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File No. 17909

June 5, 2006

ALBERTA ENERGY AND UTILITIES BOARD
640 - Fifth Avenue, S.W.
Calgary, AB
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Attention: Mr. Doug Larder, Q.C., General Counsel

Dear Sirs:

**Re: Proceeding 1457147 (the "Proceeding")
Review and Variance Applications:
9500-1404564 (Prairie Mines and Royalty Ltd. ("PMR")/
Fairborne Energy Ltd. ("Fairborne"))
9500-1456814 (PMR/Fairborne)**

Please be advised that, effective, June 1, 2006, PMR transferred all of its right, title and interest in coalbed methane ("CBM"), including in the lands which are subject to the captioned applications (the "Fairborne Applications") to its affiliate, Carbon Development Partnership ("CDP"). Our retainer in this matter continues with respect to the interests of CDP. Please amend your records accordingly.

We are in receipt of your letter of May 31, 2006 seeking comments on whether the Alberta Energy and Utilities Board (the "Board") should grant the requests for intervener status contained in the letters described below, and enclosing:

- (a) a letter dated May 15, 2006 from Quicksilver Resources Canada Inc. ("Quicksilver") requesting status as an intervener in both Phase 1 (interim conditions) and Phase 2 (entitlement to CBM for the purposes of the applications which are the subject of the Proceeding, including the Fairborne Applications) of the Proceeding;
- (b) a letter dated May 15, 2006 from the Freehold Petroleum & Natural Gas Owners Association (the "Freehold Owners Association") requesting status as an intervener in both Phases 1 and 2 of the Proceeding; and

- (c) a letter dated May 26, 2006 from Peacock Linder & Halt, LLP, as counsel for Centrica Canada Limited (“Centrica”), requesting status for Centrica as an intervener in Phase 2 of the Proceeding.

Centrica has indicated, through its counsel, that it has applications before the Board, the processing of which has been suspended pending the outcome of the Proceeding. CDP acknowledges that the holding of the Proceeding has at least caused delay to Centrica and the outcome of the Proceeding may, therefore, directly and adversely impact Centrica’s applications and interests. CDP does not object to the Board granting intervener status to Centrica to participate in Phase 2 of the Proceeding.

CDP opposes the applications for intervener status by Quicksilver and the Freehold Owners Association, for the reasons set out below. Comments in this letter are applicable to both requests, unless reference is made to a specific applicant or letter. For the purpose of this letter, CDP assumes that the Freehold Owners Association would be considered to be a person, for all relevant purposes.

A. Proposed Interveners not “Directly and Adversely Affected”

1. Subsection 26(2) of the *Energy Resources Conservation Act* (RSA 2000, c. E-10) (the “ERC Act”) allows the Board to determine whether its decision on any application “may directly and adversely affect the rights of a person”.
2. The Alberta Court of Appeal has ruled, in *Dene Tha’ First Nation v. The Alberta Energy and Utilities Board and Penn West Petroleum Limited*¹, that this test for achievement of intervener status is twofold. The first part of the test is purely legal, that is, whether the claimed right or interest being asserted is one that is known to law. CDP acknowledges that the leasehold rights asserted by Quicksilver and the fee simple petroleum and natural gas ownership rights asserted by the Freehold Owners Association on behalf of its membership would, if proved, constitute rights recognized by law in Alberta. The second branch of the test is whether the Board has information which demonstrates that the application(s) before the Board may directly and adversely affect those interests or rights. The Court of Appeal has determined that this branch of the test is purely factual, to be determined on the facts of each case.
3. The Board has also publicly pronounced its understanding of the effect of subsection 26(2) of the ERC Act on intervener standing and the rights which flow from that standing. In Decision 2002-107² (the “Manhattan Decision”), the Board stated at page 6:

¹ *Dene Tha’ First Nation v. Alberta* (Energy and Utilities Board), 2005 ABCA 68

² Memorandum of Decision Prehearing Meeting Manhattan Resources Ltd. Applications for Wells, Pipelines, and Facilities Licences and an Amendment to a Facility Fort Saskatchewan Field (December 6, 2002), p. 6.

"In identifying who may participate at a public hearing, the Board is governed, first, by Section 26 of the Energy Resources Conservation Act, which provides that those persons whose rights may be directly and adversely affected by the approval of an energy facility are entitled to an opportunity to lead evidence, cross examine, and give argument -- in short, full participation at a hearing or "standing".

Others who may not be able to meet the standing test (for example, those persons who are not situated in close proximity to a proposed facility) are not afforded these participation rights by the statute."

4. The requirement of direct and adverse effect is conjunctive. To achieve intervener status, the effect of the activity which is the subject of the application before the Board on the rights of a person must be both direct and adverse.
5. Neither Quicksilver nor the Freehold Owners Association has asserted any right of ownership (fee or leasehold) of or any other right in relation to any of the lands which are the subject of the Proceeding (the "Affected Lands"). As such, neither of these persons can be **directly** affected by the decision of the Board in any of the applications which are comprised within the Proceeding.

B. Irrelevance of Commonality of Issues

6. Quicksilver alleges that its current practice with respect to its CBM operations is to meter its CBM wells on a group basis and that very few have individual metering. With respect, this is an operating procedure which Quicksilver, a single corporation, has elected on its own volition to pursue. Without conceding whether this voluntary corporate policy might be relevant to any applications Quicksilver itself may bring before the Board, it is certainly not relevant to the present Proceeding, in which Quicksilver has no direct property or economic interest.
7. All of the proposed interveners express concern that a Board decision in the Proceeding may somehow adversely affect their legal entitlement to CBM in properties other than the Affected Lands. This is simply not the case. Firstly, all parties to the present Proceeding have acknowledged that legal ownership to CBM has not yet been determined by the courts and will not be finally settled unless and until a Court decision has been rendered. The Board's examination of "entitlement" to CBM in the Proceeding is expressly and entirely within the context of the Board's enabling statutes, insofar as they relate to the Board's willingness (and jurisdiction) to grant well licences and holding orders to Fairborne, Devon Canada Corporation ("Devon") and Bearspaw Petroleum Ltd. ("Bearspaw"). In other words, well licences (if any) will only grant operational entitlement to drill for CBM and holding orders (if any) will only grant operational entitlement to produce CBM. No decision of the Board in this Proceeding will affect the underlying ownership rights (contingent or otherwise) to CBM of any of the parties to the Proceeding. Consequently, no decision of this Board can possibly affect the underlying ownership rights of any of the proposed interveners.

8. Further, even if the Board's decision in the Proceeding could affect underlying ownership rights of the parties to the Proceeding itself, the decision would still have no adverse effect on the interests of the proposed interveners. Unlike the courts, this Board is not bound by the principle of *stare decisis*. As the Board noted in Decision U990322³ (with reference to itself):

"...the Board notes the well-established principle that a panel of a board is not bound by a previous decision of the same board. Rather, decisions are made based on the merits of each application."

Any decision made by the Board in the Proceeding will not bind the Board in its examination of any application which any of the proposed interveners may make in future relating to lands other than the Affected Lands. Each of those applications will be addressed and decide on the merits of such application.

9. Commonality of issues which are presently before the Board in the Proceeding with issues which might or would be relevant to future applications, which future applications might directly and adversely affect either of Quicksilver or the Freehold Owners Association is simply not a justification for the Board to grant intervener status to either of these applicants. There are many issues and matters which are common and relevant to different, discrete applications before the Board. By way of example, Directive 56 lists a large number of requirements (such as the location of the proposed well or facility, the degree of public consultation which is required depending upon the percentage of H₂S, the type and amount of emergency planning), all of which must be addressed in each application for a sour gas well. However, the fact that each of these issues must be addressed in other, subsequent applications, does not elevate them to any special status in these separate and distinct applications which are already before the Board. The Proceeding has been called to deal with distinct applications before the Board, relating to the Affected Lands (and no other lands) and the rights and entitlements of the particular parties already named in the Proceeding.

C. Value of Information to be Provided by Applicants for Intervener Status

10. The three gas producers, Fairborne, Devon and Bearspaw, who are already involved in the Proceeding as applicants, are sophisticated corporations with highly competent counsel. It is hard to imagine that any issue which might be addressed by either Quicksilver or the Freehold Owners Association will not already be placed before the Board in the Proceeding by one or more of these parties. As such, with respect, the value of repetition by these proposed interveners of submissions which will inevitably be addressed by one or more of Fairborne, Devon and Bearspaw is extremely limited, at best and, arguably, *de minimis*.

