REGULATORY LAW CHAMBERS

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:

SUPREME COURT OF CANADA

Saulteau First Nations v. Attorney General of Canada, et al.
Leave to Appeal – Dismissed

The Supreme Court of Canada dismissed an application for leave to appeal from the judgment of the Federal Court of Appeal, Number 15-A-37, dated August 12, 2015, with costs to the respondent NOVA Gas Transmission Ltd.

The Supreme Court of Canada, as is its normal practice, did not provide reasons for its decision to deny leave to appeal.

ALBERTA ENERGY REGULATOR

Request for Regulatory Appeal and Suspension by Ember Resources Inc. – Encana Corporation and Manitok Energy Inc. (Appeal No.: 1885827)
Regulatory Appeal Request – Pipeline Licence Transfer

In this decision, the AER considered Ember Resources Inc.'s ("Ember") request under section 38 of the *Responsible Energy Development Act* ("*REDA*") for a stay and a regulatory appeal of the AER's decision to approve the transfer of certain pipeline licences (the "Transfer Decision") from Encana Corporation ("Encana") to Manitok Energy Inc. ("Manitok").

The AER found that Ember was not eligible to request a regulatory appeal and therefore dismissed its request.

Reasons

The AER found that:

(a) the appropriate forum for legal interpretation and enforcement of private agreements is the Alberta courts unless such interpretation is required by the AER to meet its mandates under its legislation;

(b) Ember's concerns related to a private agreement between the parties; and

(c) Ember had not shown a potential breach of an AER requirement that would require determination of the private agreement, and therefore the AER is not the appropriate forum for such a legal determination.

The AER concluded that Ember was not directly and adversely affected by the Transfer Decision and dismissed its request for regulatory appeal.

Obsidian Energy Ltd. (Formerly Penn West Petroleum Ltd.) – Statements of Concern (SOC No. 30792, 30793, 30814)
Approvals Issued – No Hearing

In this decision, the AER considered statements of concern ("SOCs") from Donna Dahm and Robert Plowman regarding applications by Obsidian Energy Ltd. ("Obsidian").

The AER decided that a hearing was not required under an enactment, or necessary, to consider the concerns outlined in the SOCs.

Reasons

In determining that no hearing was necessary, the AER's findings included the following:

(a) Obsidian had met all the applicable consultation and notification requirements of Directive 056;

(b) Ms. Dahm's land was approximately 22 km from the nearest proposed projects/infrastructure;

(c) Mr. Plowman's land was approximately 23.5 km from the nearest proposed projects/infrastructure;

(d) the parties' use of their lands or other natural resources in the area would not be affected by the projects;

(e) the proposed well and facility would be located on Crown land, and the potential impacts on water bodies would have been assessed at the time of the original Public Land Use application process;

(f) the proposed wells and facility are located in the Peace River Area and Directive 084: *Requirements for Hydrocarbon Emission Controls and Gas Conservation in the Peace River Area* ("*Directive 084*") prohibits routine venting and strictly limits non-routine venting in the area; and

(g) no venting of emissions were associated with the subject applications, and venting is not permitted in the Peace River Area as per *Directive 084*.

Based on the above, the AER concluded that Ms. Dahm and Mr. Plowman had not demonstrated that they might be directly and adversely affected by approval of the applications. The AER, therefore, issued the applied-for licences.

Notice re Abuse of Process

The AER noted that the concerns raised in the SOCs were identical or very similar to numerous SOCs from Ms. Dahm and Mr. Plowman regarding applications in the Peace River Area over the last several years. The AER stated that the concerns stated are generic, generally relate to bitumen development in the Peace River area, and are not specific to the projects proposed in the applications. The AER stated that Ms. Dahm and Mr. Plowman had continued to restate these same concerns despite the fact that enhanced regulatory requirements that directly address many of their concerns have been recently implemented in the Peace River area.

For these reasons, the AER notified Ms. Dahm and Mr. Plowman that if they continued to file generic, non-application specific SOCs similar in nature to previous SOCs, the AER might determine that this is an abuse of process, and disregard any or all of the concerns raised in such SOCs, as contemplated under section 6.2 of the AER's Rules of Practice.

Request for Regulatory Appeal by Gordon Knull – Apache Canada Ltd. (Appeal No.: 1891163)
Regulatory Appeal Request

Mr. Knull requested a regulatory appeal of an AER decision to issue a reclamation certificate to Apache Canada Ltd.

The AER determined that a hearing into the Regulatory Appeal would be held as the legislative tests had been met.

