ENERGY REGULATION QUARTERLY

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MISSION STATEMENT

The mission of the Energy Regulation Quarterly is to provide a forum for debate and discussion on issues surrounding the regulated energy industries in Canada including decisions of regulatory tribunals, related legislative and policy actions and initiatives and actions by regulated companies and stakeholders. The Quarterly is intended to be balanced in its treatment of the issues. Authors are drawn principally from a roster of individuals with diverse backgrounds who are acknowledged leaders in the field of the regulated energy industries and whose contributions to the Quarterly will express their independent views on the issues.

EDITORIAL POLICY

The Quarterly is published by the Canadian Gas Association to create a better understanding of energy regulatory issues and trends in Canada.

The managing editors will work with CGA in the identification of themes and topics for each issue, they will author editorial opinions, select contributors, and edit contributions to ensure consistency of style and quality.

The Quarterly will maintain a "roster" of contributors who have been invited by the managing editors to lend their names and their contributions to the publication. Individuals on the roster may be invited by the managing editors to author articles on particular topics or they may propose contributions at their own initiative. From time to time other individuals may also be invited to author articles. Some contributors may have been representing or otherwise associated with parties to a case on which they are providing comment. Where that is the case, notification to that effect will be provided by the editors in a footnote to the comment. The managing editors reserve to themselves responsibility for selecting items for publication.

The substantive content of individual articles is the sole responsibility of the contributors.

In the spirit of the intention to provide a forum for debate and discussion the Quarterly invites readers to offer commentary on published articles and invites contributors to offer rebuttals where appropriate. Commentaries and rebuttals will be posted on The Energy Regulation Quarterly website.

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Rowland J. Harrison, Q.C. and Gordon E. Kaiser, FCIArb
Managing Editors

2014 was a tumultuous year for the energy industry in Canada. The year saw the continued growth of high cost renewables, the collapse of oil prices, and a sudden increase in the number of crude by rail shipments.

It was also a busy year for many energy regulators. We saw what amounted to a reversal of the National Energy Board's Mainline decision, a continuation of the battle to build pipelines across Canada, and a new Ontario-Quebec energy alliance.é

We will examine these developments in this Editorial, as is our practice at the end of every year. We will also try to forecast the important regulatory developments coming in 2015.

The big issue that will challenge Canadian regulators in 2015 is the regulation of electricity rates in a world where utilities are facing declining volumes. We also look forward to the decision of the Supreme Court of Canada in April when it decides two appeals, one from Alberta and one from Ontario, dealing with one of most fundamental regulatory principles, the prudence of utility decision making.

Pipeline Construction Stalls

There is no question that the dominant regulatory issue in Canadian energy markets relates to pipelines. The ERQ has reviewed many of these projects at various stages in past issues. It is useful to see where they all stand year end. The product that is trying to find its way to market originates in the Alberta oil sands near Fort McMurray and the Bakken shale oil in North Dakota.

The cost of landlocked crude is real. Alberta Premier Jim Prentice has estimated that the lack of pipelines costs the federal and Alberta governments $6 billion per year. Western Canadian crude trades at a substantial discount to the international oil price because Canadian crude lacks easy access to world markets.

There are four projects that continue to dominate the discussion, TransCanada's Keystone XL pipeline, the Enbridge Northern Gateway line, the Kinder Morgan Trans Mountain expansion and more recently the TransCanada Energy East project. All four projects have faced serious opposition from First Nations, environmental groups and local communities.

The TransCanada Keystone XL Pipeline

The Keystone XL pipeline, a $5 billion project, was first proposed by TransCanada in 2008 to transport crude from Canada through the Midwest and Texas to the Gulf of Mexico. The US Department of State has been reviewing the pipeline for nearly 7 years. The Canadian portion of the line obtained National Energy Board approval in 2010.

American approval has been held up by environmental opposition nationally, and local opposition in Nebraska. The latter led to court decisions and ultimately gubernatorial action to support the line, shifting the focus back to the national debate and the U.S. Congress. In November 2014 the House of Representatives passed legislation that approved Keystone XL for the ninth time. That bill was subsequently defeated in the Senate by one vote.

Midterm elections in November saw the Republicans regain a majority in both the House and Senate for the first time in 8 years. A January vote passed both the House and Senate but failed

to get the 67 vote majority required to override a presidential veto. On February 24, President Obama exercised his veto. That is where things stand as we go to print.

