**ISSUE:**
**May 2017**

REGULATORY LAW CHAMBERS

# ENERGY REGULATORY REPORT

***Regulatory Law Chambers*** *is a Calgary-based boutique law firm dedicated to excellence in energy regulatory matters. We have expertise in oil and gas, electricity, including renewable energies and commercial matters, tolls and tariff, compliance and environmental related matters. We frequently represent clients in proceedings before the Alberta Energy Regulator ("AER"), the Alberta Utilities Commission ("AUC"), the National Energy Board ("NEB"), all levels of the Courts, and in energy related arbitrations and mediations.* ***Our advice is practical and strategic. Our advocacy is effective.***

*This monthly report summarizes matters under the jurisdiction of the AER, the AUC and the NEB and proceedings resulting from AER, AUC and NEB decisions. For further information, please contact Rosa Twyman at Rosa.Twyman@RLChambers.ca or John Gormley at John.Gormley@RLChambers.ca.*

**IN THIS ISSUE:**

## FEDERAL COURT OF APPEAL

***Tsleil-Waututh Nation v Canada (Attorney General) (2017 FCA 102)***
***Leave to Intervene - FCA Rule 109 and 110 – Approved and Denied***

In this decision, the Federal Court of Appeal ("FCA") considered two motions for leave to intervene in the FCA proceedings considering sixteen consolidated judicial review applications arising from the NEB Report, dated May 9, 2016 and Order in Council PC 2016-1069, dated November 29, 2016, approving the proposed Trans Mountain Expansion Project (the "Trans Mountain Expansion Project Approvals").

The Attorney General of Alberta (the "Alberta AG") and the Tsartlip First Nation (the "Tsartlip") each made such motions to the FCA requesting leave to participate as interveners. The FCA granted the Alberta AG leave to participate as an intervener, but denied the Tsartlip's motion.

The Trans Mountain Expansion Project

The FCA explained that the proposed Trans Mountain Expansion Project (the "Project") would add new pipeline, in part through new rights of way, thereby expanding the capacity of the existing 1,150-kilometre pipeline running from Edmonton, Alberta to Burnaby, British Columbia, from 300,000 to 890,000 barrels of oil per day.

Alberta AG Motion

The Alberta AG made its motion for leave to intervene under Rule 110 of the *Federal Courts Rules*, SOR/98-106 (the "*Rule(s)*"), which provides:

> Where a question of general importance is raised in a proceeding, other than a question referred to in section 57 of the Act,
>
> (a) any party may serve notice of the question on the Attorney General of Canada and any attorney general of a province who may be interested;
>
> (b) the Court may direct the Administrator to bring the proceeding to the attention of the Attorney General of Canada and any attorney general of a province who may be interested; and
>
> (c) the Attorney General of Canada and the attorney general of a province may apply for leave to intervene. [Emphasis added.]

The FCA held that Rule 110 of the *Rules* contemplates a special role for attorneys general and provides them a broader right to apply to intervene in order to advance the public interest under Rule 110(c), even if such an attorney-general does not satisfy the prerequisites in Rules 109, 110(a) and 110(b) of the *Rules*.

The FCA explained that Rule 110 of the *Rules* require that there be "a question of general importance raised in the proceeding." That requirement can be met where:

(a) There is a question that affects the interests of the government or the population in the relevant jurisdiction in a general way; or

(b) Where serious questions are raised in proceedings that themselves are of general importance.

The FCA found that the Alberta AG intended to make arguments to encourage the Court to adopt clear, consistent and predictable rules and processes to facilitate the consideration of resource development projects in Alberta in a manner that respects section 35 of the *Constitution Act, 1982*.

The FCA further found that the legal issues raised in the appeal are of general importance. Such issues identified by the FCA included:

(a) Issues concerning the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52;

(b) Issues concerning the *Species at Risk Act*, SC 2002, c 29; and

(c) Issues relating to the rights and interests of Indigenous peoples.

The FCA found that taken together, the Alberta AG had shown a strong nexus between the issues raised in the appeal and the interests of the Government of Alberta and the population it serves.

The FCA held that the Alberta AG "easily" met the test for leave to participate in the appeal as an intervener under Rule 110 of the *Rules*.

Tsartlip Motion

The FCA, citing its decision in *Rothmans, Benson & Hedges Inc. v Canada (Attorney General)*, [1990] 1 F.C. 84 (T.D.), affirmed [1990] 1 F.C. 90, 103 N.R. 391 (C.A.), explained that with respect to an intervention motion brought under Rule 109 of the *Rules*, the FCA will consider the following factors:

(a) Is the proposed intervenor directly affected by the outcome?