The AER noted that:

(a) in his request for regulatory appeal, Mr. Knull raised concerns with the state of the site, drainage, including sinkholes in the driveway that do not let water runoff and issuance of the reclamation certificate for the site;

(b) in an AER letter dated June 21, 2017, the AER advised that, by operation of sections 91(1)(i) and 145 of the *Environmental Protection and Enhancement Act* ("*EPEA*") and section 36 of the *Responsible Energy Development Act*, the tests for appealable decision and eligible person appeared to have been met in this case; and

(c) the *EPEA* grants a landowner whose lands are subject to a reclamation certificate an automatic right of regulatory appeal. To limit a landowner's right of regulatory appeal in such a case requires extraordinary and obvious circumstances mitigating against that right. The AER found that no such circumstances existed in this case.

The AER granted the regulatory appeal and noted that it would be asking that the Chief Hearing Commissioner appoint a panel of hearing commissioners to conduct a hearing.

ALBERTA UTILITIES COMMISSION

ATCO Electric Ltd. – 2013 and 2014 Transmission Deferral Accounts and Annual Filing for Adjustment Balances (Decision 21206-D01-2017)

Direct Assigned Capital Projects – Deferral Account Disposition

In this decision the AUC considered ATCO Electric Ltd.'s (Transmission) ("ATCO") application for approval of the capital costs of 35 direct assigned capital projects completed in 2013 and 2014 (the "Direct Assigned Capital Projects"), representing total additions to its rate base of $421.4 million in 2013 and $402.3 million in 2014.

Decision Summary

The AUC approved the vast majority of the Direct Assigned Capital Project costs without changes.

The AUC disallowed some of the project costs in relation to legal costs, hearing support, capitalized training costs and the use of charter aircraft.

The AUC approved ATCO's 2013 and 2014 direct assign capital deferral accounts ("DACDA") on an interim basis. ATCO requested the interim approval given the AUC's pending decision on its 2018-2019 general tariff application ("GTA").

ATCO proposed in the 2017-2018 GTA to refund construction work in progress ("CWIP") in rate base balances collected over the 2013 to 2016 period for direct assigned projects. The AUC explained that because those 2013-2014 capital project costs would be affected by the AUC's determination on that issue, the capital project costs could not be finally determined as part of this application.

The AUC did not approve ATCO's requested application of the net present value ("NPV") methodology for disallowed costs related to the northeast loop project. The AUC directed that the disallowed costs simply be removed from rate base.

Common Costs

Disallowed Legal Costs

The AUC considered it appropriate to disallow $100,000 of the legal fees claimed by ATCO, representing a reduction of about 10 per cent of the fees attributed to senior resources.

The AUC noted that the legal invoices supplied by ATCO included the name of the resource, level of resource, hourly rate, total time of the resource for that invoice and an itemized list of the work performed by the resources. The AUC found that such level of detail was sufficient to assess the allocation of resources.

The AUC explained that while ATCO was free to retain the legal counsel of its choice, the AUC is responsible for evaluating the overall reasonability and prudence of the costs claimed.

The AUC encouraged ATCO to use an open and freely competitive tendering process, similarly to what is used for other contractors. The AUC found that although it would not order a tendering process for legal services, it would rely on the evidence and what it has seen from other law firms and utilities with respect to regulatory legal fees. In this regard the AUC noted that legal counsel for other utilities offered discounts off standard rates in some cases.

Disallowed Aircraft Charter Costs

The AUC directed ATCO to remove $115,000 from the requested aircraft charter costs, approximately one third of the total ATCO requested.

The AUC noted its concerns that the information provided on aircraft charter flights was not sufficient to show that using charters was the best alternative based on weather, ambient conditions, availability of other alternatives and cost.

The AUC found that ATCO failed to demonstrate that:

(a) aircraft charters were the best available alternative in many cases; and

(b) in particular, the AUC found that for flights between Calgary and Edmonton, attendance at meetings could have been accommodated by teleconferencing or similar technologies, as opposed to in-person attendance, and therefore that those aircraft charter flights were not required.

With respect to flights to and from the United States, the Commission found that manufacturing facility visits may be required to understand the capability of the vendor and view the quality of material being procured. However, ATCO had not adequately demonstrated that a "compressed itinerary" was necessary and that commercial flights were not a valid alternative.

Capitalized Projects

For the 35 projects for which ATCO sought additions to rate base in 2013 and 2014, ATCO calculated that a net refund of $3,208,000 would be payable to the

AESO for 2013 and a net collection of $2,729,000 would be due from the AESO for 2014.

Test for Prudence

The AUC cited the test for prudence, as previously set out in Decision 3585-D03-2016, where it stated:

> In summary a utility will be found prudent if it exercises good judgment and makes decisions which are reasonable at the time they are made, based on information the owner of the utility knew or ought to have known at the time the decision was made. In making decisions, a utility must take into account the best interests of its customers, while still being entitled to a fair return.

The AUC explained that the burden of proof to establish prudence is on the applicant and that recent jurisprudence from the Supreme Court of Canada confirmed that the AUC had no obligation to presume prudence, even where no evidence is provided to the contrary.