The Enbridge Northern Gateway Pipeline

The Enbridge Northern Gateway pipeline would run 1178 km from Bruderheim, Alberta to a marine terminal in Kitimat, British Columbia. One line would transport 525,000 barrels per day of Alberta oil west to tidewater. The other would bring 93,000 barrels per day of condensate back to Alberta to be used in the processing of Alberta's bitumen.

The National Energy Board Joint Review panel issued its Report to the Federal Cabinet on December 19, 2013, and recommended approval of the project subject to 209 conditions. The Federal Cabinet accepted the panel's recommendation in June 2014 and ordered the National Energy Board to issue Certificates of Public Convenience and Necessity subject to the conditions.

One of the conditions that the Joint Review panel established was a requirement that Enbridge reengage its consultation with First Nations. Enbridge restarted those consultations and they remain ongoing.

There are currently 18 appeals and review applications before the Federal Court of Appeal. There are five judicial review applications regarding the Joint Review Panel's Report and nine judicial review applications relating to the Cabinet's Order in Council directing the National Energy Board to issue Certificates of Public Convenience. To top things off, there are four appeals relating to the Certificates issued by the National Energy Board.

Most of these appeals have been commenced by First Nations groups challenging the adequacy of consultation. The others were brought by environmental groups challenging the adequacy of the environmental assessment. One of the larger issues is the Joint Review Panel's refusal to take into account upstream environmental effects of oil sands production, an issue the Province of Quebec has taken up in the Energy East proceeding.

The Kinder Morgan Transmountain Expansion

On December 16, 2013, Kinder Morgan filed an application for approval of the $5.4 billion Trans Mountain Expansion project. Twinning the 1150 km existing pipeline from Edmonton, Alberta to Burnaby, British Columbia, the project would increase the capacity from 300,000 barrels per day to 890,000 barrels per day. The Westridge Marine terminal in Burnaby would also be expanded to allowBurrard Inlet tanker traffic to increase from 5 to 34 vessels per month.

The initial public hearing was the largest in the country - 1650 registered participants of whom 400 were granted full intervener status. Initially the line was to go through the

streets in Burnaby. Faced with widespread public opposition, Trans Mountain changed the route to tunnel through the Burnaby Mountain Conservation area. That met with even greater opposition. The City of Burnaby began issuing various bylaw infractions including an Order to cease and desist. Trans Mountain in response filed a motion with the National Energy Board seeking an order directing Burnaby to permit access to allow Kinder Morgan to do the necessary engineering studies.

In October 2014, the National Energy Board granted Trans Mountain permission to access the Burnaby Mountain facility to conduct the necessary studies. This was met with more protesters.

In September 2014, Trans Mountain filed a Notice of Constitutional Question with the National Energy Board. The Board agreed with Trans Mountain that the Board had the authority to determine that specific Burnaby bylaws were inoperative if they conflicted with the National Energy Board rulings under section 73 of the *National Energy Board Act.*

The Board also accepted Trans Mountain's submissions that the doctrine of federal paramountcy or alternatively inter jurisdictional immunity made Burnaby bylaws inapplicable. This was the first time that the National Energy Board had issued an order against a municipality in connection with a dispute regarding a pipeline company's access to the lands. The Federal Court of Appeal denied the City's motion for leave to appeal from the Board's decision, finding that federally regulated pipelines have the power to access public and private lands for the purpose of performing surveys and investigations under the *National Energy Board Act*. Richard King has provided an excellent summary of this

constitutional battle in this issue.

The TransCanada Energy East Project

On October 30, 2014, TransCanada filed an application with the National Energy Board for approval of the Energy East project. This is a $12 billion project consisting of a 4,600 km pipeline to carry 1.1 million barrels of crude oil per day from Alberta and Saskatchewan to refineries in Montreal and Saint John, New Brunswick. To do this, TransCanada proposes to convert 3000 km of existing natural gas pipe to oil service between Saskatchewan and Ontario and to build 1600 km of new pipe in various provinces to connect with the converted pipe.

Shortly after filing the application, TransCanada revised its plan for a marine terminal in Cacouna, Quebec when the federal government concluded that beluga whales in the area would be in danger. At the same time, it was clear that Energy East was running into opposition in Ontario and Quebec, driven in part by local gas distributors (Enbridge and Union in Ontario and Gas Métro in Quebec) who were concerned they would lose gas transmission capacity.

