July 4, 2012

Unjustly discriminatory rates on Ventures Pipeline to continue; the Commission decides that it lacks jurisdiction to set interim or final rates.

By Nigel Bankes

Cases and decisions commented on:

(1) AEUB Decision 2006-105, Suncor Energy Inc., Preliminary Decision Regarding Jurisdiction to have the Ventures Pipeline (Oil Sands Pipeline) Regulated Under the Provisions of the *Gas Utilities Act*, Section 24 of the *Gas Utilities Act*, October 24, 2006;

(2) *TransCanada Pipeline Limited v Alberta (Energy and Utilities Board)*, 2008 ABCA 55 (appeal of AEUB Decision 2006-105);

(3) AUC Decision 2009-065, TransCanada Pipeline Ventures Ltd, Suncor Energy Inc, Application to Have the Ventures Pipeline (Oil Sands Pipeline) Regulated Under the Provisions of the *Gas Utilities Act*, Section 24 of the *Gas Utilities Act* – Investigation, May 20, 2009;

(4) *TransCanada Pipeline Ventures Ltd v. Alberta (Utilities Commission)*, 2010 ABCA 96 (appeal of AUC 2009-065);

(5) AUC Decision 2012-164, Williams Energy (Canada), Inc, Application to Terminate the Williams Contract for Ventures Pipeline Transportation Service or, in the Alternative, Set Rates to be Imposed and Observed by the Owners of Ventures Pipeline, June 14, 2012.

On June 14, 2012 the Alberta Utilities Commission (AUC\Commission) handed down its decision in the latest effort by the contract shippers on Ventures Pipeline to obtain relief from what the Commission has already ruled to be rates that are "unjust or unreasonable, unjustly discriminatory or unduly preferential" (AUC Decision 2009-065 at paras 145 & 147). The AUC declined to grant the relief sought. How could this be? The simple answer is that section 5 of the *Gas Utilities Act*, RSA 2000, c G-5 (GUA) provides that the Commission may only exercise its authority under certain key sections of the GUA (including the rate setting provisions) if the Commission has been authorized to do so by means of an Order in Council (OC), or if the gas utility in question is covered by an exemption under the regulations. The Commission held that Ventures did not fall within any of the existing categories of exemption and further, that since there was no OC in place (despite the Commission's request), the Commission had no jurisdiction to fix final or interim rates for Ventures.

The *Gas Utilities Exemption Regulation* (Alta Reg 53/99) exempts a number of scenarios from the need to obtain an OC. The regulation is complex but we can summarize it this way. The following types of rate setting or utility supervision proceedings do not require an OC: (a) traditional utilities, (b) facilities subject to common processor or common carrier orders under the *Oil and Gas Conservation Act*, RSA 2000, c O-5, (OGCA) (c) proceedings to establish depreciation rates, standards etc, or to extend facilities to provide service, (d) orders to supply gas in relation to a traditional utility, and (e) proceedings in relation to NOVA (recognizing that this provision is perhaps spent since the NOVA system is now subject to federal regulation – see my post on that issue here). The Commission held that none of these exemptions applied to Ventures since Ventures is a contract pipeline which supplies a natural gas transmission service to a limited number of commercial operators in the oil sands area. The Commission rejected Williams' efforts to bring Ventures under paragraph (e) of the *Exemption Regulation* on the basis that Ventures was a subsidiary of NOVA. And while that relationship is the source of the difficulty in this case (since NOVA uses significant excess capacity on the pipeline to offer a regulated service to other parties in addition to the contract service provided to Williams and others), the Commission concluded (AUC Decision 2012-164, at para 38) that "the legislature (*sic*) intended the section to apply only to NGTL [NOVA] and not to its affiliates."

The *GUA* does not lay out a procedure for obtaining an OC. The Commission's decision records (AUC Decision 2012-164 at para. 20) that the AUC first wrote to the Government of Alberta to request an OC on June 4, 2009 and followed up that request on March 4, 2010 and "To date no order in council has been issued …" There is presumably nothing to preclude Williams from petitioning for an OC itself. In that petition Williams would lay out, in the form of the Commission's conclusions in 2009-065, the reasons why the Lieutenant Governor in Council (LGiC) should grant the Order according the AUC jurisdiction over the matter. But does Williams have any sort of effective remedy if it is met with either silence or a rejection (without reasons)? It seems unlikely. Section 5, the relevant section of the *Act*, offers no guidance to structure what appears to be a very broad discretion. Section 5(1) simply provides that the Commission may not proceed with a listed matter "unless it is authorized to do so by an order of the Lieutenant Governor in Council." If no such Order is forthcoming mandamus will not be available (since the power is discretionary) and it is hard to imagine any other form of relief - notwithstanding the trite proposition of law usually recited on these occasions to the effect that no discretionary power is absolute.

This situation demonstrates that the current regulatory scheme is bankrupt. It is hard to defend a scheme which results in three applications to the Commission, two decisions of the Court of Appeal (and recall that this is a two step process involving both the leave to appeal application and then judgment on the merits) over an extended period of six years but still leaving the shippers without an effective remedy. While the underlying philosophy of section 5 is clearly to prefer competition, markets and freedom to contract over economic regulation, the premise of that preference must be that the market is working and that a dominant party (here NOVA\NGTL) has not abused its market power. The AUC plainly concluded that there is abuse in this case: AUC Decision 2009-065, at paragraph 142.

Since the system is broke what would make more sense?

The current system and its requirement of an OC before the AUC can proceed to rate setting is very poorly designed, and, despite being shuffled between the old Public Utilities Board, the Alberta Energy and Utilities Board and now the AUC, the fundamental provisions of the GUA have not been examined and revised for decades. Perhaps it is time for that review and while we are at it we should examine all of the LGiC provisions in the energy statutes of the province. An LGiC provision for present purposes is a provision that makes the exercise of a power by a regulator subject to the approval of the LGiC. The clear purpose of an LGiC provision is to take authority away from technical experts (regulatory boards) and to transfer that authority to a politicized decision maker who is presumably subject to lobbying. In reviewing these provisions we need to ask whether this is the type of decision that should still be subject to political review or whether it would be better, for example, to establish more technical pre-conditions to the exercise of jurisdiction. In this case, the relevant conditions might be a preliminary assessment (as there was here) of either abuse of market power or discrimination. In other cases, the applications seem so routine and politically non-contentious (e.g. compulsory pooling applications under the OGCA) and the relevant conditions already specified in the statute itself (as in the case of pooling) or in Board guidance documents (as in the case of the common orders), that there is surely no need whatsoever for LGiC approval.

Perhaps this issue will be dealt with as part of Alberta's single window regulatory review (see here, there is a hint of this at 16) which is to be rolled out in the fall. While I am no fan of that particular exercise (see my post here) the current range of LGiC provisions in our energy statutes cries out for reform.