³ Decision U99032 The Small Explorers and Producers Association of Canada (SEPAC) Application for Review and Variance of Board Decision U96001, 1 April 1999.

D. Needlessly Increasing Complexity and Time Required for the Proceeding

11. As the Board encourages, PMR/CDP and Fairborne/Devon are negotiating toward agreements respecting the segregated measurement of CBM from the wells operated by Fairborne and Devon which are subject to this Proceeding. The proposed agreements would minimize the cost and effort required by these parties, in respect of Phase 1 of the Proceeding. CDP has every expectation that these agreements will be finalized prior to the filing of CDP's response submissions in the Proceeding on June 9. The granting by the Board of the requests of Quicksilver and the Freehold Owners Association for status in Phase 1 will inevitably adversely affect CDP by forcing it to expend greater effort in Phase 1 of the Proceeding. There is no public interest component alleged by these parties, only the private property rights of a single corporation, in the case of Quicksilver, and of individual freehold mineral rights owners (albeit a large number of them), in the case of the Freehold Owners Association.

E. The Proceeding is not Industry Wide

12. As identified above, the Proceeding relates to specific applications made by individual natural gas lessees for well licences and holding orders relating exclusively to the particular Affected Lands and the opposition to those applications by the owners of the coal underlying and within those same Affected Lands. It is not, and should not become, an omnibus hearing to address what is, admittedly, an issue of importance to a large number of persons who are involved in the natural gas industry, petroleum and natural gas owners and coal owners. Should the Board determine that the issues which are involved in the Proceeding are of sufficient importance and breadth of impact, then, separately and apart from the Proceeding, the Board should call an omnibus inquiry into the matter of CBM entitlement and related operational issues. The Board called just such an inquiry in respect of the gas over bitumen conflict in Alberta. Such an inquiry would be preceded by wide advertisement by the Board, to ensure that all parties who were potentially affected could pursue their respective interests and place their positions before the Board. With respect, this Proceeding is not the appropriate time or place for such an inquiry.
13. For the reasons set out above, CDP submits that neither Quicksilver nor the Freehold Owners Association is not and will not be directly and adversely affected by the decision of the Board in the Proceeding. Consequently, CDP urges the Board to deny each of the applicants the status that full interveners enjoy under the ERC Act.

F. Inclusive Board Practice

14. Notwithstanding the foregoing, CDP recognizes that it has long been the Board's practice to allow limited participation by persons who do not qualify as interveners. This principle was expressed by the Board at page 7 of the Manhattan Decision⁴, as follows:

⁴ Manhattan Decision, p. 7.

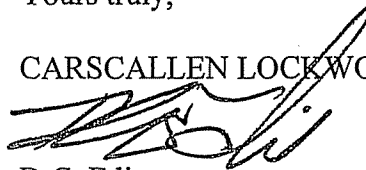
"Others who may not be able to meet the standing test (for example, persons who are not situated in close proximity to a proposed facility) are not afforded these participation rights by the statute. However, it is the long-standing practice of the Board to allow those persons who would otherwise not have standing to participate to some extent at a public hearing provided they offer relevant information."

15. CDP would not object to limited participation of the proposed interveners, through presentation of a short statement of their position, without full rights of participation, such as leading evidence, cross-examination of witnesses or giving final argument, akin to that which was determined to be appropriate by the Board in the Manhattan Decision.⁴

All of which is respectfully submitted.

Yours truly,

CARSCALLEN LOCKWOOD LLP



D.C. Edie

DCE

Attachments

- | | |
|--|--|
| c. Attached Listing | |
| c. Carbon Development Partnership
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Attention: Mr. Christian Popowich |
| c. Fraser Milner Casgrain LLP
30th Floor, 237 - Fourth Avenue, S.W.
Calgary, AB T2P 4X7
Attention: Mr. A.L. McLarty, Q.C. | c. EnCana Corporation
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Calgary, AB T2P 2S5
Attention: Ms. Lisa Stebbins |
| c. Fairborne Energy Ltd.
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Attention: Mr. David Pyke | c. Thackray Burgess
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Attention: Mr. John Gruber |
| c. Field LLP
1900 - 350 Seventh Avenue, S.W.
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Attention: Mr. William Corbett, Q.C. | c. Quicksilver Resources Canada Inc.
2000, 125 - 9th Avenue S.E.
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Attention: D. Johnson, Sr. V.P. |
| c. Freehold Petroleum & Natural Gas Owners Association
1403 - 12 Street N.W.
Calgary, AB T3C 1B3
Attention: E. Pederseon | c. Peacock Linder & Halt LLP
1800, 350 - 7th Avenue S.W.
Calgary, AB T2P 3N9
Attention: Peter T. Linder, Q.C. |

**ATTACHMENTS TO LETTER TO
THE ALBERTA ENERGY AND UTILITIES BOARD
DATED JUNE 5, 2005
FROM D.C. EDIE, Q.C., CARSCALLEN LOCKWOOD LLP**

CASE LAW AND EUB DECISIONS

In the Court of Appeal of Alberta

**Citation: Dene Tha' First Nation v. Alberta (Energy and Utilities Board), 2005
ABCA 68**

20050216

0232-AC

Calgary

Date:

Docket: 0301-

Registry:

Between:

Dene Tha' First Nation

Appellant

- and -

The Alberta Energy and Utilities Board

Respondent

- and -

Penn West Petroleum Limited

Respondent

- and -

Her Majesty the Queen in Right of Alberta

Intervener

The Court:

**The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Ellen Picard
The Honourable Mr. Justice Peter Costigan**

**Memorandum of Judgment
Delivered from the Bench**

Appeal from the Decisions by the
Alberta Energy and Utilities Board
Dated the 16th day of January, 2003 and
the 15th day of April, 2003

**Memorandum of Judgment
Delivered from the Bench**

Côté J.A. (for the Court):

[1] This is an appeal from the Alberta Energy and Utilities Board on three questions of law, by leave of one judge.

[2] In 2002, the respondent energy company made known to the appellant First Nation that it proposed to drill a number of wells and put in access roads, all on Crown land. None of this was within the reserve of the First Nation. There were a number of meetings and discussions between the energy company and the First Nation, and a helicopter site tour by both sides. But the First Nation wished to be paid \$111,000 before those discussions could continue. The energy company tried to get some information from trappers belonging to the First Nation, but the First Nation strongly objected to that, and told the energy company to desist except through a central office. On November 26, 2002 the respondent company told the First Nation the precise legal descriptions of the proposed wells, down to the quarter section numbers.

[3] The Board issued licenses for the wells and roads, but the First Nation then applied to the Board to intervene in the matter. After an exchange of information by correspondence, the Board decided on January 16, 2003 that the First Nation had not met the statutory test for intervention, which is showing that they might be directly adversely affected. The decision letter was somewhat ambiguous as to its grounds.

[4] The First Nation applied for a reconsideration. Again there was an exchange of information by correspondence, the solicitors for the First Nation submitting one long letter and some shorter ones. At one point, an official on the Board's staff requested more details. On April 15, 2003 the Board again decided that the test of adverse impact had not been met, and did not give intervener status. The First Nation now appeals from that.

[5] The Board has extensive statutory powers, and is an important expert regulatory tribunal. In general, there is no right to appeal from it. There is one exception. There can be an appeal with leave of one judge of the Court of Appeal, which judge may confine the appeal to specified questions. That was done here. And the appeal must be on a question or questions of law or jurisdiction. So no appeal lies on a factual matter, with or without leave. The Court of Appeal has no jurisdiction over such topics.

[6] The application before the Board was for licenses for wells and ancillary roads.

[7] We will consider the nature of such an application later in this judgment.

[8] We must note at the outset that some other things are not before us. First, the First Nation expressly declines to attack the constitutionality of any legislation, and has given no notice to anyone of any such challenge. Second, the First Nation cannot appeal on the ground of inadequacy of reasons by the Board. Though there was a brief complaint during oral argument of some ambiguity in the reasons, no leave to appeal was given on that ground.

[9] The section in issue in this application is s. 26(2) of the *Energy Resources Conservation Act of Alberta*. The section generally allows the Board to act without notice, but subsection (2) requires the Board to give certain rights to a person if "it appears to the Board that its decision on an application may directly and adversely affect the rights of [that] person . . .". No one argued before us that that was not the test.