The Provinces of Ontario and Quebec subsequently joined forces and insisted that seven conditions must be met if TransCanada wanted to obtain their approval of the pipeline. One of those is that natural gas capacity be sufficient to meet the needs of each province. Another and perhaps more important condition is that certain environmental assessments be taken into account concerning greenhouse gases.

Quebec appears to be seeking an environmental assessment that includes consideration of upstream greenhouse gas emissions from production outside the province. That is something the National Energy Board has consistently refused to consider and is the subject of one of the Federal Court appeals in connection with Northern Gateway.

Energy East is an interesting regulatory process. Few would doubt that the Federal government and the National Energy Board have exclusive jurisdiction over interprovincial pipelines. But pipelines also require environmental approvals, many of which are under Provincial jurisdiction.

Ontario and Quebec have initiated hearings before their own energy regulators to deal with their concerns regarding Energy East. Both regulators have been instructed to file Reports with the Provincial Minister of Energy. The Régie filed its report on December

18, 2014 and the Ontario Energy Board is expected to file its report in the spring. The plan is that these reports will serve as the basis for the interventions by both provinces in the National Energy Board hearing.

In the meantime many remain hopeful that Ontario, Quebec, and Alberta reach a settlement and put that settlement before the National Energy Board.

One argument that will be front and center is the very clear desire of the federal government and the Alberta government to get Alberta crude to tidewater. Northern Gateway is mired in aboriginal environmental opposition and the Trans Mountain expansion is not faring much better. In some respects Energy East is more promising, particularly if a deal can be brokered with Ontario and Quebec on environmental issues.

It may seem like a strange outcome but Energy East may result in the first carbon pricing plan adopted by a number of Canadian provinces

The Mainline Settlement

The most important regulatory decision in 2013 was the National Energy Board's decision on March 27 to restructure TransCanada's rates. That decision introduced some new and important legal concepts. The most important decision of 2014 was the reversal of that decision.

The 2013 Board decision, discussed in an earlier issue of ERQ, was that the cost of stranded assets should not be borne by the customer but by the utility. The rationale was that the utility had in the past been allowed a premium in its rate of return. That premium, paid by ratepayers, was designed to cover this risk. Now that the risk had arrived, it was TransCanada's responsibility to manage it.

At the time, this finding sent shockwaves around the regulatory world, particularly the utility world. Utilities, citing well established legal principles, believed that if they made prudent investments they were entitled as of right to recover the cost of that investment. The Board

did offer compensation of some measure - it increased the companies ROE from 8.07 per cent to 11.5 per cent, suggesting that perhaps the future looked a little riskier than the past.

The Board then gave TransCanada what it believed was the necessary tool to work its way out of the situation. Essentially the Board deregulated rates for discretionary services. The Board allowed TransCanada complete pricing discretion on short-term and interruptible services. There was some logic to this move. Interruptible services are always cheaper than fixed long-term services. Because every customer knew that the Mainline had excess capacity, they contracted for cheaper short-term service knowing they would never be interrupted. The reduced revenue did not help the TransCanada bottom line.

There was one other important finding in the initial decision that factored into subsequent events. The Board had found that TransCanada had no duty to serve because it had no exclusive franchise territory.

TransCanada applied to the Board for a review and variance. The essential component of that application was to increase the price from $1.42/gj in the decision to $1.52/gj. The Board rejected that application in its entirety.

TransCanada then turned to the marketplace. Because the Board had found that the utility had no duty to serve, TransCanada withdrew from earlier commitments to build new capacity. This led Union Gas and Gas Métro to apply to the NEB for an order requiring TransCanada to connect a new Union, Gas Métro pipe from Maple to Vaughn.

In another interesting turn of events, TransCanada and Enbridge entered into a Memorandum of Understanding which allowed joint use of parts of a new Enbridge facility from Parkway to Albion giving exclusivity to TransCanada. That exclusive arrangement was challenged by Union Gas and Gas Métro in a motion before the Ontario Energy Board. Enbridge then terminated the MOU with TransCanada. TransCanada responded by suing Enbridge in the Ontario Superior Court for $ 4.5 billion.