(b) Does there exist a justiciable issue and a veritable public interest?

(c) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

(d) Is the position of the proposed intervenor adequately defended by one of the parties to the case?

(e) Are the interests of justice better served by the intervention of the proposed third party?

(f) Can the Court hear and decide the cause on its merits without the proposed intervenor?

The FCA held that the Tsartlip's motion was an improper attempt to obtain full party status in the application for judicial review, without having filed its own judicial review application.

The FCA found that, in substance, the Tsartlip had not brought a motion for leave to intervene. Rather, in the FCA's opinion, the Tsartlip had brought "an application for judicial review in the guise of a motion to intervene."

The FCA found that the Tsartlip intended to argue that the NEB Decision was unreasonable in the administrative law sense.

Specifically, in its notice of motion, the Tsartlip stated that they intended to raise the issue as to:

> "whether the environmental assessment done by the under the [sic] *Canadian Environmental Assessment Act, 2012*...and section 52(3) of the *National Energy Board Act*...was lawful" as well as "the issue of the assessment of significant environmental impacts under [the Canadian Environmental Assessment Act, 2012]."

The FCA found that, in effect, the Tsartlip intended to argue that the decision must be quashed because it unreasonably affected the Tsartlip's own rights and interests. The FCA held that Rule 109 of the *Rules* cannot be used, intentionally or unintentionally, as an end-run around the potential liability for costs that judicial review applicants face.

The FCA explained that successful moving parties for intervention often propose to rely on the existing evidentiary record, but propose to do something different than the existing parties. Examples noted by the FCA included interveners that:

(a) propose to invoke a body of jurisprudence that existing parties have not invoked;

(b) ask the Court to interpret certain jurisprudence differently; or

(c) acquaint the Court with the larger implications associated with its ruling.

The FCA found that the Tsartlip were not proposing to make submissions that differed from the Tsleil-Waututh Nation, who was one of the judicial review applicants. The FCA noted that the Tsartlip did not call into question the capability or willingness of the Tsleil-Waututh Nation to advance all of the evidence in the record relevant to the assessment of the effect of the Project on the Southern Resident Killer Whale, including the evidence offered by the Tsartlip concerning the importance of this species to them.

The FCA found that the Tsartlip failed to meet the test for leave to intervene under Rule 109 of the *Rules* and therefore dismissed the Tsartlip's motion.

The FCA noted that, although intervention was not open to them, the Tsartlip could still participate in other valuable, less expensive ways, such as offering the services of their counsel to assist the Tsleil-Waututh Nation and other applicants with aligned interests.

***Tsleil-Waututh Nation v. Canada (Attorney General) (2017 FCA 116)***
***Judicial Review - Evidence Admissibility***

This is another procedural decision within the consolidated Federal Court of Appeal ("FCA") proceeding considering sixteen judicial review applications from the Trans Mountain Expansion Project Approvals (discussed above).

In this decision, the FCA considered objections to the admissibility of various parts of:

(a) the two affidavits served by the respondent Trans Mountain Pipeline ULC ("TMP"); and

(b) the one affidavit served by the other respondent, the Attorney General of Canada ("Canada").

The FCA explained that its consideration of such objections was governed by a comprehensive procedural order dated March 9, 2017. Under that order, the parties were permitted to object to the admissibility of all or part of any affidavits and, following the receipt of submissions, the FCA would rule on any such objections.

The procedural order also contained some general guidance on admissibility for the parties to consider, including:

(a) The general rule is that the only evidence admissible in applications for judicial reviews of administrative decisions is the record before the administrative decision-makers;

(b) The general rule is that new issues should not be raised in applications from administrative decisions; and

(c) However, one exception to (a) and (b) is where the administrative decision-maker did not have the power to receive full evidence on the issue or did not have full jurisdiction to deal with the issue: for this reason, issues relating to the duty to consult Indigenous peoples may be permitted.

<u>Inclusion of Background Information and Summary of Record Below</u>

The FCA noted that all parties accepted that affidavits filed in a judicial review application can provide background explanations and summaries regarding the administrative

proceedings below and the massive record of those proceedings. However, the FCA cautioned that these are admissible for only one purpose: to assist the reviewing court and orient it.