[10] The Board correctly stated here that that provision in s. 26(2) has two branches. First is a legal test, and second is a factual one. The legal test asks whether the claim right or interest being asserted by the person is one known to the law. The second branch asks whether the Board has information which shows that the application before the Board may directly and adversely affect those interests or rights. The second test is factual.

[11] Satisfaction of the first test, some legally-recognized interest, was pretty well conceded on this appeal. That topic forms the great bulk of the material filed by the First Nation. Obviously a constitutional, a legal, or an equitable interest would suffice.

[12] Though some of the counsel at some stages seem to have thought that the Board had found no legally-recognized interest here, that is not how we read the two Board decisions. They clearly recognized the two branches (legal and factual). Though there is some ambiguity in the January 16 decision, we see none at all in the April 15 decision. Still less do we read the Board as saying that it had no jurisdiction to ask such a question (about a legally-recognized interest). The letter from a Board staff member asking for more information is not a decision by the Board, and was sent before most of the submissions were sent to the Board. The First Nation's solicitors sent lengthy letters giving a lot of authority about the legal aspects of the appellant First Nation's asserted aboriginal and treaty rights.

[13] The wording of the April 15 letter seems clear to us. When it says that no person was shown to be susceptible of direct adverse effect, it clearly makes a factual finding. That is not a mis-statement of the test; it is a statement about the factual branch of the test.

[14] It was argued before us that more recent case law on *prima facie* infringement of aboriginal or treaty rights changed things. But the Board still needed some facts to go on. It is not compelled by this legislation to order intervention and a hearing whenever anyone anywhere in Alberta merely asserts a possible aboriginal or treaty right. Some degree of location or connection between the work proposed and the right asserted is reasonable. What degree is a question of fact for the Board.

[15] Whether that factual decision was correct here is not for us to say, and we lack jurisdiction to go into it.

[16] However, in case it be thought that the Board had missed some issue, or erred in something procedural, we should say one thing. Despite many opportunities, the First Nation gave the Board very little factual detail or precise information. On appeal it now asserts that the key question was adverse effect on traplines; but that is only one matter of a number vaguely asserted in the letters. The letters came from the solicitors for the appellant First Nation.

[17] The First Nation argument suggested to us that it lacked information to be more specific. As that is said to tie into the question of consultation, we will say a little about it in deference to counsel, even though it is a purely factual question.

[18] There had been discussions and provision of exact wellsite locations long before the

submissions to the Board. There never has been any suggestion that anyone lived outside the reserve, or that any wells or roads were to be within the reserve. The First Nation must know, or be able easily to learn, where its members hunt and trap. None of that hard information was provided to the Board. Instead the solicitors gave vague and adroitly-worded assertions of rights, some of which encompassed all land in Alberta, or in any event, all Crown land in Alberta.

[19] The First Nation also contended before us it had no duty to tell the Board specifics, and that the Board should have frozen all development while deciding the question. We cannot agree, and have seen no authority, constitutional or otherwise, requiring such a logical impasse.

[20] We repeat that we think these Board decisions sufficient for this evidentiary record, and have no power to intervene had we thought otherwise.

[21] Therefore, the answer to question #1 is that the Board did not err in the respect asked. Questions #2 and #3 by their express terms do not arise.

[22] That is really enough to dispose of this appeal.

[23] However, duty to consult those with aboriginal or treaty rights was also argued before us. Indeed, at one point we were told that it was the core issue. But that recasts the dispute, and is quite different from what the Board was told. For one thing, the consultation suggested to the Board was that the energy company had a duty to consult.

[24] It is now conceded to us that neither the energy company nor the Board has or had any duty in law to consult with those holding aboriginal or treaty rights. That concession is plainly correct today, though it may have been unclear for a time. At one point in oral argument, there was a stray reference to the Board as an "emanation" of the Crown, a characterization not argued elsewhere, and in our view inaccurate. In the 1930s the Privy Council condemned that term as vague and apt to mislead.

[25] A duty of the Crown to consult was not really raised before the Board, though one or two phrases in the solicitors' letters make stray reference to it.

[26] Though the Crown has later intervened on this appeal, it was not a party to the Board proceedings, and got no notice of them. As no claim was made against the Crown to the Board, that is not surprising. We do not regard as notice the fact that two of many letters were copied to an official in the government's Energy Department, particularly for letters making legal points, written and sent by solicitors. We presume that that official is not a lawyer.

[27] Nor did anyone ever ask the Board to make the Crown a party, to give it notice, or to summon or implead it in any way.

[28] A suggestion made to us in argument, but not made to the Board, was that the Board had some supervisory role over the Crown and its duty to consult on aboriginal or treaty rights. No specific section of any legislation was pointed out, and we cannot see where the Board would get such a duty. We will now elaborate on that.

[29] There is no evidence here to tell the Board whether the Crown had consulted or not, and that fact is not conceded in argument. It seems to be disputed. Still less is there an

evidentiary record which shows that there was no time or chance to consult. The little evidence there is suggests the contrary, but it is woefully inadequate to decide that question. Nor was anyone put on notice that that issue would be before the Board.

[30] It was properly conceded in argument that someone wishing to drill an oil or gas well, or build a road, on Crown land in Alberta needs much more than the permission of the Board of the type which the energy company here sought and got. The person wishing to drill needs a Crown license or lease, and a number of other permits from the Crown. See for example s. 19 of the ***Oil and Gas Conservation Act*** respecting access road locations on Crown land.

[31] Section 3 of that ***Act*** makes the ***Act*** cover all wells in Alberta, whether on public or private land. The Crown issues those licenses, leases, and permits; the Board does not. Nor does the Board review or cancel those. No one ever suggested to the Board in this case that it take such steps, nor that such leases, licenses or permits did not exist, nor that they were void or voidable. The topic never came up.

[32] Though the record is not completely clear on this point, the application by the energy company seems to have been under the ***Oil and Gas Conservation Act***, and its regulations. Section 4 of that ***Act*** (on scope) is about public protection from danger, and conservation of non-renewable resources (plus some issues among mineral owners). The applications seem to have been under that ***Act's*** Part 6, which requires a license from the Board (in its capacity as the Energy Resources Conservation Board) before a well is drilled: see s. 11. Section 19 lets the Board regulate location of access roads.

[33] We do not and cannot decide whether the Crown in Right of the province has or had a duty to consult here, or whether it in fact consulted sufficiently or at all. There is no leave to raise either such question on appeal, neither arises from these proceedings, the Board did not rule upon them, and it had no cause to, on this record.

[34] We dismiss the appeal.

Appeal heard on February 11, 2005

Memorandum filed at Calgary, Alberta
this 16th day of February, 2005

Côté J.A.

Appearances:

J.R. Rath
A.T. Rana
D.F. Saly
for the Appellant

J.R. McKee
D.H. Pickup
for the Respondent Alberta Energy and Utilities Board

A.W. Carpenter
K. O'Callaghan
for the Respondent Penn West Petroleum Ltd.

T.G. Rothwell
for the Intervener Her Majesty the Queen in Right of Alberta

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by  _____ for the Federation of Law Societies of Canada 

ALBERTA ENERGY AND UTILITIES BOARD
Calgary Alberta

**MEMORANDUM OF DECISION
PREHEARING MEETING
MANHATTAN RESOURCES LTD.
APPLICATIONS FOR WELLS, PIPELINES, AND
FACILITIES LICENCES AND
AN AMENDMENT TO A FACILITY
FORT SASKATCHEWAN FIELD**

**Decision 2002-107
Applications No. (see Appendix A)**

This report provides the Alberta Energy and Utilities Board's (EUB/Board) decisions arising out of a prehearing meeting held to obtain input from interested parties. In light of the history of proposals for oil and gas development in the area east of Ardrossan, and having regard for concerns about how certain facilities have been licensed, the Board believes that it is useful to first document the background to the present applications.

1 BACKGROUND

Manhattan Resources Ltd. (Manhattan) applied to the EUB for approval to drill six wells, construct and operate a pipeline gathering system and well site surface facilities, and modify an existing facility at the locations shown on the attached figure. Manhattan filed the well licence applications between December 2001 and March 2002 and the pipeline gathering system application in May 2002. It filed the well site surface facilities applications in October 2002, with the modification to the facility filed later the same month. The EUB recommended that the individual applications be brought together as parts of a larger project. Ultimately, component-specific information on this project was provided to the public at various stages by various operators, starting as early as January 2000, with full project-specific detail compiled and issued by fall 2002.