All of this led to a settlement agreement between the three gas distributors and TransCanada crafted during the OEB fight. The settlement agreement includes capacity builds by each of Union, Enbridge, and TransCanada in the east, with a resultant decline in long-haul revenues being picked up by short-haul shippers including primarily Union, Enbridge, and Gas Métro. The settlement was then filed with the OEB in support of the Union and Enbridge projects and subsequently brought to the National Energy Board for approval of the resulting new tolls.

Under the settlement agreement, the tolls were even higher than TransCanada had proposed in the Review and Variance Application that the NEB had rejected. In addition, TransCanada received additional revenue recovery protection from a "bridging contribution" by shippers for revenue shortfall.

Finally the settlement agreements established a new rate of return on equity at 10.1 per cent. The March 27, 2013 decision had set the ROE at 11.5 per cent to recognize the increased risk that TransCanada faced. Previously that ROE had been 8.07 per cent.

On November 20, 2014 the NEB approved the Mainline settlement. Rates for 2015 to 2020 were increased substantially. Long-haul tolls increased from those approved in the original decision by 18 per cent. Short haul rates increased by 52 per cent.

The original National Energy Board decision on the Mainline restructuring in March 2013 had set the rate between Empress to Dawn at $1.42. Under the terms of settlement, that rate became $1.68. In effect the litigation between the parties before the National Energy Board, the Ontario Energy Board and the Ontario Superior Court had essentially reversed the original Mainline decision.

The Settlement Decision certainly casts some doubt on the principle advanced by the Board in the original decision that the risk of stranded asset costs was to be borne by the utility, not the customer. In the end it was the customers that bore the risk. The customers had no choice. TransCanada used the hammer that the Board had given it when the Board declared that TransCanada had no duty to serve. Relying on that principle, TransCanada withdrew planned facility expansions. For a short time the customers considered building the capacity themselves. But it became clear that was going to involve long and expensive litigation. Union, Enbridge, and Gas Métro decided to settle.

The New Ontario Quebec Alliance

Quebec and Ontario are in the process of developing important agreements regarding electricity trading and energy policy. Currently both governments and their energy regulators are involved in finalizing an electricity trade. The basic understanding is that Ontario will be allowed to borrow 500 MW of electricity from Quebec in the winter. In return Quebec can borrow 500 MW from Ontario during the summer. The Ontario amount cannot exceed the amount that Quebec borrows from Ontario. No money changes hands.

For a long time the Crown corporations that control much of the electricity production in Canada have concentrated on dealing with American parties south of the border. This changed in a major way on July 22, 2013 when the Nova Scotia Utility And Review Board approved the Maritime Link project that will deliver of power from the Muskrat Falls hydroelectric project in Labrador to Nova Scotia and through New Brunswick to the northeast Eastern US markets. The Quebec-Ontario energy trade is another important step in the development of East-West cooperation between Canadian provinces.

The other aspect of the growing Quebec-Ontario energy alliance is the cooperation between the two provinces in the Energy East negotiations, noted above.

It is evident that one of the conditions the two provinces are likely to demand is some commitment from the federal government on carbon pricing. Some media reports suggest that the Alberta government will join the Ontario-Quebec conversation in some capacity.

As in the Mainline settlement, the three gas distributors - Union, Enbridge, and Gas Métro - are key players behind the scene on Energy East. However a reading of the Quebec report suggests that those interests can be accommodated. The Ontario Report will no doubt address that issue as well.

Looking Ahead

The Supreme Court of Canada and the Prudence Test

As noted above, The National Energy Board did not accept the prudence test argued by TransCanada in the mainline case, despite previous confirmations of the test at the Supreme Courts of both Canada and the United States. TransCanada did not appeal the decision. However two cases, the Power Workers case in Ontario and the Atco Gas case in Alberta raised this same prudence principle. Both of those cases have been appealed to the Supreme Court of Canada. The cases were heard together on December 3. A decision is expected in April.

These are important decisions which could easily change the regulatory landscape in Canada. There is nothing more important to a utility than the ability to recover major capital or operation expenditures in rates.

In Power Workers, the Ontario Energy Board denied Ontario Power Corporation recovery of $145 million of labor costs. Those costs were driven by a collective agreement the utility had entered into with the union two years earlier. In reaching that agreement, the parties had involved an independent arbitrator.