The FCA found that all of the background statements objected to, were admissible for the limited purpose of orienting the court, but not as evidence of what actually happened below. The FCA stated that evidence of what actually happened below was to be found exclusively in the record of the administrative proceedings.

The FCA also considered applicants' submissions that some of the background statements and summaries throughout the affidavits were too argumentative or contained statements of opinion. The FCA found that some of the background statements and summaries in the affidavits should have been more clinically expressed. However, the FCA assured the parties that it was "certain that the panel hearing these consolidated applications will not be misled or swayed by argumentative statements or statements of opinion."

To provide further assurance, the FCA ordered that the objections filed by the applicants to all three of the respondents' affidavits form part of the electronic record. The FCA explained that the panel would be able to read these and will exercise caution in taking the background statements and summaries as anything other than general statements adduced for the purpose of orienting the reviewing court and for no other purposes.

Evidence re TMC Engagement with Aboriginal Groups

Some of the applicants objected to evidence regarding TMC's engagement and consultation with Aboriginal groups, on the grounds that, as a matter of law, TMC's engagement with them is irrelevant, as the duty to consult is upon the Crown and is a non-delegable duty.

The FCA found the matter to be not so clear-cut and obvious that the FCA should determine the issue on an interlocutory basis. The FCA found the matter should be left for the panel hearing the matter on the basis of full argument.

Evidence re Consultation after Approvals

Some applicants objected to evidence filed regarding the duty to consult after the Order-in-Council was issued. They submitted that only material that was before the Governor in Council at the time of its decision can be relied upon concerning the issue of duty to consult.

The FCA disagreed, finding that the evidence of activities after the Governor in Council's decision might shed light on whether there were certain things not done that could have been done concerning consultation before the Governor in Council decided the matter. In addition, the FCA found such evidence may be relevant to whether there is any point in quashing the decision. The FCA stated that there may be no point in quashing the Governor in Council's decision if any deficiencies in consultation at the time of the Governor in Council's decision have subsequently been repaired.

Reply Evidence

Some applicants raised the possibility that they may have to seek leave to file reply affidavits in response to the FCA's ruling on evidentiary objections.

The FCA found that reply evidence is not necessary on the background statements and summaries contained in the affidavits due to the very limited orienting role played by those statements and the use of such statements in many of the applicants' affidavits.

The FCA stated that it would seek submissions from the parties on whether reply evidence needs to be filed with respect to Aboriginal engagement and consultation activities that occurred after the Governor in Council's decision approving the project.

## ALBERTA ENERGY REGULATOR

***Tidewater Midstream and Infrastructure Ltd. – Statement of Concern Decision on Pipeline Amendment Application (Application No. 1877230)***
***Statements of Concern – No Hearing***

In three separate letters, the AER set out its reasons for its determination that no hearing was required to consider the concerns outlined in statements of concern from a number of residents (the "Residents") regarding Tidewater Midstream and Infrastructure Ltd.'s ("Tidewater") pipeline amendment application (the "Amendment Application").

The AER noted that it had considered the following in deciding that no hearing was required:

(a) The licenced pipeline is located between 50 and 500 meters from the concerned Residents' lands;

(b) The pipeline will transport sweet natural gas and there are no setbacks associated with the licenced pipeline that affected the concerned Residents;

(c) The original pipeline application was approved by the AER on December 12, 2015;

(d) The amendments to the licence do not change the pipeline route, substance, or category;

(e) The amendments will decrease the outer diameter and the wall thickness of the pipe, and decrease the maximum operating pressure; and

(f) The scope and impact of the pipeline are unchanged.

The AER found the Residents' concerns about noise and traffic due to construction of the pipeline were concerns related to temporary disturbances, and that Tidewater would notify the Residents prior to commencing any activities in the vicinity.

The AER found that the Residents' concerns about theft and disrespect to be vague and the nature and specifics of such concerns to be unclear. The AER noted that Tidewater had committed to security measures to ensure the safety of materials and equipment on the job site. The AER advised that, should any occurrences of theft or vandalism occur in the area, the Residents should report such concerns to the RCMP and to Tidewater.

The AER concluded that the Residents had not demonstrated that they may be directly and adversely affected by approval of the Amendment Application. The AER therefore issued the applied-for amendment to Tidewater without a hearing.

***Canadian Natural Resources Ltd. – Statement of Concern Decision on Pipeline Application (Application No. OSE160038)***
***Statement of Concern – No Hearing***

Mikisew Cree First Nation ("MCFN") filed a statement of concern regarding Canadian Natural Resources Ltd. Pipeline Application No. OSE160038 (the "Application").