Barrington Petroleum Limited (Barrington) originally applied for two of the well licences. Barrington amalgamated with Petrobank Energy and Resources Limited (Petrobank) on January 1, 2002, and the project was further advanced by Manhattan filing additional well licence applications. In February 2002, Manhattan and Petrobank informed the EUB that they intended to proceed cooperatively with a project involving six wells and a pipeline gathering system. On June 1, 2002, Petrobank informed the EUB that it had sold its interest in the Strathcona County area to Manhattan, including its interest in the six-well project. Manhattan then advised the EUB that it intended to proceed independently and that it would adopt the previously filed applications. It said that it would rely on the technical details and consultation achieved to date and would build upon that with the community. It submitted minor updates to both the well licence and pipeline applications and proceeded to evaluate its newly acquired existing facilities and need to modify facilities in the area, including a facility located at Legal Subdivision 7, Section 29, Township 53, Range 21, West of the 4th Meridian (the 7-29 facility).

Licensing of the 7-29 Facility

Prior to 2000, certain types of facilities did not require approval by the EUB. The 7-29 facility was one of those facility types. To ensure that a complete inventory of existing facilities was developed and that those facilities are identified and licensed to the correct owner, the EUB implemented the Retrospective Licensing Facility Program, as set out in *Interim Directive (ID) 2000-10*.¹ Under that program, operators were required to provide design and site information for existing facilities so that the EUB could effectively regulate facility ownership, transfer, abandonment, and reclamation liabilities associated with those sites. The program was targeted for completion in February 2001. However, as detailed in *General Bulletin GB 2002-16*,² the Board continued to retrospectively license facilities under the program until October 22, 2002, due to an incomplete description of facilities in the initial list. This program was intended to be a routine administrative process.

In the course of its evaluation of its newly acquired facilities, Manhattan determined that the 7-29 facility had not been identified and properly licensed under the retrospective program. Accordingly, on September 23, 2002, Manhattan filed an application consistent with the requirements in *ID 2000-10* to retrospectively license the 7-29 facility. The EUB approved the application routinely on October 10, 2002, under the retrospective licensing program. Manhattan then filed an application for modifications to the existing 7-29 facility on October 11, 2002, as part of the project it proposed to develop in the area east of Ardrossan. The Board notes that while the 7-29 facility was unlicensed for a number of years, it was not unregulated. EUB staff in the St. Albert Field Centre responded to any issues and public inquiries with regard to the facility.

The Board is aware of some concerns raised by community members respecting the licensing of the 7-29 facility. In addition, the Board has received two requests for a formal review of the application under Section 39 of the Energy Resources Conservation Act. The Board has therefore decided to include Application 1278764, Licence 27531, as part of the upcoming hearing.

EUB staff completed a detailed review and audit of all of the applications and determined that they were complete and met the EUB's requirements set out in *Guide 56: Energy Development Applications Guide* and applicable acts and regulations.

2 PREHEARING MEETING

Residents and landowners in the vicinity of Manhattan's project, in addition to other interested parties, corresponded with the company, its predecessors, and the EUB expressing concerns with the proposed project. These concerns were expressed most recently in a public meeting held by EUB staff on October 3, 2002, and at a public meeting conducted by Manhattan on October 24, 2002. Having regard for the numerous unresolved concerns, the Board directed that the subject applications be considered at a public hearing. However, before scheduling a hearing, the Board decided that it would be useful to obtain further information from the interested parties and

¹ *ID 2000-10: Retrospective Facility Licensing Program.*

² *GB 2002-16: Recision of ID 2000-10: Retrospective Facility Licensing Program and Guide 68: Retrospective Facility Licensing, October 2000.*

Manhattan regarding aspects of the public hearing to ensure that the hearing will be conducted in the most efficient and effective manner.

The EUB held a prehearing meeting in Sherwood Park, Alberta, on November 20, 2002, before Presiding Board Member M. N. McCrank, Q.C., and Board Members J. D. Dilay, P.Eng., and T. M. McGee.

The Board received input from the applicant and interested parties on a number of issues, including the scope of the hearing, timing, procedures, participant roles, costs, and funding. The Board did not hear evidence, submissions, or arguments pertaining to the merits of the applications or objections. Parties will be given an opportunity to present evidence, cross-examine witnesses, and make arguments regarding the merits of the applications at the public hearing.

Those who spoke at the prehearing meeting on behalf of a group of interested parties or on their own behalf are listed in Appendix B. The parties who registered their interest by providing a *Participant Registration Form* are listed in Appendix C.

3 PRELIMINARY MATTERS

Prior to the convening of the prehearing meeting, several parties had written to the Board requesting an adjournment of the meeting on the basis that more time was required to review and understand the applications. The Board responded to these parties by letter indicating that the prehearing meeting would proceed and be focused on procedural matters and identifying the scope and other features of the public hearing, not the merits of the applications. At the prehearing meeting, some participants reiterated the view that the meeting was premature but acknowledged that since the Board, the applicant, and a large number of residents were in attendance, some benefit might result if the meeting proceeded. The Board agreed with this sentiment.

Counsel for the Downeys applied to the Board to stay the consideration of the applications until such time as an inquiry had been conducted into the cumulative impacts of oil and gas projects on the community. He argued that such an inquiry was essential to fully understand and address the many issues created by the proximity of industrial activities to the expanding residential population of the area. He made specific reference to earlier Board decisions³ pertaining to Strathcona County and the oil sands areas in which, according to counsel, the Board had made comments regarding the utility of such a process. The Board notes that these comments were made in the context of a large, heavily concentrated infrastructure of industrial activity encroaching upon a relatively few number of residents. The Board does not believe that the scale of the proposed project warrants an inquiry of the kind requested and is of the view that a public hearing, with its attendant prehearing filings, information request (IR) exchanges, and examination of ordinary and expert evidence and argument at the hearing, will provide a satisfactory forum for the consideration of all relevant issues.

³ EUB *Decision 2001-99, Decision 1997-4, and Decision 1997-07.*

Some participants argued that the applications were not complete with respect to the proposed pipeline and that consideration of them should be halted until the deficiencies were addressed. Specifically, a landowner contended that he was unable to confirm from the application materials whether the proposed pipeline route crossed his property. Other residents maintained that the entire route was not shown in the materials. The Board notes that it requires detailed base maps depicting the applied-for pipeline route to be included as part of a routine application. It also requires a list of landowners who will be impacted by the route. The Board notes that both of these requirements have been fulfilled in Manhattan's applications filed with the EUB.

The Board was invited by counsel for the Klingspons to provide its views on the meaning of "in the public interest." Decisions regarding the approval or denial of oil and gas facilities must, of course, be made in the public interest, and each decision issued by the Board contains a discussion of the public interest in the context of that particular application. The determination of the public interest is ultimately a subjective one bounded only by the general and specific objects of the legislation in question and the powers of the EUB to carry out those purposes. Such a determination must also arise from the evidence presented and the careful, fair, and objective discernment of that evidence by the Board. The facts, circumstances, and issues of each individual application necessarily mean that no single objective test of what constitutes "in the public interest" can be formulated.

Generally, the public interest standard is met by an activity that benefits the segment of the public to which the legislation is aimed, while at the same time minimizing, to an acceptable degree, the potential adverse impacts of that activity on more discrete parts of the community. The existence of regulatory standards is an important element in deciding whether potential adverse impacts are acceptable and whether a proponent has satisfactorily accounted for these impacts, but the Board retains the discretion where circumstances require to find that a project fails to meet the public interest notwithstanding its compliance with these standards.

The Board's consideration of an energy facility application under the Oil and Gas Conservation Act,⁴ the Pipeline Act,⁵ and the Energy Resources Conservation Act⁶ (the "energy statutes") obliges it to take account of the legislative purposes set out in the energy statutes in determining the public interest. These include, but are not limited to,

- the economical, orderly, and efficient development of energy resources in the province;
- the conservation of energy resources and the prevention of the waste of these resources;
- securing safe and efficient practices in the exploration for, processing, development, and transportation of the energy resources of Alberta;
- pollution control and environmental conservation in the energy sector; and
- affording each owner the opportunity of obtaining the owner's share of the production of oil or gas from any pool.

In assessing whether a proposed project meets these purposes and the various specific technical requirements for energy facilities, the Board must, in addition, "give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment."⁷

⁴ RSA 2000, Ch. O-6.