Both the union and the utility argued that the Board was required to presume the compensation costs were prudent. The Board disagreed and found it could rely on benchmarking studies comparing the OPG labor costs with the costs at other utilities. The benchmarking studies had been ordered by the Board in an earlier rate case. As a result of this analysis, the Board disallowed $145 million in labor costs.

The Board recognized the constraints on OPG but held nonetheless that ratepayers were only required to bear reasonable costs. An appeal to the Ontario Divisional Court upheld the $145 million reduction, stating that the Board must have the freedom to reconsider current compensation arrangements in order to protect the public interest. That decision was overturned by the Ontario Court of Appeal, which held that the costs were committed costs fixed by collective agreements and the Board had violated a fundamental principle of the prudence test - namely whether an investment or expenditure decision is prudent must be based on the facts available at the time. The Board cannot use hindsight.

The ATCO case in Alberta is similar to the Power Workers case. In the Alberta case, the utility had asked the Utilities Commission to approve a special charge to the ratepayers which would cover a unfunded pension liability of

$157 million. Those costs included a cost-of-living allowance that was set in advance each year by an independent administrator. The allowance was set at 100 per cent of the consumer price index.

As in Power Workers, the Alberta utility argued that this was a committed cost set by an independent authority and was therefore a prudent expenditure by the utility. The Alberta Commission disagreed and reduced the cost-of-living allowance to 50 per cent of the consumer price index.

In disallowing part of the expense, the Commission relied on evidence that an escalator equal to 100 per cent of CPI was high by industry standards. The utility appealed to the Alberta Court of Appeal which upheld the Commission decision.

There are only a few fundamental principles of public utility law. The prudence doctrine is one of them. Disallowing capital or operations expenditures years after the decision has been made concerns utilities. But the regulators from both provinces were united in another principle - utilities cannot rely blindly on a third party, whether a labor arbitrator or a pension administrator. The regulator has a responsibility (as does the utility) to make a determination whether the costs are reasonable for ratemaking purposes. Utilities may have a greater due diligence burden going forward. The Supreme Court of Canada decision will have major implications for Canadian ratemaking.

Customer Owned Generation

At the beginning of this editorial, we mentioned that the producing sector is facing a dramatic change in circumstances brought about by the sudden 50 per cent drop in the price of crude. There is another industry participant that is also facing dramatic change- the electricity distributor.

The agent of change here is not crude, it is customer-owned generation. There is a wave of technology unfolding that will soon allow many electricity customers to generate their own electricity.

Across North America electricity sales peaked nearly 6 years ago. Per capita consumption has been stagnant for over a decade. In part this is a reaction to higher prices. It is also a reaction to widespread conservation and energy efficiency programs. But more recently it is a function of new options customers have to generate their own electricity at prices less than the grid cost.

As new self-generation technologies enter the market at increasingly lower cost points, it is the electric distributors which are particularly vulnerable. Distributors exist to distribute electricity from central sources of generation (e.g., large natural gas power plants, wind farms, hydro facilities, etc) to the customer's premises. If a customer can generate a portion of their own electricity, they can rely less on electricity from their distributor.

Customer generation first gained prominence with solar power, which has witnessed a dramatic decline in solar panel price – falling 20 per cent per year between 2009 and 2013. In the same timeframe the output has risen from over 1000 MW to 12,000 MW in the United States. In this period, solar as a percent of newly constructed US power plant capacity has risen from 6 per cent to 31 per cent.

Solar is a bigger problem for utilities in the southern United States. In 2014, San Diego Gas and Electric had 39,000 rooftop solar installations representing 270 MW of capacity equivalent to 6 per cent of the companies peak load. But the utility estimates that by 2015 rooftop solar will equal 540 MW or 12 per cent of peak load.

The real customer-owned generation threat for the Canadian electricity distributor and the Canadian energy regulator is not solar. It will have an impact but not nearly as substantial as in the southern United States.

In Canada, the emerging technology innovation is micro combined heat and power (CHP). As the name suggests, the technology is a single unit producing both heat and electricity. It is not new technology – CHP has been used in industrial applications for decades and a number of Canadian natural gas utilities have experimented with residential-CHP units over the years[1]. The issue at the time was cost, with installed costs in the order of $20,000. What is new to the

[1] For further information on studies in Canadian residential CHP, visit Canadian Center for Housing technology, Stirling Engine, online: Government of Canada <http://www.ccht-cctr.gc.ca/eng/projects/chp_striling.html>.

