidelines provide general guidance regarding Commission expectations of the process and methods for utilities to follow in developing plans that reflect their specific circumstances. More specific directions regarding resource plans will be provided to utilities on a utility to utility basis. Further directions may address issues regarding the elements of the resource plan or the underlying methodology. The Commission will review resource plans in the context of the unique circumstances of the utility in question. For this reason, the Guidelines do not distinguish between the circumstances of small and large utilities or between transmission and distribution utilities, nor do they prescribe specific planning horizons or approaches to resource acquisition. Although the Guidelines are not prescriptive in that sense, after review of a resource plan the Commission expects to be prescriptive on a utility by utility basis, as necessary, to facilitate cost-effective delivery of a reliable and secure supply that meets demand for a utility's service.

RESOURCE PLANNING GUIDELINES

1. Identification of the planning context and the objectives of a resource plan

Key underlying issues and assumptions that inform the planning context should be identified and discussed (e.g., reliability and security issues, risk factors, major uncertainties). Objectives include, but are not limited to: adequate and reliable service; economic efficiency; preservation of the financial integrity of the utility; equal consideration of DSM and supply resources; minimization of risks; compliance with government regulations and stated policies; and consideration of social and environmental impacts.[2]

2. Development of a range of gross (pre-DSM) demand forecasts

In making a demand forecast, it is necessary to distinguish between demographic, social, economic and technological factors unaffected by utility actions, and those actions the utility can take to influence demand (e.g. rates, DSM programs). The latter actions should not be reflected in the utility's gross demand forecasts.[3] More than one forecast would generally be required in order to reflect uncertainty about the future: probabilities or qualitative statements may be used to indicate that one forecast is considered more likely than others. The energy end-use categories[4] used to analyze DSM programs should be compatible with those used in demand forecasting, so that at any point a consistent distinction can be made between demand with and without DSM on an end-use category-specific basis. Thus, the gross demand forecast should be structured in such a way that the savings, load shifting or load building due to each DSM resource can be allocated to specific end-uses in the demand forecast.

---

[2] Bonbright, Danielsen and Kamerschen, (Principles of Public Utility Rates, 1988, Ch.8, p.165) suggest that the rates set by utility commissions invariably involve some discretionary judgment about the extent to which broader social principles should influence ratemaking. Because of social and environmental impacts, the rates charged by utilities may be allowed to deviate from those that would result from a rate determination based exclusively on financial least cost. The objectives to be addressed may be identified by the utility, intervenors, or government. The BC Utilities Commission interprets its jurisdiction as extending only to consideration of environmental and social impacts that are likely to become financial costs in the foreseeable future.

[3] In other words, gross forecasts represent an attempt to simulate markets in which the utility did nothing to influence demand. Of course, this is not entirely possible. Utilities will continue to require rate increases and existing DSM programs will affect demand as will already ordered rate design changes. However, the assumptions made with respect to these factors in estimating future gross demand should be clearly specified so that the effects of these assumptions may be distinguished from the effects of future utility actions designed to influence demand.

[4] The term *End-use categories* is intended to mean energy consumption by categories of end-user, such as industrial, commercial, or residential. Guideline No. 2 does not prescribe *end-use forecasting* or *end-use modeling*, but rather requests that forecast outputs and DSM results be organized and checked according to end-use categories.

3. Identification of supply and demand resources

Feasible[5] individual supply and demand resources, both committed and potential, should be listed. Individual resources are defined as indivisible investments or actions by the utility to modify energy and/or capacity supply, or modify (decrease, shift, increase) energy and/or capacity demand.

4. Measurement of supply and demand resources

Each supply-side and demand-side resource must be measured against the objectives established under Guideline No. 1. This includes identifying utility and customer costs (life cycle costs, impact on rates, etc.), associated risks, and lost opportunities.[6] Characterizing the feasible supply and demand resources could also include reporting how these resources perform[7] relative to specific social and environmental objectives. This can facilitate a more comprehensive understanding of the tradeoffs between objectives as they may be associated with various supply and demand resources. Supply and demand resource cost estimates should represent the full costs of achieving a given magnitude of the resource. These cost estimates may be represented as supply curves; i.e. graphs showing the unit costs associated with different magnitudes of the resource.

5. Development of multiple resource portfolios

For each of the gross demand forecasts, several plausible resource portfolios should be developed, each consisting of a combination of supply and demand resources needed to meet the gross demand forecast. The gross demand forecasts and the resource portfolios should cover the same period, generally 15 to 20 years into the future.

6. Evaluation and selection of resource portfolios

For each of the gross demand forecasts, the set of alternative resource portfolios that match the forecast are assessed against the objectives. Analysis of the tradeoffs between portfolios and how they perform under uncertainty will facilitate determining which portfolio performs best relative to the stated objectives. This process will lead to the selection of a set of preferred resource portfolios, each portfolio matching one of the gross demand forecasts.[8]

---

[5] Feasible resource options are defined as those options consistent with the objectives of the resource planning process, as established under Guideline No. 1. For example, government policy may rule out a particular technology or form of energy.

[6] *Lost opportunities* are opportunities that, if not exploited promptly, are lost irretrievably or rendered much more costly to achieve. Examples can include cogeneration opportunities that are available but not taken when renovating a pulp and paper mill, or additional insulation that is not installed in a new house.

[7] Performance measures may be quantitative or qualitative.