⁵ RSA 2000, Ch. P-15.

⁶ RSA 2000, Ch. E-10.

⁷ Energy Resources Conservation Act, supra section 3.

The components of the public interest as expressed in these provisions are broad and flexible. This inherently demands that the Board assess and balance the competing elements of the public interest in each specific application before it. As indicated earlier, part of this exercise is an analysis of the nature of the impacts associated with a project and the extent to which a project proponent has addressed these impacts. Balanced against it is an assessment of the project's potential public benefits.

4 ISSUES CONSIDERED AT AND ARISING FROM THE PREHEARING MEETING

The Board identified a number of issues concerning the applications from correspondence it received from area landowners and from the meetings in the area. It listed these issues in an attachment to its October 17, 2002, letter that accompanied the Notice of Prehearing Meeting. Some participants expanded on those issues and presented additional ones at the prehearing meeting. It is the Board's view that all of the issues raised are relevant for consideration at the upcoming public hearing. The Board has organized the issues as follows:

- Need for the Applied-for Wells, Pipelines, and Facilities
- Location of Proposed Wells and Facilities and Routing of Pipelines
- Environmental Impacts
 - < Potential for Contamination of Air, Water, and Soil
 - Measures for air monitoring, water well testing, and drilling fluid management
 - < Noise
 - < Dust
 - < Cumulative Effects
 - < Abandonment and Reclamation
- Health and Safety Impacts
 - < Human Health
 - < Emergency Response Planning
 - < Poultry Operations
 - < Bee Operations
 - < Race Horse Operations
 - < Organic Growing Operations
 - < Wildlife Impacts
- Land-Use Impacts
 - < Quality of Life
 - < Aesthetics
 - < Property Values
 - < Potential for Future Oil and Gas Development
- Resource Recovery and Benefits
- Adequacy of Public Consultation Efforts
- Financial Security and Technical/Operational Ability of Manhattan

The Board is of the view that the matter of cumulative effects requires elaboration. As outlined earlier in the report, the Board does not believe that an inquiry into the general cumulative impacts of industrial activity in the area is warranted by this particular application. With respect to environmental impacts, the Board is prepared to hear the site-specific evidence about the nature of the proposed facilities' impacts to the air, water, and soil, the potential consequences of such impacts to the environment, and whether such effects are in compliance with provincial environmental standards, such as the Ambient Air Quality Guidelines established by Alberta Environment. These are relevant lines of inquiry, and the fullest opportunity will be provided to participants to explore them.

The Board makes the general observation that while all the enumerated issues may have relevance to the applications, the weight to be accorded each issue in making a decision will be assessed in light of the scale and nature of the proposed Manhattan development.

5 PARTICIPATION AT THE PUBLIC HEARING

Standing

As evident from the steady volume of correspondence received by the Board, the high attendance at the recent public meetings, and the large number of people (over 300) who came to the prehearing meeting, the community has a considerable desire to participate at the public hearing. In identifying who may participate at a public hearing, the Board is governed, first, by Section 26 of the Energy Resources Conservation Act, which provides that those persons whose rights may be directly and adversely affected by the approval of an energy facility are entitled to an opportunity to lead evidence, cross examine, and give argument—in short, full participation at a hearing or “standing.”

Others who may not be able to meet the standing test (for example, those persons who are not situated in close proximity to a proposed facility) are not afforded these participation rights by the statute. However, it is the long-standing practice of the Board to allow those persons who would otherwise not have standing to participate to some extent at a public hearing provided they offer relevant information. However, funding to cover costs, as described below, are not available to persons who may participate but do not have standing.

In the present case, Manhattan has acknowledged that there are indeed a number of residents who qualify as interveners under Section 26 of the Energy Resources Conservation Act. These persons either own or occupy land on which part of the facilities are proposed or are close enough geographically to the sites to trigger hearing participation rights. The Board agrees with Manhattan.

Given the potential number of participants and the proximity of several subdivisions to the facilities, and taking into account that under *Guide 56* Manhattan is required to use a 1.5 kilometre (km) personal consultation radius and a 2 km notification radius, the Board is of the view that residents and landowners located within the 2 km radius of the wells, facilities, and pipelines have standing for the purposes of participating at the public hearing under Section 26 of the Energy Resources Conservation Act.

The Board cautions that participation at the public hearing is also predicated on persons

complying with the Board's *Rules of Practice* regarding the presentation of evidence and procedural matters. For example, persons who do not file their own evidence and that of their experts prior to the hearing (as more particularly outlined in the next section) may be denied the opportunity to give that evidence at the hearing.

Those parties who have registered their interest and who fall outside of the 2 km radius may participate at the hearing but, depending on whether they have joined a group with standing, their participation may be limited to presenting a short statement of their position, without full participation rights, such as leading evidence, cross-examination of witnesses, and giving final argument.

Local Intervener Costs

Parties who are entitled to participate at a public hearing under Section 26 of the Energy Resources Conservation Act may also qualify for funding so that they may effectively and efficiently present their interventions. Such funding is referred to as "local intervener costs" and is provided for under Section 28 of the Energy Resources Conservation Act. This section grants the Board the discretion to award costs to participants who have an "interest in land" that may be directly and adversely affected by the approval of an energy project. When such awards are given, the applicant company is directed to pay the monies. Generally, if people qualify for participation, i.e., standing under Section 26, they also qualify for local intervener funding.

It is extremely important to note that a finding of local intervener status does not automatically mean that all or any costs incurred by local interveners will be approved by the Board. Costs must be shown to be reasonable and necessary to the intervention, as well as meet the requirements of Part 5 of the *Rules of Practice*. The Board must also find that the intervention added to its understanding and appreciation of the relevant issues before costs or a part of them are approved. Duplication of effort on common issues by two or more interveners or excessive representation on issues that are clearly common to a number of participants will not likely result in more than one set of costs being approved in the absence of special circumstances. Parties must review Part 5 of the *Rules of Practice* and *Guide 31A: Guidelines for Energy Cost Claims* to acquaint themselves with the cost regime administered by the Board.

The Board strongly encourages individuals who share a common purpose and concerns to pool their resources and present a collective intervention. Such interventions are usually effective and efficient, as they eliminate duplication of effort and costs that may occur when several individual residents present essentially the same intervention. At the prehearing meeting the Board noted that a number of individuals with similar interests had formed into groups.

The Board is concerned about the number of counsel who advised the Board at the prehearing meeting and in correspondence of their particular representation of residents and landowners. Local intervener funding does, of course, acknowledge the retention of experts in various occupations, including lawyers, to assist interveners. At least nine counsel and one representative advised the Board of their anticipated involvement in the process leading to and including the public hearing. It is the Board's view that given the commonality of issues raised by the various residents and landowners in the community, and taking consideration of the nature and magnitude of the applications, this number appears excessive. Certainly, the anticipated number of participants will require coordination and administrative resources to manage effective

interventions, but parties and their current representatives are advised that they seriously risk an unsuccessful cost claim for legal fees if the present numbers of counsel remain. This does not mean that parties cannot retain counsel of their choice to represent their interests, only that funding in whole or in part may not be available under the local intervenor cost regime.

It has been the Board's policy to award an advance of costs where it is shown that an advance payment of forecast expenditures is essential in preparing and presenting a submission. Parties must also show that they do not have the financial resources to initially retain necessary consultants and bear other related costs. An award of advance funding is subject to the Board's posthearing assessment of whether an individual's or group's costs are reasonable and directly and necessarily related to the intervention. Costs awarded in advance of a hearing are paid by the applicant company and form part of the overall costs of an intervention. If the Board approves overall costs in an amount that is less than the sum advanced prior to the hearing, the individual or group must repay the difference.

Parties who wish to have their status confirmed as local intervenors for costs purposes as well as for an advance of costs, must submit an application to that effect to the Board by December 31, 2002. A copy of the application must also be sent to Manhattan.

6 TIMING

Manhattan noted that an applicant has the right to have its applications heard on a timely basis and that there should be a balance between the applicant's needs and the intervenors' needs. As a consequence, Manhattan proposed a start date for the hearing by mid-March 2003. Some participants submitted that the applicant had not conducted adequate or satisfactory public consultation or attempted in a meaningful way to negotiate resolution of the issues with residents. They expressed the view that setting a time for the hearing was premature and that the commencement of a public hearing should only be considered when the applicant established that it had engaged in diligent and genuine efforts to resolve the community's concerns.