The AUC's role, it explained, was to examine each project's costs with consideration to the applicant's decisions, given the information that was known or should have been known at the time the decisions to incur were being made (i.e. no hindsight). If there was insufficient information to determine that a decision was reasonable, the AUC had the discretion to direct disallowances.

With respect to the 35 projects included in this application, other than for projects specifically addressed (summarized below), the AUC found that:

(a) the information on the record was sufficient to assess the reasonableness of the requested capital additions; and

(b) ATCO's requested capital addition amounts were reasonable.

<u>Livock 240-kV Phase Shifting Transformer</u>

ATCO reported the actual cost of the Livock 240-kV Phase Shifting Transformer ("PST") project to be $38.4 million, compared to the $31.5 million estimated in the proposal to provide service ("PPS").

ATCO explained that the key cost variances between the PPS and actuals were mainly due to (1) bridge reinforcement along the transportation route, (2) higher camp costs, (3) the addition of oil containment, (4) increased engineering due to the unique nature of the PST, and (5) poor and wet ground conditions at the substation site.

The CCA requested $3.8 million in disallowed costs related to the Livock PST project, or roughly 10 percent of the total project costs.

Unique Nature of PST – Substation Engineering Labour Costs

The AUC found that:

(a) the unique nature of the PST, combined with transportation requirements for the PST resulted in cost increases, as compared to the PPS;

(b) variance from a PPS estimate is not, in and of itself, an indication of imprudence;

(c) the costs could not have been avoided and had the unique requirements of the PST been fully understood, the PPS estimate simply would have been higher; and

(d) ATCO attempted to proactively address the unique nature of the PST by retaining specialized engineering support to assist in engineering the PST, while attempting to minimize costs by limiting the hours worked by the external vendors.

The AUC concluded that ATCO's substation engineering labour cost variances attributable to the unique nature of the PST were not unreasonable.

Substation Labour – Site Prep and Survey

The AUC found that:

(a) ATCO had limited opportunity to conduct geotechnical investigations prior to permit and licence, after which relocating the substation or PST based on the geotechnical data would have been difficult;

(b) the geotechnical conditions encountered required additional cut and fill quantities that, in turn, resulted in higher site grading costs;

(c) ATCO could not have known that the weather conditions would result in a wetter site that would necessitate dewatering and additional rig mats;

(d) regardless of whether ATCO had known earlier that the Alberta Transportation bridge load rating would be inadequate to support the weight of the PST, ATCO would still have been required to build a new bridge; and

(e) the AESO was at all times aware of the schedule and estimated cost increases and did not direct ATCO to stop work or modify the ISD or scope.

Based on the above, the AUC did not find ATCO's substation labour cost variances attributable to site grading or rig mats to be unreasonable.

Substation labour – construction – oil containment

The AUC found that there was insufficient information on the record to determine if the quantum of costs for the secondary oil containment were reasonable. The AUC noted that ATCO did not provide a technical and cost analysis of the technologies that were available for secondary containment, nor any reason why other technologies were rejected in favour of a concrete secondary oil containment system. The AUC found that without such analysis, it could not make a determination on the reasonableness of ATCO's decisions in light of available alternatives at the time of design and construction.

The AUC directed ATCO, in the compliance filing, to provide an analysis of the secondary oil containment systems that would have been available at the time, the estimated costs for design, procurement and construction of each system and the resulting rationale for ATCO's selection of a concrete secondary oil containment system.

The AUC approved the oil containment system costs on the Livock PST project on a placeholder basis, pending final determination in the compliance filing.

Variance in Final Cost and Requested Capital Additions

The AUC noted that ATCO's requested capital additions for the Livock PST project were $38,648,913, with zero forecast trailing costs and that this amount was greater than the final project cost of $38,429,415. The AUC directed ATCO to provide an explanation for this variance at the time of its refiling.

Otauwau 144-kV Reinforcement Project

ATCO requested additions to rate base of $12.2 million in 2013 and $0.1 million in 2014, representing a variance of approximately $2.8 million from the forecasted costs at the PPS stage.

The AUC approved the costs for the Otauwau project based on the following findings:

(a) Given the market conditions at the time, the actions of ATCO to execute the project by bundling the substation construction for two projects and soliciting bids from a large number of vendors for the procurement of substation construction services was reasonable;

(b) ATCO pointed out these market conditions to the AESO, who determined that the project should proceed without delay; and

(c) as ATCO is legislatively required to follow the direction of the AESO, its actions to proceed with the execution of the project were reasonable at the time.

Cancelled Projects

ATCO applied to recover costs it incurred for Project 57130 – Athabasca Area Transmission Development up to the date of its cancellation by the AESO. ATCO incurred approximately $139,000 to date in preliminary planning costs.