The AER determined that a hearing on the Application was not required to consider the concerns outlined in the MCFN's statement of concern.

The AER noted that in reaching its decision it considered that:

(a) The project is located about 20 kilometres southeast from Fort McKay, where many MCFN members live; and

(b) The proposed project is located within MCFN's traditional territory.

The AER found that MCFN did not provide site-specific information regarding the location of traditional land use sites along the proposed pipeline route or other information sufficient to demonstrate that MCFN might be directly and adversely affected by the application.

The AER issued the applied-for approval without holding a hearing.

***InterPipeline Ltd. – Request for Regulatory Appeal (Regulatory Appeal No. 1884415)***
***Regulatory Appeal Request - Granted***

The AER determined that a hearing into the regulatory appeal requested by InterPipeline Ltd. ("InterPipeline") would be held.

InterPipeline requested a regulatory appeal of a decision refusing the issuance of a formal disposition under section 38 (1) of the *Water Act*. Based on the wording of section 115 of the *Water Act*, section 36 of the *Responsible Energy Development Act* and section 4 of the *Responsible Energy Development Act General Regulation*, the AER held that InterPipeline was entitled to a regulatory appeal hearing.

The AER stated that the Chief Hearing Commissioner had been asked to assign a panel of hearing commissioners to conduct the hearing.

## ALBERTA UTILITIES COMMISSION

***Application by the Market Surveillance Administrator regarding the Publication of the Historical Trading Report (Decision 21115-D01-2017)***

***Market Surveillance Administrator – Historical Trading Report – Fair, Efficient and Openly Competitive Electricity Market Regulation***

In this decision, the AUC considered an application by the Market Surveillance Administrator (the "MSA") under subsection 51(1)(b) of the *Alberta Utilities Commission Act* ("*AUCA*") and pursuant to Section 20 of AUC Rule 001: *Rules of Practice*. In its notice and application, the MSA requested that the AUC direct the Alberta Electric System Operator (the "AESO") to stop publishing the historical trading report (the "HTR").

The Historical Trading Report

The AUC explained that the HTR is an hourly spreadsheet published by the AESO five to ten minutes after the end of each hour. It shows the price and quantity of each offer made to the power pool in that hour. The HTR does not reveal the market participant that made the offer or the associated generating unit.

The HTR discloses all offers (i.e., price/quantity pairs) made by generators to the power pool to dispatch power at specified quantities and prices during the preceding hour, along with what their price/quantity pairs were during the previous day. The AUC noted that the HTR does not identify the names of the generating units or the associated offer control for each price/quantity pair. However, the asset identification and offer control associated with each price/quantity pair are disclosed in a separate report called the Merit Order Snapshot Report ("MOSR") that is published by the AESO 60 days later.

The MSA submitted that data being released by the AESO in the HTR undermines the fair, efficient and openly competitive nature of the wholesale electricity market and adversely affects the structure and performance of the market by relieving competitive constraints on the exercise of market power.

The AUC found that the MSA's notice and application raised two important issues for consideration, namely:

(a) Is the AESO required by Section 6 of the *Fair, Efficient and Open Competition Regulation* (the "*FEOC Regulation*") to publish the HTR in its current format; and

(b) If the AESO is not required to publish the HTR, is its publication consistent with the fair, efficient and openly competitive operation of the electricity market?

Statutory Scheme

The AUC explained that *AUCA* section 56(4)(b) empowers the AUC to provide direction or make any order it considers appropriate in respect of a matter raised by the MSA in a notice issued under subsection 51(1)(b). The AUC found that, in order to grant the relief requested by the MSA, the AUC must be satisfied, on a balance of probabilities, that the relief requested is appropriate.

The AUC found that to be "appropriate", an order or direction of the AUC about a matter relating to the MSA's mandate must be consistent with the purposes and objectives of the statutory scheme.

Section 6 of the *FEOC Regulation*

Section 6 of the *FEOC Regulation* provides as follows:

> 6(1) The ISO shall make available to the public the price, quantity and asset identification associated with each offer made to the power pool that is available for dispatch.
>
> (2) The ISO shall
>
> (a) develop information technology systems that are capable of identifying and tracking the market participant that holds the offer control associated with each price and quantity offer made to the power pool, and
>
> (b) include that information in the reporting made available to the public under subsection (1), when the ISO's information technology systems are capable of identifying and tracking that information.
>
> (3) The ISO shall delay making available to the public the asset identification referred to in subsection (1) and the identification of the market participant that holds the offer control referred to in subsection (2) by 60 days after they are made to the power pool.

