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Utilities Commission Act updated

Cal Johnson and Ron Ezekiel, Vancouver

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On May 29th, British Columbia's *Utilities Commission Act* – the legislation that governs the British Columbia Utilities Commission (BCUC) – was amended. The amendments bring the *Utilities Commission Act* in line with the BCUC's current practices and make it clear that the regulatory process should move away from the traditional adversarial hearing process into an era that focuses more on results and alternative dispute resolution. The amendments also facilitate unbundling (i.e. the sale of natural gas by marketers to low volume commercial and residential customers).

Notable changes include:

- Part 2, which required that an Energy Removal Certificate be obtained from the Minister of Energy before energy could be removed from the province, was deleted.

- Section 45 now requires a utility to file, if required by the BCUC, certain capital expenditure plans; plans of how the utility intends to meet the demand for energy by acquiring energy from others, and the expenditures required for that purpose; and plans of how the utility intends to reduce energy demand, and the expenditures required for that purpose. These amendments provide the BCUC with authority to require longer term plans from utilities and also allow the BCUC to pre-determine the means of recovering expenditures before the expenditures are made.

- Section 60 was amended by: (1) introducing provisions that require the Commission, when determining rates, to have regard to measures that encourage utilities to increase efficiency, reduce costs and enhance performance, and (2) allowing the Commission to use mechanisms, formulas and other methods of setting rates. These amendments provide statutory authority for formulaic rate setting (which has been common in BC for more than five years) and encourage the use of performance-based ratemaking.

- The definition of "electricity transmission contract" was repealed and a new definition of "energy supply contract" was introduced. The new definition is limited to sales of energy to a utility. The effect of this amendment is that energy supply contracts with entities other than a

utility will not have to be filed with the BCUC.

- Section 71.1 was introduced which grants authority to the Commission to make rules and require licensing of marketers in respect of gas sales to low volume consumers. These provisions were required before any consideration of unbundling could proceed.
- Sections 86.1 and 86.2 were added. They allow the BCUC to encourage alternative dispute resolution methods such as negotiated settlements and also provide that oral hearings are not required when the BCUC considers that a written hearing is appropriate.

New British Columbia Transmission Corporation Established

Cal Johnson, Vancouver

On May 29th the *Transmission Corporation Act* received royal assent, but it is not yet in force. The *Act* will come into force by order of the Lieutenant Governor in Council.

The new *Act* creates a framework for the British Columbia Transmission Corporation (BCTC) and the transfer of operation of the electric transmission system in BC from BC Hydro to BCTC. The major transmission facilities will continue to be owned by BC Hydro but leased to BCTC, with operation and management of those facilities performed by BCTC.

The *Act* requires BCTC, by December 31, 2004, to seek an order from the BCUC approving BCTC's first schedule of rates for transmission service. Until that order is issued, BC Hydro must continue to offer transmission service at rates approved by the BCUC.

Cabinet is given authority to make regulations, and specifically can make regulations that define the transmission system. The division of assets will play an important role in determining the rates charged by BCTC. Previously there had been suggestions that the BCUC would hold a hearing to decide which assets would continue to be operated by BC Hydro and which would be operated by BCTC, but it appears that this decision will be made by regulation.

Busy Period for Environmental Law Reform

Kevin O'Callaghan, Vancouver

In recent months the provincial government has enacted or amended numerous pieces of environmental legislation. We have summarized the key pieces of legislation below:

Drinking Water Protection Act

On May 16, 2003, the *Drinking Water Protection Act* and its accompanying regulations were proclaimed in force. Under this legislation:

- drinking water supplies are monitored and evaluated to ensure that they comply with minimum quality standards;
- where supplies are not meeting acceptable minimum quality standards, measures must be taken to both inform the public of the risk posed and to improve the quality of the drinking water in the affected area; and
- investigations may be undertaken to determine the potential source of contamination, and the

implementation, if required, of drinking water protection plans.

Bill 74: *Forest and Range Practices Act*

The *Forest and Range Practices Act*, which is to be fully implemented by December 2005, attempts to improve the processes currently imposed under the Forest Practices Code for the management of forest practices generally. Under the new *Act*:

- there will be more of an emphasis on the new "results based" system (requiring forest companies to meet standards rather than dictating how those standards are to be reached);
- forest companies will not be required to produce site plans for approval prior to minor amendments or modifications to their current practices, however they will face stiff penalties under the new legislation where their practices fail to meet the established standards; and
- the non-compliance penalties under the *Act* have increased and include the possibility of imprisonment, as well as fines of up to $1,000,000.