The AUC found that ATCO provided sufficient information to justify the reasonableness of these costs and approved ATCO's cost recovery for that cancelled project in accordance with Section 40 of the *Transmission Regulation*.

NPV Payment of True-up Balances

ATCO proposed the use of a one-time net present value ("NPV") payment for the true-up of 2013 and 2014 and direct and indirect IT capital balances. It also proposed the use of this NPV approach to deal with the disallowed assets related to the disallowed NE Loop project. ATCO Electric proposed a one-time NPV payment of $924,000 for 2014 for the NE Loop Project disallowance.

The AUC noted that:

(a) it previously approved the use of the NPV for the refund of the Evergreen II disallowances; and

(b) it approved the use of ATCO's weighted average cost of capital ("WACC") as the discount rate to be used in those calculations.

Despite these previous decisions, the AUC considered the use of the NPV methodology and the associated discount rate as a specific matter to be decided with respect to the NE Loop disallowance in this proceeding.

The AUC found that in the present case, for customers to be held whole, the customers, upon receipt of the one-time payment from ATCO, would then have to purchase an annuity which would yield after tax payments to the customers that were equal to the future payments they in turn would make to ATCO Electric. The AUC rejected ATCO's assertion that customers could purchase such an annuity, guaranteeing payments for 40 years, that would be based upon a discount rate equal to ATCO Electric's WACC.

For the above reasons, the AUC found that if the NPV method were to be approved for use in the future, the discount rate applied should reflect the actual discount rate that would be inherent in a notional annuity.

The AUC therefore denied ATCO's request to use the NPV approach for dealing with the disallowed assets in this case. The AUC directed that the expenditures and assets related to the NE Loop be removed from rate base.

Direct Energy Regulated Services – Review of Decision 21568-D01-2016 (Decision 22472-D01-2017)
Review and Variance Phase II

Background

In this decision, the AUC considered Direct Energy Regulated Services' ("DERS") application for review (the "Review Application") of Decision 21568-D01-2016 (the "Decision"). Decision concerned DERS' 2012-2016 default rate tariff ("DRT") and regulated rate tariff ("RRT") non-energy compliance filing true-up application.

The AUC decided to vary the Decision for the reasons summarized below.

Decision Subject to Review

In the Decision, the AUC directed that DERS apply interest, in accordance with AUC Rule 023: *Rules Respecting Payment of Interest* ("*Rule 023*"), "as part of each of the true-up amounts." The true-up amounts consisted of the over-collection of $2.0 million through its DRT interim rates, the over-collection of $1.4 million for the DRT energy-related "labour" costs, the over-collection of $21.2 million for the DRT energy-related "other" costs, the under-collection of $6.8 million through its RRT interim rates, and the under-collection of $4.2 million for the DRT return margin.

Phase I Review Decision

On March 10, 2017, the AUC released Decision 22282-D01-2017, granting DERS' request to review certain findings in the Decision regarding the requirement that DERS pay interest in accordance with *Rule 023*. *Rule 023* provides for the payment of interest on adjustments of utility rates, tolls, charges or other costs upon AUC approval.

Phase II Review

In the Phase II review proceeding, DERS submitted that:

(a) the AUC incorrectly applied *Rule 023*;

(b) interest pursuant to *Rule 023* is not normally applied when interim rates are made final;

(c) the AUC only departs from this principle in exceptional circumstances; and

(d) no such exceptional circumstances existed to warrant the application of the rule.

Rule 023 Not Applicable

Section 3 of *Rule 023* states:

> 3 Application for payment of interest
>
> (1) A utility may request that the Commission approve the payment of interest on adjustments of utility company rates, tolls or charges or other costs or charges administered within the Commission's jurisdiction.
>
> (2) The Commission shall, when considering a request received under Section 3(1) of these rules, consider the following:
>
> …

The AUC found that:

(a) the operative provisions in Section 3(2) of *Rule 023* require that a utility request pursuant to Section 3(1) that the AUC approve the payment of interest;

(b) DERS made no such request; and

(c) for this reason, *Rule 023* could not be relied upon to direct the calculation of interest.

Determining Compensation to Ratepayers for Over-Collected Amounts

Notwithstanding this finding, the AUC considered whether, in determining just and reasonable rates, ratepayers should be compensated for the fact that during the period when interim rates were in effect, DERS over-collected funds of $13.6 million.

The AUC found that:

(a) the net amount over-collected by DERS was available to DERS to use, at no cost, for the purposes of funding its operations;

(b) regardless of whether or how DERS used these funds, they were available to DERS to use and the final rates for that period should account for this amount of no cost capital; and

(c) recognition of an adjustment in principal will result in just and reasonable rates for these years, given the quantum of the over-collection and the length of time over which interim rates were in place.