AUC Majority Findings

Commission Members Romaniuk and Kolesar (the "Majority") found that section 6 of the *FEOC Regulation* does not require the AESO to publish the HTR in its current form. The Majority also found that the publication of the HTR immediately after the end of each hour, in its current format, is not consistent with the fair, efficient and openly competitive operation of the market because it enables market participants to exercise market power with greater precision than would be possible without the HTR.

With respect to the proper interpretation of section 6 of the *FEOC* Regulation, the Majority found that:

(a) the phrase "that is available for dispatch" in subsection 6(1) means that the AESO's publication obligation under section 6 arises only with respect to those offers that are available for dispatch, and excludes from its publication obligation offers that are not available for dispatch (e.g., capacity reserved for ancillary services);

(b) subsections 6(1) and (2) must be read as describing what types of information the AESO must publish, with no reference to timing, while subsection 6(3) must be read as restricting when some of that information may be published; and

(c) subsection 6(3) governs the timing of the AESO's publication of information relating to asset identification and offer control (i.e. 60 days after offers are submitted to the power pool). The AUC noted that subsection 6(3) is silent as to when the AESO must publish the associated price and quantity information.

The Majority further found that:

(a) The AESO's discretion as to the timing of the release of price and quantity information under section 6 of the *FEOC Regulation* is not limitless;

(b) The AESO is required to time the release of price/quantity information so that it provides the benefits of an "information rich environment" without distorting the market or the structure of the electric industry by creating an unfair advantage for any participant;

(c) The ongoing publication of the HTR in its current format and timing is not a statutory requirement; and

(d) All of the AESO's *FEOC Regulation* section 6 obligations with respect to the publication of various types of market information are satisfied by the publication of the MOSR.

HTR Not Consistent with Fair, Efficient and Openly Competitive Electricity Market

Having concluded that section 6 of the *FEOC Regulation* does not require the AESO to publish the HTR in its current form, the AUC went on to consider whether the current form of the HTR and the timing of its publication was consistent with the fair, efficient and openly competitive operation of the electricity market.

The AUC found that, in certain circumstances, the HTR could allow market participants to exercise market power with greater precision than would be possible without the HTR. The Majority found that the publication of the HTR could reduce dispatch risk by revealing the residual demand faced by generators in the hour just passed. The Majority found that the effect of the HTR is to relax the competitive restraints on the ability of generators to exercise market power and, hence, in certain circumstances to result in market outcomes incompatible with an efficient market for electricity based on fair and open competition. The Majority held that such an outcome was inconsistent with the objectives and principles underlying the legislation governing the market for electricity in Alberta.

Order

The Majority directed that the AESO cease publication of the HTR as soon as practicable, and by no later than 11:59 p.m. on Tuesday May 23, 2017.

Dissent of Commissioner Bill Lyttle

In a dissenting opinion, Commissioner Lyttle would have interpreted the phrase, "is available for dispatch" in subsection 6(1) of the *FEOC Regulation*, as requiring the AESO to immediately publish the price and quantity of each offer made to the power pool. In Commissioner Lyttle's view, the use of the word "is" rather than the word "was" indicated that the legislature did not intend a delayed publication of the price and quantity information. Commissioner Lyttle noted, as further support for this finding, that the drafters took exactly such an approach when drafting subsection 3(2)(b) of the *FEOC Regulation*, which allows market participants to share records "60 days after the price and quantity offer was made to the power pool".

Commissioner Lyttle found that Section 6 of the *FEOC Regulation* requires the AESO to publish price and quantity information for each offer made to the power pool when that offer is available for dispatch, and that the AESO is required to publish the information found in the HTR in real time.

***Alberta Electric System Operator Needs Identification Document Application and AltaLink Management Ltd. Chestermere 419S Substation and Interconnection Facility Applications (Decision 21973-D01-2017)***

***NID Application – Substation and Interconnection Facility Applications – Facility Siting***

In this decision, the AUC had considered a needs identification document ("NID") application from the Alberta Electric System Operator ("AESO") (the "NID Application") and facility applications from AltaLink Management Ltd. ("AltaLink") to construct and operate a new Chestermere 419S Substation, connect the substation to the Alberta Interconnected Electric System via two single-circuit 138-kilovolt (kV) transmission lines, and alter the Balzac 391S Substation (the "Facility Applications").