Intervenor proposed hearing dates that ranged from March to late fall 2003. Parties expressed concern over having sufficient time to obtain expert support and to collaborate effectively with other parties with similar interests.

Having considered the views expressed at the prehearing meeting, the Board finds that the applications will be considered at a hearing in Sherwood Park, Alberta, commencing on March 24, 2003. The Board supports ongoing consultation and negotiation of the issues and believes that setting the hearing date in March will provide the parties sufficient time to conduct such discussions and prepare for the hearing. The Board notes that some of the applications have been filed since December 4, 2001, and known to the community as early as January 2000. It is the Board's experience that setting the hearing date provides the parties with the incentive to conduct both meaningful and timely discussions if a mutual desire to do so exists.

In order to help parties gain a greater understanding of another's position, the Board may allow that written questions and answers be exchanged by the parties. This is referred to as the information request/response process, or IR process. IRs are intended to clarify evidence already filed with a view to making the actual hearing more efficient, as the IRs form part of the

evidence at the hearing. Sections 27, 28, and 29 of the *Rules of Practice* outline the procedure for making an IR. In this case, the Board will allow participants with standing, if they wish, to issue IRs to Manhattan. Manhattan will have the opportunity to file rebuttal evidence before the hearing commences. The Board directs that the following schedule regarding IRs and submissions be followed:

December 31, 2002 – Applications filed for advance of costs
February 4, 2003 – Interveners issue IRs
February 18, 2003 – Manhattan responds to IRs
March 3, 2003 – Interveners file submissions
March 14, 2003 – Manhattan files rebuttal submission
March 24, 2003 – Hearing commences

The Board will issue a formal notice of hearing in due course and send a copy of the notice directly to each party who participated at the prehearing meeting, as well as to parties who completed the participant registration forms, those who provided written objections to the applications to the EUB but did not attend the prehearing meeting, and all of the others identified in the applications as being potentially affected by the proposed developments. The notice will also be published in the local newspapers. At the commencement of the hearing, the Board will be prepared to discuss the sitting times for the hearing.

DATED at Calgary, Alberta, on December 6, 2002.

ALBERTA ENERGY AND UTILITIES BOARD

<Original signed by>

M. N. McCrank, Q.C.
Presiding Member

<Original signed by>

J. D. Dilay, P.Eng.
Board Member

<Original signed by>

T. M. McGee
Board Member

APPENDIX A

Manhattan Resources Ltd.

Strathcona County Area

Applications for Well Licences

Applications No. 1250462, 1250463, 1260250, 1260253, 1260257, and 1269744

Application for Pipeline Gathering System

Application No. 1270601

Application for Well Site Surface Facilities

Applications No. 1279696, 1279698, and 1279699

Application for an Amendment to Existing Facility

Application No. 1280291

APPENDIX B

THOSE WHO PARTICIPATED AT THE PREHEARING MEETING

Principals (Abbreviations Used in Report)	Representatives
Manhattan Resources Ltd. (Manhattan)	D. C. Edie, Q.C. M. B. Niven
B. McNabb, T. and C. Romaniuk, C. Chevalier, B. and S. Bunker, D. and Y. Kadatz, K. and A. Aasman	G. A. Smith
Dowling Estates (about 30 parties)	D. M. Hawerluk
K. and I. Grycan, H. and I. Manji, A. and F. Jaffer, C. Tremblay, L. Caldwell, J. Penner, N. and R. M. Coyne	T. D. Weiss
D. and K. Klingspon	D. J. Carter
J., S., and N. Andrew	S. K. Luft
P. and C. Downey (a.k.a. C. Bezooyen)	W. L. McElhanney
A. and A. Campbell, H. Ewanchuck, V. Bennett, G. Weber, L. and P. Clark, R. Hucuiak, S. and S. Richard, J. and C. Hay, D. and K. Joy, R. and P. Schaaf, M. and D. Cartwright, N. and T. Gribby, P. and C. Schaaf, L. and M. Tychkowsky, D. and D. Kosanovitch, B. and D. Kutzner G. Fitch	A. and N. Skjodt B. Whiston
E. Sweet, A. and S. Morris, G. McKee, A. Szelekovszky	M. Bronaugh
Sherwood Park Fish and Game Association	A. Boyd

(continued)

THOSE WHO PARTICIPATED AT THE PREHEARING MEETING (continued)

Principals

(Abbreviations Used in Report)

Representatives

THE FOLLOWING REPRESENTED THEMSELVES:

E. Moscicki

A. and D. Allen

C. Lavold

S. Chudley

T. Lipphardt

J. Pace

R. Thomas

J. Schoof

G. Berggren

E. Schotte

O. Stiener

B. Dobransky

D. Jait

M. Hughes

Alberta Energy and Utilities Board (EUB) staff

D. Larder, Board Counsel

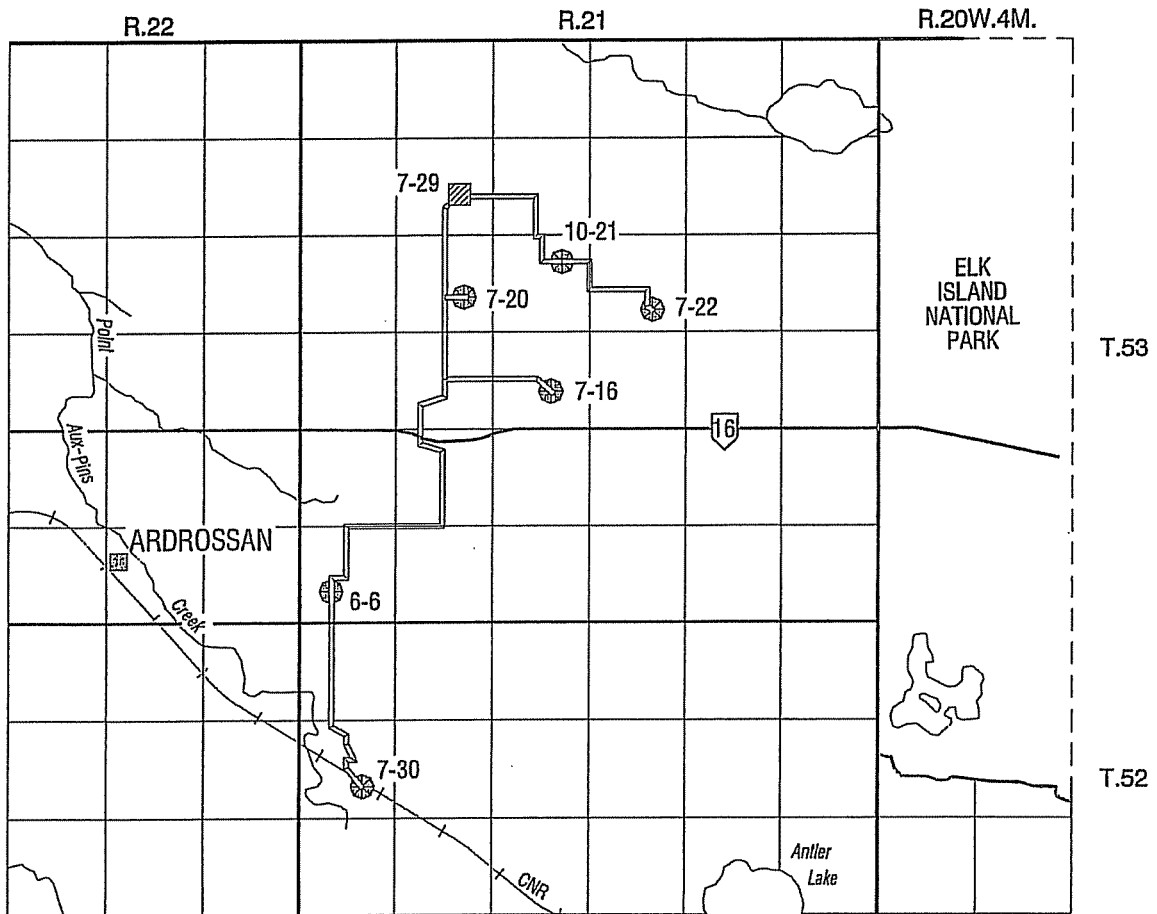
P. Derbyshire

S. Brown




APPENDIX C

PARTIES THAT HAVE PROVIDED PARTICIPANT REGISTRATION FORMS BUT DID NOT GIVE AN ORAL PRESENTATION AT THE PREHEARING MEETING

Alec and Anne Marie Babich
Nick Christon
Kathy Duff
Susan Ellenwood
Glen A. Ferko
Gail and Gary Flint
Bob Gauvin
Richard Girard
Pat and Derrick Goldsmith
Eric and Sabrina Heglund
Paul and Alfreda Hotte
Edgar and Miriam Jenkins
John B. Jones
Stanley and Carole Kuzyk
Archie and Simone MacPherson
John and Tovè Marko
Bill and Kathrine Morusyk
Judy Nicolet
Kevin Norrena
Gordon and Roxanne Oslund
Garth and Betty Petrich
Arleen Puchala
Jessie and Geoff Readman
John and Pauline Schroter (Counsel - David Cook)
Jerry Grant and Grace Shewchuck
Sally Sielsky
Curtis and Jocelyn Stewart
Bryan James Thompson
Kenneth and Rhonda-May Trelenberg
White Bird Poultry Farm (Herman Klaassens)



Legend

-  Existing facilities
-  Proposed wells and surface facilities
-  Proposed pipelines

Strathcona County Area

Manhattan Resources Ltd.