Given the above, the AUC considered whether DRT customers should be compensated for the loss of the

use of the $20.8 million of DRT over-collection, given that the over-collection occurred for a lengthy period of some three years, as contemplated by the AUC panel in the Decision.

The AUC found that:

(a) it was reasonable to account for the cost of the funds over-collected from DRT customers, in establishing just and reasonable rates; and

(b) to be consistent, it was also reasonable to consider the impact of the under-collection of funds from RRT customers over the same period.

Accordingly, the AUC directed DERS:

(a) to submit a compliance filing to include interest calculated using the Bank of Canada bank rate plus 1½ percent, applied to the net over-collection amounts for the DRT;

(b) to apply interest to the period from January 2012 to June 30, 2017, which is the end of the approved rider period for the refund of the DRT over-collections; and

(c) as part of the compliance filing, to compare the resulting interest amount in total to the $2.2 million interest amount calculated in accordance with the DRT net over-collection as set out in Table 1 of Decision 22174-D01-2017 and submit a proposal to deal with the difference between these two amounts.

NATIONAL ENERGY BOARD

LNG Canada Development Inc. - Application to Extend Export Commencement Expiry Date, Licence GL-330
Liquid Natural Gas Export – Sunset Clause Extension

In this letter decision, the NEB considered an application from LNG Canada Development Inc. ("LNG Canada") for an extension of the expiration date of 40-year export Licence GL-330 (the "Licence"). The sunset clause expiration date was included as Condition 3 to the Licence and stated as follows:

> This Licence shall expire on 31 December 2022, unless exports have commenced on or before that date, or the Board otherwise directs.

LNG Canada requested a 5-year extension to the sunset clause expiration date for commencement of export from December 31, 2022 to December 31, 2027.

Specifically, LNG Canada requested that:

(a) the NEB exercise its discretion to extend the export commencement expiry date pursuant to the authority retained by the Board in Condition 3 to "otherwise direct" an alternative expiry date; or

(b) in the alternative, that the Licence be varied by extending the expiry date pursuant to section 21 of the *National Energy Board Act* (the "*NEB Act*").

LNG Canada submitted that:

(a) it was requesting the extension due to market uncertainty affecting the timing of a final investment decision and the required timeframe for construction; and

(b) based on its assessment of the expected natural gas supplies and Canadian requirements during the period from 2063 through 2067 (the "Extension Period"), the quantity of proposed exported gas in the Extension Period was surplus to Canadian needs.

For the reasons summarized below, the NEB approved, pursuant to subsection 21(2) of the *NEB Act* and subject to Governor in Council ("GIC") approval, the variance of Condition 3 of the Licence to reflect the change in expiry date for the commencement of exports from December 31, 2022 to December 31, 2027.

NEB Findings

The NEB's findings included the following:

(a) LNG Canada was not requesting any changes to the maximum annual export quantity, the maximum term quantity, or the licence term (40 years);

(b) not all LNG export licences issued by the NEB would be used or used to the full allowance;

(c) acknowledging the difficulties associated with forecasting many years into the future, particularly given the uncertainty in the export market, applications for export must take into account the overall dynamics of the market and be grounded in evidence;

(d) LNG Canada had done so in this instance, but "perhaps only just";

(e) the length of the requested extension was significant, and should be affected by way of a variance to the Licence pursuant to section 21 of the *NEB Act*; and

(f) variations to licences, other than name changes, require approval by the GIC.

Decision

The NEB approved, pursuant to subsection 21(2) of the *NEB Act* and subject to GIC approval, the variance of Condition 3 of the Licence to reflect the 5-year extension to the expiry date for the commencement of exports.

Reasons for Decision – Westcoast Energy Inc. Wyndwood Pipeline Expansion Project Application (GH-001-2017)
Pipeline Facility Application – Westcoast System

On October 21, 2016, Westcoast Energy Inc. ("Westcoast") applied for an order under section 58 of the *National Energy Board Act* (the "*NEB Act*") for approval to construct and operate a natural gas pipeline and associated facilities, consisting of:

(a) a 27 km, 914 mm pipeline;

(b) additional associated facilities, including pig sending and receiving facilities; and

(c) minor modifications at Westcoast's existing Compressor Station No. 2, including the addition of a receiving barrel and tie in piping.

Together, these facilities are known as the Wyndwood Pipeline Expansion Project (the "Project").