AESO NID Application

The AUC explained that the AESO is responsible for preparing and filing the NID Application with the AUC for approval. Section 11 of the *Transmission Regulation* ("*T-Reg*") and Section 6.1 of AUC Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations and Hydro Developments* ("*Rule 007*") prescribe the application informational requirements, including:

(a) an assessment of current transmission capacity;

(b) load and generation forecasts;

(c) studies and analysis that identify the timing and nature of the need for new transmission; and

(d) a technical and economic comparison of the technical solutions considered by the AESO, and the AESO's preferred solution.

The AUC explained that:

(a) Subsection 34(1)(c) of the *Electric Utilities Act* (the "*EUA*") requires the AESO to file a NID application on request for system access service from a market participant;

(b) Subsection 38(e) of the *T-Reg* requires the AUC to consider the AESO's assessment of need to be correct, unless an interested person establishes that the assessment is technically deficient, or that approval of the need application would not be in the public interest; and

(c) Section 34(3) of the *EUA* provides the AUC three options when deciding a need application: approve the application, deny it, or refer it back to the AESO with directions or suggestions for changes or additions.

The AUC addressed two key issues subject to dispute with respect to the AESO's assessment of the need for the facilities in this case:

(a) First, the AUC had to determine whether the AESO's NID Application was technically deficient (i.e. not complete); and

(b) Second, the AUC had to consider the opposing views of the Office of the Utilities Consumer Advocate (the "UCA") and the AESO regarding the AESO's statutory mandate and responsibilities relating to NID applications and approval processes, and whether the public interest had been served in this instance.

The UCA argued that the NID Application was technically deficient because it did not contain actual peak demand data for 2014 through 2016 at the time it was filed, and did not include actuals for 2016 as of the date of the hearing.

The AUC explained that *Rule 007* requires NID applications to include "the last five-year summer and winter peak substation loads applicable to the development area." The AUC agreed with the AESO's submission that a reasonable interpretation of this requirement is to include the last five years of available data, which in this case would not include 2016 actuals.

The AUC found that all parties had an opportunity to review the updated information. The AUC concluded that the NID Application was not technically deficient and complied with *Rule 007* requirements.

The AUC found that the AESO's assessment of the need was not based purely on the need to serve future forecast loads, but also on evidence showing a need for existing development in the area. The AUC found that the proposed transmission development is needed and that it is in the public interest to ensure that the transmission system is reliable.

AESO's Mandate re NID Application

The UCA argued that a higher level of scrutiny is required for the NID Application resulting from Fortis Alberta Inc.'s ("Fortis") request for system access service than the level of review that the AESO undertook. The UCA was also concerned that because Fortis is subject to a form of cost-of-service regulation for projects eligible for capital tracker treatment, that Fortis is incentivized to build a larger rate base upon which to earn a return.

The AESO submitted that a market participant's request for system access service is distinct from the scenarios contemplated in sections 34(1)(a) and 34(1)(b) of the *EUA*, in which the AESO independently identifies a need to expand or enhance the transmission system to address constraints or conditions affecting the operation of the system, or to improve the efficiency of the transmission system.

The AUC agreed with the UCA's assertion that Fortis' planning decisions can be subject to questioning and oversight. However, in this case, the AUC found the project to be in the public interest, given the oversight provided in the capital tracker true-up process and the effect of transitioning to expected stronger incentives under the next generation of performance-based regulation. However, the AUC stated that these matters may be reviewed by the AUC in the context of contribution policy provisions in a future AESO tariff proceeding.

Facility Applications

With respect to AltaLink's Facility Applications, the AUC found that:

(a) the facilities proposed in the Facility Applications were consistent with the need identified in the AESO's NID Application; and

(b) the Facility Applications, filed by AltaLink pursuant to sections 14 and 15 of the *Hydro and Electric Energy Act*, comply with the information requirements prescribed in *Rule 007*.

Siting of Proposed Substation

With respect to land use, the AUC found that:

(a) the current land use is an important factor in weighing the overall impacts of a proposed site;

(b) the alternative sites A and C were currently in use by private landowners engaged in agricultural operations;

(c) maintaining agricultural land and minimizing impacts on agricultural operations when a suitable industrial site is available, is in the public interest;

(d) the preferred Site E was located on lands slated for light industrial development; and

(e) this was a significant factor weighing in favour of Site E.