[8] Guidelines No. 4 through No. 6 may require an iterative process to account for any interdependencies.

7. Development of an action plan

The selection process in Guideline No. 6 provides the components for the action plan. The action plan consists of the detailed acquisition steps for those resources (from the selected resource portfolio) which need to be initiated over the next four years in order to meet the most likely gross demand forecast. The action plan should include a contingency plan that specifies how the utility would respond to changed circumstances, such as changes in loads, market conditions or technology and resource options. For resources with considerable uncertainty, the action plan should incorporate an experimental design and monitoring plan to allow for hindsight evaluation of associated market impacts and full resource costs.

8. Stakeholder input

Although utility management is responsible for its resource planning and resource selection process, utilities should normally solicit stakeholder input during the resource planning process. Methods could include stakeholder collaboratives, information meetings, workshops, and issue papers seeking stakeholder response. Utilities are encouraged to focus such efforts on areas of the planning process where it will prove most useful and to choose methods that best fit their needs.

9. Regulatory input

To streamline the regulatory process, utilities are encouraged to seek review and comment from Commission staff during the various phases of resource plan preparation.

10. Consideration of government policy

A resource plan filed in accordance with the UCA and these Guidelines should be consistent with government policy, as it is expressed in legislation (e.g. efficiency standards) or in specific policy statements and directives. Emerging policy issues, such as increased control of emissions, may be addressed as risk factors.

11. Regulatory review

Upon receipt of a resource plan filed pursuant to Section 45, paragraph 6.1, the Commission will establish a review process, as necessary, pursuant to Section 45, paragraph 6.2. A review may provide, as the Commission considers appropriate, opportunities for written and/or oral public comment.

Terms of Reference

Clean Environment Commission Public Hearing on the Manitoba Hydro Wuskwatim Proposals

BACKGROUND

On December 7, 2001, Manitoba Conservation received separate Environment Act Proposals from Manitoba Hydro respecting the proposed Wuskwatim Generating Station and associated transmission facilities (Wuskwatim Proposals). A cooperative provincial/federal review of the proposals is underway in accordance with the *Canada-Manitoba Agreement on Environmental Assessment Cooperation*. The review includes the preparation of an Environmental Impact Statement in accordance with Guidelines prepared by Manitoba and Canada and finalized after a public consultation process led by the Clean Environment Commission. As well, a Comprehensive Study Report prepared pursuant to the requirements of the *Canadian Environmental Assessment Act* will be prepared. It was also decided that the review would include a public hearing of the Clean Environment Commission (the Commission).

MANDATE OF THE HEARINGS

The Commission shall conduct an integrated public hearing, in appropriate locations in Winnipeg and Northern Manitoba as determined by the Commission, to consider:

- Firstly, the justification, need for and alternatives to the Wuskwatim Proposals; and
- Secondly, the potential environmental, socio-economic and cultural effects, of the construction and operation of the Wuskwatim Proposals.

The Commission shall conduct the hearing in general accordance with its *Process Guidelines Respecting Public Hearings* which include procedures for Pre-Hearing Meetings or Conferences and Proprietary Information.

Following the public hearing the Commission shall provide a report to the Minister of Conservation pursuant to Section 7(3) of *The Environment Act*.

The Commission may, at any time, request that the Minister of Conservation review or clarify these Terms of Reference.

SCOPE OF THE REVIEW

For the justification, need for and alternatives to the Wuskwatim Proposals component of the hearing, the Commission shall:

- Consider whether all alternative resource options have been considered and whether the Wuskwatim Proposals have been selected on reasonable grounds, including economic viability as an export market driven project and relevant technical factors. The review of economic viability shall consider the Wuskwatim Proposals in their entirety.

.../2

- Include the effect, if any, of the Wuskwatim Proposals on Manitoba Hydro customer rates and the Corporation's financial stability. The partnership between the Nisichawayasihk Cree Nation and Manitoba Hydro and the associated arrangements for such partnership are to be described to the degree such information is required to understand the financial analysis.

- Give consideration, at a conceptual level, to the environmental, socio-economic and cultural effects of the Wuskwatim Proposals relative to available alternative resources.

- Consider Manitoba Hydro's electricity generation capability, market prospects and risks as they pertain to the Wuskwatim Proposals including:

    - load growth in export jurisdictions;
    - energy supply situation in the export jurisdictions; and
    - energy pricing trends and industry restructuring.

For the potential environmental, socio-economic, and cultural effects of the Wuskwatim Proposals component of the hearing, the Commission shall consider the Environmental Impact Statement, and public concerns, and with consideration of the evidence received on the justification, need for, and alternatives to the Wuskwatim Proposals, provide a recommendation on:

- Whether Environment Act Licences should be issued to Manitoba Hydro for the Wuskwatim Proposals.

Should the Commission recommend the issuance of Environment Act Licences for the Wuskwatim Proposals, then appropriate recommendations should be provided respecting:

- Measures proposed to mitigate any adverse environmental, socio-economic, and cultural effects resulting from the Wuskwatim Proposals and where appropriate, to manage any residual adverse effects; and

- Future monitoring and research that may be recommended in relation to the Wuskwatim Proposals.

The Clean Environment Commission's recommendations shall incorporate, consider and directly reflect, where appropriate, the Principles of Sustainable Development and Guidelines for Sustainable Development as contained in *Sustainable Development Strategy for Manitoba*.