Westcoast requested the following relief:

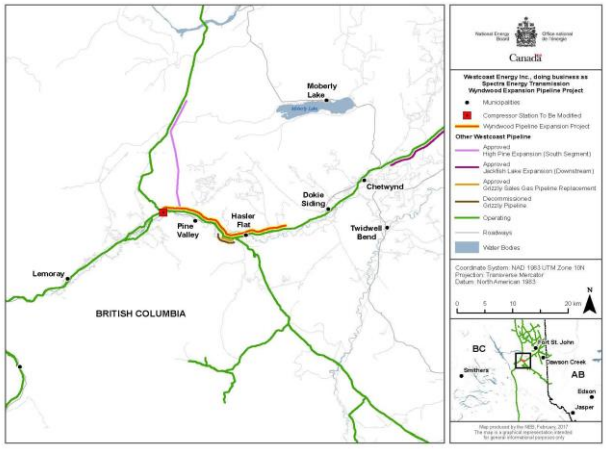
(a) an order pursuant to section 58 of the *NEB Act* exempting the applied-for facilities from the application of paragraphs 30(1)(a) and (b) and section 31 of the *NEB Act* and exempting the pipeline tie-ins from the application of section 47 of *the NEB Act*; and

(b) an order pursuant to Part IV of the *NEB Act* affirming that the cost of the Project would be included in the Transmission North (T-North) (Zone 3) cost of service and tolled on a rolled-in basis.

For the reasons summarized below, the NEB found the Project, as proposed by Westcoast, to be in the public interest and granted Westcoast's requested orders to construct and operate the Project.

The Project will be located in the Peace River District southwest of Chetwynd, British Columbia, as shown in the figure below:

Figure: Project Location Map



Economic Feasibility

Regarding the economic feasibility of the Project, the NEB assessed the need for the proposed facility and the likelihood of it being used at a reasonable level over its economic life. To make this determination, the NEB considered:

(a) the supply of product to be shipped on the proposed facilities, and transportation contracts underpinning the facilities;

(b) the availability of adequate markets to receive the product to be delivered by the pipeline, and the adequacy of the capacity of the pipeline; and

(c) the applicant's ability to finance the proposed facilities and the rationale for selecting the applied-for pipeline capacity.

The NEB concluded that the applied for Project was needed and would likely be used at a reasonable level over its economic life, based on the following findings:

(a) the natural gas resources in the Montney Formation represented adequate supply to support the Project;

(b) adequate markets existed to support the Project given the access to markets provided by Westcoast's T-South system, as well as access to the Alliance Pipeline and NOVA Gas Transmission LTd. ("NGTL") System and their connections to downstream markets;

(c) there was sufficient commercial support for the Project in the form of executed expansion service agreements; and

(d) Westcoast sized the facilities appropriately to accommodate firm service requirements and the capacity of the proposed pipeline loop was appropriate to transport the associated volumes to markets.

Tolling Matters

Westcoast requested an order from the NEB, affirming that the cost of the Project would be included in the T-North (Zone 3) cost of service and tolled on a rolled-in basis.

The NEB explained that, in assessing a proposed tolling methodology, it must be satisfied that a proposed tolling methodology:

(a) would not result in any unjust discrimination in tolls, service or facilities; and

(b) the resulting tolls would be just and reasonable and under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, the tolls would be charged equally to all persons at the same rate.

In the context of the Project, for the reasons summarize below, the NEB found that the proposed tolling methodology reasonably satisfied section 62 of the *NEB Act*, which requires that the same tolls should apply to all shippers using the same transportation services over the same facilities.

Westcoast's Current Zone 3 Tolling Methodology

Zone 3 of the Westcoast System is tolled using a postage stamp methodology. The cost of service is

allocated on the basis of contract demand volumes only. Westcoast explained that there are two postage stamp tolls in Zone 3:

(a) The Short Haul Toll for deliveries to distribution utilities connected to Zone 3 that serve northern communities and for gas movements of 75 km or less other than to the Alliance or NGTL systems; and

(b) The Long Haul Toll for all other gas movements in Zone 3.

NEB Findings re Proposed Tolling for Project

The NEB noted that:

(a) the rolled-in tolling methodology was consistent with Westcoast's existing practice for system expansions; and

(b) the proposed tolling methodology had the unanimous support from the Westcoast Toll and Tariff Task Force.

The NEB found that:

(a) the proposed tolling methodology (rolled-in) for the Project was appropriate for the circumstances; and

(b) the proposed tolling methodology reasonably satisfied section 62 of the *NEB Act*, which requires that the same tolls should apply to all shippers using the same transportation services over the same facilities.

In granting Westcoast's proposed tolling for the Project, the NEB emphasized that it could determine that a different tolling treatment would be appropriate in the future.

Facilities and Emergency Response Matters

The NEB found that:

(a) the Project would be constructed and operated in accordance with all applicable legislation and standards, including in accordance with the *National Energy Board Onshore Pipeline Regulation* and the CSA Z662-15 standard; and

(b) the design of the Project is appropriate for the intended use in consideration of Westcoast's proposed mitigative measures to eliminate or minimize potential impacts of horizontal directional drilling (HDD), slope stability and potential effects of blasting activities on domestic water wells.