With respect to flood risk, the AUC found that:

(a) Site E was at a greater risk for flooding because it is located much closer to Chestermere Lake than Site A or Site C; and

(b) even in the unlikely event of a dam breach, the substation lands and facilities at Site E would be elevated above the inundation zone through proper design, engineering and construction.

The AUC considered that the flood risk factor weakly favoured Sites A or C.

With respect to impacts on residents in the vicinity, the AUC found that while Site E has more residences within 800 metres than either alternate site, the City of Chestermere had committed to planting trees along the west side of the project to create a visual buffer for the closest residences. In addition, the AUC noted that AltaLink had also committed to installing slats along the west and south sides of the substation fence.

The AUC found that:

(a) given the distance to residences, existing conditions, and proposed mitigation measures, the visual impact of Site E would be reduced in the short-term;

(b) the lands around Site E would be developed into a business park in the future, which would further reduce visual impacts of the substation; and

(c) in the long-term, the visual impacts of the proposed development at Site E would be less than at Site A or Site C.

With respect to environmental impacts, the AUC found that

(a) Site A was marginally better than Site E with respect to potential impacts on wetlands and to wildlife;

(b) differences between the sites were not significant and that the impacts associated with Site E could be effectively mitigated; and

(c) approval of Site E would not result in significant effects to the local environment.

The AUC concluded that approval of the preferred Site E location would result in lesser overall impacts than approval of either of the alternate locations.

The AUC therefore found that construction of the proposed Chestermere 419S Substation at Site E was in the public interest, pursuant to Section 17 of the *Alberta Utilities Commission Act*, having regard to the social and economic effects of the facilities, and their effects on the environment.

138-kilovolt transmission lines 765L and 691L

Having approved the proposed substation at the Site E location, the AUC went on to consider the associated 35-metre-long proposed 138-kV transmission line. The AUC noted that the new transmission line would be strung on single-pole, include wood structures and all structures would be located either within a road allowance or on AltaLink-owned property.

The Commission found that:

(a) the potential environmental effects of the proposed transmission line developments would be minimal with the implementation of the mitigations itemized in the Environmental Specifications and Requirements;

(b) the proposed transmission lines were consistent with the need identified in the NID Application; and

(c) the Facility Applications complied with the information requirements prescribed in *Rule 007*.

The AUC found the proposed transmission line developments to be in the public interest pursuant to Section 17 of the *Alberta Utilities Commission Act*.

## NATIONAL ENERGY BOARD

***Report of the Expert Panel on the Modernization of the National Energy Board: "Forward, Together – Enabling Canada's Clean, Safe, and Secure Energy Future"***
***Expert Panel Report***

On May 15, 2017, the Expert Panel (the "Panel") conducting the review of NEB modernization, tabled its report titled: *Forward, Together – Enabling Canada's Clean, Safe, and Secure Energy Future* (the "Report").

The full Report is available on the Ministry of Natural Resources Canada ("NARCan") website.

***Panel Mandate and Terms of Reference***

The Panel was established by the federal Minister of Natural Resources (the "Minister") to conduct a targeted review of the NEB's structure, role, and mandate pursuant to the *National Energy Board Act* (the "*NEB Act*").

With respect to the scope of review and Report, the Panel's Mandate regarding NEB modernization was divided into the following six areas of focus:

1. **Governance**: The Panel was asked to make findings and recommendations with respect to the following:

(a) Composition and expertise of Board members;

(b) Governance and division of the NEB's operational and adjudicative functions, including the roles of the Board's Chief Executive Officer and Chair;

(c) Role of the NEB in implementing Government policies and priorities, including mechanisms for policy direction; and

(d) Delegation of authorities to Board members and senior NEB staff.

2. **Mandate**: The Panel was asked to make findings and recommendations with respect to the following:

(a) Defining and measuring public interest (e.g., consideration of national, regional, Indigenous, and local interests as well as environmental, economic and social factors);

(b) Potential to clarify and expand the NEB's mandate with respect to collecting and disseminating energy data, information, and analysis; and

(c) Potential to expand the NEB's mandate (i.e., in emerging areas such as offshore renewables and to support the transition to a low carbon economy in light of Canada's climate change commitments).

3. **Decision-making Roles:** The Panel was asked to make findings and recommendations whether to maintain or revise the current approach with respect to who is making what decision (e.g. respective roles of NEB, Minister, and the Governor in Council).