The *Environmental Assessment Act*

The *Environmental Assessment Act* generally came into force on December 30, 2002. Under the new *Act*:

- the executive director has the discretion to determine whether or not a reviewable project requires an assessment at all, and if so, then what methods and procedures should be used in carrying out the assessment;
- situations in which an environmental assessment certificate will be issued are outlined, along with the prohibition against carrying out any work on a reviewable project prior to a certificate being granted;
- sanctions are provided for non-compliance, including fines of up to $200,000;
- the provincial government may enter into agreements with other jurisdictions in an attempt to harmonize assessment procedures between the provincial and federal governments, and to avoid any overlap and duplication of reviews; and
- the provincial government may enter into agreements relating to environmental assessment with the Nisga'a nation.

Bill 53: *Integrated Pest Management Act*

The *Integrated Pest Management Act* was introduced in the Legislative Assembly on May 13, 2003, but is not yet in force. The Act will apply to pesticide use on all public land and all private land used for forestry, public utilities, transportation and pipelines. Under the *Act*:

- an affected party will only be permitted to use pesticides without a permit where the party has developed a pesticide use plan that considers the best methods that can be implemented to control pests with the least impact on the environment; and
- there will be a requirement to consult with the public on the plan, and notify the Ministry of Water, Land and Air Protection of its contents.

Bill 57: Environment Management Act

This Bill combines and amends BC's *Waste Management Act* and *Environmental Management Act*. For further information, please see our May 2003 bulletin on the publications section of our web site.

Species at Risk Act

Rob Lonergan and David Everett, Vancouver

Portions of Canada's *Species at Risk Act* (SARA) came into force by proclamation on June 5, 2003. SARA sets out protective measures for those species identified as being at risk (extirpated, endangered, threatened or species of special concern) and for identified critical habitat. Particular provisions brought into force include, SARA's listing provisions and provisions governing the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), a committee of wildlife scientists and experts. However, certain other provisions including SARA's general prohibitions on killing listed species and destroying listed species' critical habitat, as well as the *Act*'s enforcement and offence provisions will not be in force until June 1, 2004.

Key elements of SARA are:

- COSEWIC is charged with determining whether a species is at risk. Upon receiving COSEWIC's assessment, the Minister of the Environment must make a recommendation to Cabinet to list the species under SARA. Cabinet may either accept or refuse the recommendation, or refer the matter back to COSEWIC for reconsideration. However, if Cabinet does not act within nine months, the Minister must list the species in accordance with COSEWIC's assessment.

- SARA contains a set of general prohibitions that automatically apply to listed species. These include prohibitions against any person killing, harming, harassing, capturing or taking listed species, as well as possessing or trading in listed species. The *Act* also prohibits any person from damaging or destroying a listed species' residence (i.e. a den, nest, etc;), but not its habitat unless it is specified by Cabinet in a "recovery strategy" or "action plan".

The federal government is currently developing regulations intended to provide "fair and reasonable" compensation for losses suffered as a result of "extraordinary impacts" from the prohibition against the destruction of habitat specified in a "recovery strategy" or "action plan". The *Act* does not provide compensation for any other impacts of SARA. The decision to provide compensation will be discretionary and will lie in the hands of the Minister. Until the draft regulations are finalized, there remains considerable uncertainty regarding the procedures, limits and eligibility regarding compensation, including the eligibility of resource tenure holders.

There is also a potential for conflict arising from the possible application of SARA to provincial land. SARA's so-called "federal safety net" provisions purport to give Cabinet the power to extend SARA's general prohibitions to provincial Crown land where a province's laws do not effectively protect a listed species or its residences. Moreover, the *Act's* provisions clearly prohibit the destruction of any habitat on provincial Crown land specified in a "recovery strategy" or "action plan". Provincial governments and landowners have expressed concern over the extent of SARA's intrusion into areas of provincial jurisdiction. SARA will likely be the subject of considerable debate and potential litigation between the federal and provincial governments until issues respecting jurisdiction and compensation are resolved.

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