The NEB determined that the proposed activities related to the Project design and construction were appropriate, and that the facilities would be operated safely and securely.

Land Matters

The NEB explained that applicants are expected to:

(a) provide a description and rationale for the proposed route of a pipeline, the location of associated facilities, and the permanent and temporary lands required for a project; and

(b) provide a description of the land rights to be acquired and the land acquisition process, including the status of land acquisition activities.

Based on this information, the NEB assesses the appropriateness of the proposed route, land requirements and the applicant's land acquisition program.

In this case, the NEB found that Westcoast's proposed route for the Project was appropriate and that Westcoast had appropriately identified and engaged stakeholders, developed engagement materials, notified stakeholders of the Project, and responded to stakeholder input.

The NEB noted that:

(a) routing decisions involve the consideration of many factors, including archaeological, environmental and engineering factors, and consultation with landowners and Aboriginal groups;

(b) Westcoast had accommodated a number of minor re-routes based on input from landowners; and

(c) Westcoast's made efforts to minimize the Project's environmental disturbance by proposing a right-of-way ("RoW") that was largely contiguous to existing RoWs, and that would not result in any new permanent access.

The NEB found that:

(a) Westcoast's proposed mitigation was suitable to address the Project's potential land-related effects during design, construction, and operation;

(b) the route, as proposed, was acceptable; and

(c) the land rights documentation and acquisition process proposed by Westcoast were acceptable.

Public Consultation

The NEB found that:

(a) Westcoast's design of Project-specific public notification and consultation activities were adequate given the scope and scale of the Project; and

(b) Westcoast's implementation of Project-specific public consultation activities was adequate, including Westcoast revising the pipeline route based on consultation with stakeholders.

However, the NEB found that Westcoast's complaint tracking, resolution, and process for ongoing consultation could be improved. The NEB determined that Westcoast's ongoing consultation activities must include a process for tracking complaints and resolutions. Therefore, the NEB imposed Condition 12 (Complaint Tracking) requiring Westcoast to create and maintain records to track Project-related complaints or concerns by landowners, and how they have been addressed, beginning with the commencement of operation and for five years after.

Aboriginal Matters

NEB Findings re Westcoast's Consultation with Aboriginal Groups

In assessing the consultation undertaken by Westcoast with Aboriginal groups, the NEB evaluated:

(a) the design and implementation of Westcoast's consultation activities, including Westcoast's activities to engage Aboriginal groups and to learn about their concerns and interests, and the specific concerns expressed by Aboriginal groups about the Project; and

(b) how Westcoast sought to understand and address the concerns of potentially affected groups and how this influenced the Project's proposed design and operation.

The NEB noted that Westcoast was responsive to the request of Aboriginal communities and engaged with Blueberry River First Nations ("BRFN"), Kelly Lake First Nation, and Fort St. John Métis Society when they requested further information.

The NEB found that:

(a) Westcoast designed and implemented appropriate and effective aboriginal consultation activities for the Project; and

(b) the NEB process was appropriate in the circumstances.

The NEB found that:

(a) Westcoast provided all potentially affected Aboriginal groups with sufficient information about the Project, and that the level of engagement was commensurate with the level of interest expressed by Aboriginal communities; and

(b) Westcoast provided interested Aboriginal groups with reasonable opportunities to participate in Project planning, to share traditional knowledge, and to identify site-specific and general concerns about the Project.

The NEB concluded that Westcoast designed and implemented appropriate and effective consultation activities that met the requirements and expectations set out in the NEB's Filing Manual.

NEB Findings re Project Monitoring by Aboriginal Groups

The Board noted that:

(a) Aboriginal groups can provide valuable and unique perspectives for determining mitigation measure effectiveness, partly based on their traditional knowledge;

(b) Westcoast made commitments to provide Aboriginal monitors throughout the various phases of the Project lifecycle; and

(c) Saulteau First Nation requested conditions that could solidify these commitments.

Therefore, the NEB decided to impose Condition 6 and Condition 25, requiring Westcoast to develop an Aboriginal Monitoring Plan during both the construction and postconstruction phases of the Project. These conditions imposed by the NEB were consistent with Westcoast's stated commitments to understand any concerns raised by Aboriginal groups about the monitoring plans, to incorporate relevant feedback from Aboriginal groups into the development of the plans, and to transparently provide an explanation to the Aboriginal groups when it does not agree with specific feedback.

NEB Findings re Impacts on Traditional Land and Resource Use

The Board noted that the NEB Filing Manual requires an applicant:

(a) to describe how Aboriginal groups currently use lands and resources for traditional purposes, including the spatial and temporal extent of use and how a project could impact this use; and

(b) to describe the measures that would be taken to mitigate a project's impacts on Aboriginal traditional land and resource use.

The NEB noted that the Manual does not direct companies with respect to any specific methods of data collection and analysis, such as a Traditional Land Use ("TLU") study.