Applications No. 1250462, 1250463, 1260250, 1260253, 1260257, 1269744,
1270601, 1279696, 1279698, 1279699, and 1280291

Decision 2002-107

ALBERTA ENERGY AND UTILITIES BOARDCalgary Alberta

**THE SMALL EXPLORERS AND PRODUCERS ASSOCIATION OF CANADA
(SEPAC)****APPLICATION FOR REVIEW AND VARIANCE
OF BOARD DECISION U96001****Decision U99032
Application RU96033
File 1600-6**

OVERVIEW

This decision relates to several previous decisions and an order of the Alberta Energy and Utilities Board (EUB or Board) accepting a negotiated settlement. These are set out in point form below for ease of reference.

- Decision E95079, dated 28 July 1995, related to costs and revenue of Nova Gas Transmission Limited (NGTL) for 1993 and 1994.
- An Application for Review and Variance (R&V) of Decision E95079 was filed 22 September 1995.
- Decision U96001, dated 4 January 1996, related to costs and revenue of NGTL for 1995.
- Decision E97140, dated 4 December 1997, identified grounds for review of Decision E95079.
- An Application for R&V of Decision U96001 was filed on 14 February 1996 by SEPAC and the Canadian Association of Petroleum Producers (CAPP).
- Parties reached a negotiated settlement relating to Decision E95079 and Decision U96001 and filed it with the Board on 1 June 1998. The settlement allowed SEPAC to continue the R&V relating to Decision U96001.
- Order U98127, dated 27 July 1998, accepted the Settlement Agreement as it related to Decision E95059.
- SEPAC sought direction regarding the R&V of Decision U96001 on 29 July 1998. CAPP indicated it was withdrawing from the application.

This Decision rules on the application for R&V of Decision U96001. These matters are discussed in detail below.

INTRODUCTION

On 14 February 1996 CAPP and SEPAC filed with the EUB an application for R&V of Decision U96001, dated 4 January 1996. CAPP and SEPAC requested an R&V of the revenue requirement approved for NGTL for 1995 in respect of the treatment of a certain Firm Service Contract (the Contract) with Foothills Pipelines Limited (Foothills), dated 5 May 1994.

1 April 1999

In Decision U96001 the Board approved the revenue requirement for NGTL for 1995, including the costs associated with the Contract that provided NGTL with firm service capacity of 540 mmcf/d on Foothills Zone 7 Facilities. In its earlier Decision E95079, dated 28 July 1995, the Board found that the costs associated with the Contract (the Contract Costs) were imprudently incurred. The Board ordered NGTL to refund that portion of its rates collected between 1 November 1993 and 31 December 1994 used to fund payment of the imprudent Contract.

On 22 September 1995 NGTL filed an Application for R&V of Decision E95079. Board Decision E97140, issued 4 December 1997, outlined the grounds on which a review of Decision E95079 would be heard.

Interested parties agreed to pursue a negotiated settlement of matters related to the R&V of Decision E95079, and CAPP/SEPAC's Application for R&V of Decision U96001. A negotiated resolution was reached regarding certain of the matters and filed with the Board on 1 June 1998. The Settlement Agreement allowed, in part, that NGTL would refund an amount of \$7,000,000 to the customers as defined in NGTL's Gas Transportation Tariff as full and final satisfaction of the matters contested in Decision E95079. The Settlement Agreement specifically did not prevent SEPAC from proceeding with the Application for R&V of Decision U96001 (the Application). Order U98127, issued on 27 July 1998, accepted the Settlement Agreement.

CAPP, during 1998, indicated to the EUB that it was no longer pursuing the Application. By letter dated 29 July 1998 SEPAC, on its own, sought the Board's direction regarding the Application.

By Notice to interested parties the Board initiated a written process on 8 September 1998 indicating that it would consider submissions on whether to review Decision U96001. The Board indicated that should it decide to review Decision U96001, it would provide further directions.

The remainder of this decision deals with the question of whether to review Decision U96001.

BACKGROUND

Section 56 of the Public Utilities Board Act provides that the Board may review, rescind, or vary any order or decision made by it. The Board is of the view that section 56 requires consideration of two questions. The first question is whether the Board should embark upon a review of its original decision. If the answer is yes, the Board must then determine whether to rescind or vary its original decision. As stated in the Board's Notice, this decision will only deal with the first question.

The Board believes that its discretion to review should be exercised sparingly. Section 56 provides no statutory guidelines as to when this discretion to review should be exercised; however, the Board has indicated in past decisions that certain matters might be taken into account. Those were restated in the Application and are as follows:

1 April 1999

1. Where new evidence, which was not known, or not available at the time evidence was adduced, and which may have been a determining factor in the decision, became known after the decision was made;
2. Where a decision is based on an error of law or fact, if such error is either obvious or is shown on a balance of probabilities to exist, and if correction of such error would materially affect the decision;
3. Where correction of a clerical error or clarification of an ambiguity is required; or
4. Where other criteria, particular to a given case, are shown to be valid.

The Application set out three grounds for review. The following grounds alleged that the Board erred in jurisdiction and in law:

Ground 1 by approving a revenue requirement for NGTL for 1995 which will result in rates that are not just and reasonable, contrary to Section 28(a) of the Gas Utilities Act (GUA) and particularly, that the Board allowed costs of a contract which the Board in a prior decision determined had not been prudently entered into and as a result of which the Board concluded the costs of the contract should not be recovered by NGTL from its customers;

Ground 2 by apparently making a determination as to the prudence of costs of a contract, in an unfair and unreasonable manner, and particularly in a manner that appears to circumvent the process and procedures established by the Board to deal with issues that are pending before the Board respecting the prudence of the same contract, as raised by NGTL's application for a R&V of decision E95079.

Ground 3 by failing to give any, or any adequate reasons for its decision, contrary to Section 7 of the Administrative Procedures Act, R.S.A. 1980,c.A-2 and particularly, the Board did not provide reasons for its apparent conclusion that the contract costs it had previously disallowed, as not having been prudent were for purposes of the decision appealed from, prudent and would result in just and reasonable rates.

GROUND 1

With respect to Ground 1, SEPAC referred to the prior determination by the Board, set out in Decision E95079, that the Contract Costs were imprudent. SEPAC maintained that by allowing the Contract Costs for 1995, in Decision U96001, the Board made an implicit finding that the Contract Costs were prudent. This would represent a reversal of the determination made by the Board with respect to the imprudence of the Contract in Decision E95079.

1 April 1999

Position of NGTL

NGTL stated three reasons why SEPAC has failed to show on the balance of probabilities that the Board erred by approving rates not just and reasonable.

First, SEPAC argued there was inconsistency between Decision E95079 and Decision U96001. NGTL stated, however, that in Decision U97140, dated 4 December 1997, the Board determined an arguable case had been made to review the position of Decision E95079. NGTL argued that notwithstanding the terms of the subsequent negotiated settlement it would be wrong for the Board, in deciding whether or not to review Decision U96001, to assume that Decision E95079 was not in error.

Second, the Board is not bound by a previous board decision. Decisions are made based on the record of each proceeding.

Third, there is substantial evidence of subsequent events and changed circumstances between the issuance of Decision E95079 and Decision U96001. In the context of the broad nature of NGTL's General Rate Application and the changed facts and circumstances Decision U96001 discloses no error of law or jurisdiction.