4. **Legislative Tools for Lifecycle Regulation**: The Panel was asked to make findings and recommendations with respect to the following:

(a) Lifecycle oversight and public engagement tools (e.g., effective legislative tools throughout project planning, regulatory hearings, construction and operation and abandonment);

(b) Information requirements of regulated companies over the lifecycle of a project, and public access to this information;

(c) Safety and emergency preparedness tools (e.g., effective compliance monitoring and enforcement legislative tools; safety standards and emergency response requirements); and

(d) Land acquisition matters and related negotiation proceedings.

5. **Indigenous Engagement**: The Panel was asked to make findings and recommendations with respect to the following:

(a) Enabling early conversations and relationship building between the Government of Canada and Indigenous peoples whose rights and interests could be affected by a specific project under the NEB's mandate;

(b) Facilitating ongoing dialogue between the Government of Canada and Indigenous peoples on key matters of interest on projects to inform effective decision-making;

(c) Further integrating Indigenous traditional knowledge and information into NEB application and hearing processes;

(d) Developing methods to better assess how the interests and rights of Indigenous peoples are respected and balanced against many and varied societal interests in decision-making; and

(e) Enhancing the role of Indigenous peoples in monitoring pipeline construction and operations and in developing emergency response plans.

(f) **Public Participation:** The Panel was asked to identify legislative changes to support greater stakeholder and public participation in NEB activities (e.g., hearings, developing emergency

response plans, etc.) that would enhance the outcomes of these activities.

***Summary of Recommendations***

We provide herein a summary of the significant recommendation set out in the Report.

*Mandate and Project Review Process*

The Panel recommended that:

(a) Major projects must first be determined to align with the national interest by the Governor in Council, before any licensing hearing (1.5.1);

(b) A "modernized National Energy Board," be created, known as the Canadian Energy Transmission Commission ("CETC"). The Panel recommended that the CETC have the mandate and authority for the licensing of transboundary pipeline and transmission line projects (1.5.1);

(c) For major and significant projects, the CETC exercise this authority through Joint Hearing Panels which integrate project-level Environmental Assessments and the CETC decision making process to achieve the dual goals of delivering a single regulatory review process (not parallel technical and environmental review processes), and assuring that all federally mandated Environmental Assessments are conducted in a consistent, high quality manner (under the authority of the CEA Agency) (1.5.2);

(d) Five person Joint Hearing Panels – with at least one Indigenous member – be comprised of two Commissioners from the CETC, two from the CEA Agency, and a final independent Commissioner (1.5.2);

(e) The CETC's enabling legislation should have provisions to review and strengthen its capacity with respect to electricity transmission lines, with a particular focus on building capacity for engagement with Provinces (under whose authority new generation projects will take place), and the integration of new forms of (renewable) energy into the national grid (1.6.1);

(f) NARCan, in partnership with Environment and Climate Change Canada ("ECCC") publish a formal Canadian energy strategy which plots a course for the future of energy in Canada, balancing environmental, social, and economic objectives (1.1.1); and

(g) the government establish an independent Canadian Energy Information Agency, reporting to the Minister, whose mandate would include collection and dissemination of energy data and the production of reports on Canadian energy matters and analysis of the alignment with Canadian energy strategy goals (1.3.1).

*Relationships with Indigenous Peoples*

Amongst other more general recommendations, the Panel recommended that the federal government fund an Indigenous Major Projects Office, under the governance of Indigenous peoples (determined as they see fit) (2.2.1). Responsibilities of this office would include:

(a) defining clear processes, guidelines, and accountabilities for formal consultation by the government on energy transmission infrastructure, regulatory processes and assessing compliance with those guidelines; and

(b) defining and disseminating best practices, including coordinating and/or supporting Environmental Assessments and regulatory reviews, to help interested Indigenous communities enhance the quality of their participation in formal consultation and engagement processes.

*Public Participation*

With respect to Public Participation, the Panel recommended that:

(a) standing tests be repealed as a criterion for input into project hearings and legislation be amended to allow for a wider array of input (from simple letters to the provision and testing of evidence) (4.1.1);

(b) tests of standing should be abolished, and every interested party should have a reasonable opportunity to participate commensurate with their contribution to the process (4.2.2);

(c) letters of comment from any party should be permitted without qualification (4.2.2); and

(d) A Public Intervenor Office be established, based on successful models from other jurisdictions, to represent the interests and views of parties who wish to use the service, and to coordinate scientific and technical studies to the extent possible (4.3.1).