Given the importance of incorporating TLU/traditional knowledge information into Project design and construction activities, as raised by all Aboriginal intervenors, the NEB imposed:

(a) Condition 7, requiring Westcoast to file a plan to address outstanding TLU investigations; and

(b) Condition 6, Condition 8, and Condition 25 requiring Westcoast to submit Aboriginal engagement reports as well as Aboriginal monitoring plans for construction and post-construction activities, which would provide Aboriginal groups further opportunities to address outstanding or unanticipated TLU issues.

The NEB determined that effects of the Project on traditional land and resource use would be short-term to long-term in duration, reversible in the long-term, local to regional in geographic extent and low to moderate in magnitude.

Based on the above, the NEB concluded that the potential adverse effects of the Project on the current use of lands and resources for traditional purposes by Aboriginal persons were not likely to be significant.

NEB Findings re Adequacy of Crown Consultation under Section 35 of the Constitution Act

The NEB noted that:

(a) the Government of Canada ("GOC" or "Crown") had indicated that it would rely on the NEB's process to the extent possible to discharge the Crown's duty to consult; and

(b) the Crown therefore encouraged all Aboriginal groups whose established or potential Aboriginal or treaty rights could be affected by the Project to apply to participate in the NEB process.

The NEB further noted that a number of judicial decisions, including the Supreme Court of Canada's decision in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* 2004 SCC 74, acknowledged the Crown's ability to rely on opportunities for Aboriginal consultation available within existing processes for regulatory or environmental review.

The NEB set out how its governing legislative scheme under the *NEB Act* provides it with broad powers and expansive remedial authority to deal with the impacts of federally-regulated pipeline projects.

The NEB explained that its process is designed to be thorough and accessible to Aboriginal groups that wish to raise concerns about a proposed project. The NEB noted that:

(a) in addition to the mandated one-on-one consultation between an applicant and potentially impacted Aboriginal groups, the NEB's hearing process itself, including its reasons, is part of the overall consultative process; and

(b) in this case, while much of the early consultation was performed by Westcoast, the NEB process acted as a necessary and important check on that consultation and gave Aboriginal groups an additional avenue to explain their concerns about the Project and have those concerns considered.

The NEB found that:

(a) its process was appropriate in the circumstances;

(b) given the nature of the interests and the anticipated effects, there had been adequate consultation and accommodation for the purpose of the NEB's decision on this Project;

(c) any potential adverse Project impacts on the interests, including rights, of affected Aboriginal groups were not likely to be significant and could be effectively addressed.

The NEB concluded that the requirements of section 35 of the *Constitution Act, 1982* had been met, such that an approval of the Project was in keeping with the honour of the Crown.

<u>Environmental and Socio-Economic Matters</u>

NEB Findings re Environmental Protection Plan

The NEB noted Westcoast's commitment to having and implementing an Environmental Protection Plan ("EPP") on-site and filed a Project-specific EPP during the proceeding.

The NEB directed Westcoast:

(a) to file an updated EPP, prior to construction of the Project, as set out in Condition 4; and

(b) to include additional details on its Wildlife Mitigation Plan and mitigation of western toads as described in the condition. The EPP must also include updated Environmental Alignment Sheets.

NEB Findings re Cumulative Environmental Impacts

The NEB found that no party disputed that there were already significant existing cumulative effects on caribou and their habitat and no party disputed that, without sufficient and effective mitigation, the Project had the potential to further contribute to cumulative effects. The NEB noted that disagreement in the context of this Project's environmental assessment ("EA") was primarily around the scope, or extent, of what Westcoast is responsible to assess and address.

In the NEB's view, cumulative effects required cumulative solutions. Just as no one development at any one time is necessarily responsible for all the cumulative outcomes, so too are cumulative effects not going to be resolved by any one party.

The NEB found that, as a regulator conducting an EA of a particular project in which existing cumulative effects are already significant, the NEB is responsible to ensure that the proponent's proposed project have no net increase in cumulative effects.

The NEB noted that there were numerous proponents (including Westcoast) with existing past developments in the region. In the NEB's view, multiple interacting past contributions are best addressed through other multi-stakeholder means coordinated through the appropriate government agencies responsible, rather than through specific project EAs. The NEB stated that, in particular, the province has a key role in leading cumulative effects initiatives.

While acknowledging the importance of addressing past and ongoing cumulative effects, the NEB found that addressing as part of mitigation for this specific Project was not the appropriate forum.

The NEB encouraged all interested stakeholders, including Westcoast and other governing bodies, to contribute towards ensuring a more integrated and holistic approach towards addressing cumulative effects.

Decision

The NEB found the Project, as proposed by Westcoast, to be in the public interest and granted Westcoast's requested orders to construct and operate the Project.