Position of Foothills Pipe Lines Ltd.

Foothills stated that the Board, in Decision U97140, had determined there were reasonable grounds to review Decision E95079, but because of the negotiated settlement between the parties (including SEPAC) the review of Decision E95079 did not occur. Therefore, since the correctness of Decision E95079 was not fully tested, that decision is not useful as a determinant of any finding.

Foothills further held that it is a well-established principle of regulatory law that a panel of a board in any proceeding is not bound by a previous decision of another panel of the same board.

Finally, Foothills stated that the facts upon which Decision U96001 was based are different than the facts upon which Decision E95079 was determined. Accordingly, the comparison between the two decisions cannot be the basis upon which the Board finds grounds for a review of Decision U96001.

Board Findings

The Board, in Decision U97140, decided to review the finding of imprudence in Decision E95079. However, since a negotiated settlement was reached, the parties chose not to further pursue the question of whether or not the Contract Costs, which related to 1993 and 1994, were imprudent.

This may, in any event, have no bearing in determining whether 1995 costs for the 540 roll-in should have been included in the 1995 revenue requirement. In Decision U96001 the Board did not specifically address the prudence of the Contract Costs for 1993 and 1994 (the matter in dispute in Decision E95079) although the Board would have been aware that the question of the prudence of the Contract Costs had been reopened.

The Board notes there were different circumstances addressed in Decision U96001 than those addressed in Decision E95079.

On 1 January 1995 NGTL became fully regulated by the EUB. Prior to that date its rates, tolls, and tariffs were set by the directors of NOVA Corporation of Alberta. NGTL's customers could complain to the then Public Utilities Board to have it examine all or part of the company's revenue requirement. Decision E95079 dealt with such a complaint regarding the prudence of the Contract.

Decision E95079 addressed the Contract Costs in 1993 and 1994. By contrast, Decision U96001 represented the first ruling on NGTL's tolls and tariffs as a utility fully regulated by the EUB. All aspects of NGTL's revenue requirement for 1995 were examined, and considered in the Board's decision.

At the time of the issuance of Decision U96001 NGTL was effectively the sole shipper on Zone 7, similar in principle to its status on Zone 6. The Board determined that the entire cost of Zone 7, including the Contract Costs, should be rolled into NGTL's revenue requirement. The Board further commented on the issue of duplicate costs and noted the NEB's review of the whole of Zone 7. Essentially, after 1 January 1995, Foothills and NGTL, while still affiliated entities, were subject to full scrutiny by their respective regulators, the NEB and the EUB.

Due to the various changed circumstances, there was no obvious inconsistency or "reversal" in that Decisions E95079 and U96001 treated the Contract Costs differently in different years.

In any event, the Board notes the well-established principle that a panel of a board is not bound by a previous decision of the same board. Rather, decisions are made based on the merits of each application.

For these reasons, the Board considers that the criteria identified in SEPAC's Ground 1 have not been shown to be valid, therefore the Board dismisses this ground for review.

GROUND 2

With respect to Ground 2, SEPAC alleged a jurisdiction error in the process and procedure the Board followed in exercising its authority in Decision U96001. SEPAC alleged unfairness and unreasonableness in that the Board exercised its statutory authority in Decision U96001 in a manner that circumvented the process and procedures established to deal with the R&V of Decision E95079.

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Position of NGTL

NGTL's position was that the Board, in Decision U96001, made neither an explicit nor an implicit determination as to the prudence of the Contract. Rather, the Board's decision was based on determining the equity, justness, and reasonableness of arguments before the Board in the proceeding leading to Decision U96001.

NGTL stated that SEPAC's allegations of proper notice and fair play were moot given that Decision U97140 found that NGTL had an arguable case for review of Decision U95079.

Board Findings

This ground involves an examination of the statutory authority that was being exercised by the Board in Decision U96001 and in the R&V application of Decision E95079. In particular, the Board must examine whether the mechanisms and procedures the Board utilized in the process were appropriate so as to afford affected parties due process.

As previously stated, Decision U96001 represents the first ruling on NGTL's tolls and tariffs as a fully regulated utility. The 1995 proceeding provided a forum to deal with all issues regarding NGTL's 1995 revenue requirement including the roll-in of the 540 mmcf/d.

In Decision U96001 the Board did not rule specifically on the R&V of Decision E95079, which dealt with 1993 and 1994, rather, it effectively limited the impact of the R&V to the pre-1995 timeframe. The question of whether to review Decision E95079 was subsequently dealt with in Decision U98127.

In the proceeding leading to Decision U96001, the Board heard evidence and argument regarding 1995 circumstances and differences from the 1993 and 1994 set of circumstances. The Board is satisfied that all interested parties had sufficient opportunity to deal with the issues raised and that the Board did not utilize any process that was unfair or unreasonable.

The Board considers that the criteria identified in SEPAC's Ground 2 have not been shown to be valid, therefore the Board dismisses this ground for review.

GROUND 3

With respect to Ground 3, SEPAC alleged errors of jurisdiction and law in that Decision U96001 did not disclose the Board's reasons for accepting and, therefore, implicitly determining that the Transportation by Others (TBO) charges, incurred by NGTL pursuant to the Contract, were prudent and would therefore result in just and reasonable rates commencing in 1995.

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Position of NGTL

NGTL stated that SEPAC failed to show the Board erred in jurisdiction and law by failing to give any or any adequate reasons for its decision, contrary to Section 7 of the Administrative Procedures Act. It is NGTL's view that the Board provided reasons for its decision, which are full and adequate standing on their own and when read in light of the record before the Board.

NGTL stated that the Board reviewed evidence and argument from the parties to this proceeding and in Decision U96001 summarized many of those positions, including some history of Zones 6, 7, and 8; changed circumstances; and views regarding the integrated system.

NGTL further noted that the Board's reasons for accepting Zone 7 in its entirety are related to acceptance of the view that Zone 7 is part of the NGTL integrated system and that Zone 7 total costs have been reviewed and approved by the NEB. The Board stated that it had accepted the principle of regulatory comity in this regard.

Board Findings

The following two paragraphs summarize the Board's reasons for its findings in Decision U96001:

The Board notes that the Foothills Zone 7 facilities consist of loops on the NGTL system and form an integral part of NGTL from an operational perspective. The Board believes that shippers utilizing the integrated system under similar terms and conditions and representing a large cross-section of the producing industry should be treated equally....

With respect to the alleged duplicate costs in Foothills' tolls, this matter is more properly dealt with by the NEB, which regulates Foothills. The Board accepts the principle of regulatory comity and would not normally substitute its judgment for that of other regulators. The Board, therefore, accepts NGTL's proposed TBO charges on Foothills as filed.

Having reviewed the evidence and argument on record for this proceeding the Board considers that the above-cited reasons represent sufficient and adequate grounds for the findings regarding the 1995 revenue requirement in Decision U96001.

The Board notes that NGTL's revenue requirement includes the prudent costs incurred by NGTL to serve its customers and normally would be paid by NGTL customers, not its shareholders. In Decision U96001 the Board accepted the assignment of Pan-Alberta volumes as appropriate and that all of Foothill's Zone 7 related costs would be borne by NGTL since it was the sole shipper on Foothills Zone 7. Since those costs were incurred only to serve NGTL's customers, they would be in NGTL's 1995 revenue requirement regardless of which combination of tolls and contractual payments NGTL used to pay

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Foothills. The issue of the prudence of the 1993 and 1994 Contract Costs was therefore irrelevant for 1995 once NGTL's revenue requirement included all of Foothill's Zone 7 costs.

The Board considers that the criteria identified in SEPAC's ground 3 have not been shown to be valid, therefore the Board dismisses this ground for review.

SUMMARY

The Board considers there were fundamental changes in circumstances between Decision E95079 and Decision U96001. The Board also considers that the record satisfactorily references the changed circumstances since Decision E95079. Further, the record indicates that all parties to the proceeding had the opportunity to present their views, and there was no circumvention of process or procedure by the Board in dealing with any of the issues. The Board believes that adequate reasons for Decision U96001 were provided and that the record before the Board contains evidence of these reasons.

Having regard for the evidence presented and the conclusions summarized above SEPAC's request for review and variance of Decision U96001 is denied.

ALBERTA ENERGY AND UTILITIES BOARD

J.P. Prince Ph.D.

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