North American market is consideration of an application small enough to be considered at the household level. The Japanese are global leaders in technology development here and they have the cost of a residential unit down to the $$7,000-10,000 range. Efforts are under way to bring this down to below $5,000 by 2017.

This will be an aggressive competitive market with equipment and services supplied by well-known multinationals, and opens the door to a discussion about the opportunity to integrate electric and natural gas delivery systems (CHP at the residential level is natural gas fuelled) in a way that has never occurred before.

Nor will this market be limited to CHP. Panasonic, Toshiba, and Tokyo Gas are currently developing hydrogen fuel cell units for the same purpose.

The first regulatory issue concerns a change to rate structures. Across North America, electricity regulators are implementing fixed charges to protect their utilities. Fixed charges are controversial and would have a significant impact on the economics of micro-CHP – in the event the fixed charge was proportional to the decline in electricity use of a home through self-generation.

Some argue fixed charges shift costs from heavier and wealthier users to poorer and less frequent users. Conservationists say that fixed charges will remove the incentive for conservation. Economists say they will simply drive-up prices by charging consumers for electricity they do not use. To the extent prices go up, customers will abandon the grid even more quickly. Some will argue that fixed charges are simply a stranded asset charge. They will argue, as the NEB found in Mainline, that stranded asset costs should be borne by the utility, not the consumer. Finally, some argue that fixed charges run counter to the principles of incentive rate making.

Where fixed charges will end up is hard to say. The Ontario Energy Board is taking the lead in Canada. In April 2013 the OEB established a consultation and has received over 30 submissions. The Board will issue a report in March (2015).

Many argue that fixed charges are not a long-term solution in any event. What is the long-term solution?

This technology will arrive whether the regulators or the utilities like it or not. Customers will move to lower cost generation. Politicians will not block them.

The Canadian electricity distributor may have been shielded from solar by the weather. But CHP and hydrogen fuel cells are a different matter. They are not dependent on the sun. We should remember that only 11 per cent of wind and solar is customer owned. In the case of CHP and hydrogen cells that figure may end up being much much higher.

The only real long term solution may be to allow utilities to take a direct role in supplying distributed generation to their customers. Distribution utilities, after all, have the key assets: capital, brand recognition, and strong customer relationships. Distribution utilities can easily compete with the strongest multinationals. It is unlikely that customers will insist on owning and maintaining these systems. But customers will want the lower electricity costs customer owned generation offers.

The Ontario Energy Board has taken a leadership step in this direction. Under the direction of the Minister of Energy, the Board has reduced the traditional barriers that prevented electric utilities from operating and owning CHP generation and other energy efficiency technology. These facilities can now be owned and financed within the utility. These are however not rate based assets and accounting standards must be followed to ensure that there is no cross subsidization.

Five years from now the only successful electricity distributors may be hybrid organizations offering both monopoly and competitive services. No doubt the transition will have its challenges. It may prove to be even more challenging for the regulators as they look to balance the needs of the utility and the changing consumer demands and preferences related to electricity self-generation. ■

2014 DEVELOPMENTS IN ADMINISTRATIVE LAW RELEVANT TO ENERGY LAW AND REGULATION

David Mullan[1]

Introduction

My mandate in this paper is to address 2014 developments in administrative law that are of interest to the energy regulation community. Rather than attempt to assess the impact of the entire range of administrative law developments of potential relevance to energy regulation, I have chosen to confine myself for the most part to developments and case law arising out of energy regulatory settings. Indeed, I have narrowed the field further and will cover just three topics in some detail rather than deal superficially with a broader range of administrative law issues emerging from the regulatory process. Those three topics are: participatory rights at energy regulatory hearings, issues of standard of review emerging in judicial review applications and statutory appeals from decisions of energy regulators, and the evolution of the constitutional duty to consult and, where appropriate, accommodate aboriginal peoples.

Participatory Rights in Energy Regulatory Hearings

a. The New Federal Regime

Until recently, the energy regulatory regimes of Alberta have been the principal contributors to the law governing participatory rights at public hearings on energy issues.[2] Largely operating within statutory regimes which make party and intervenor participation at those public hearings dependent on whether those seeking status are "directly and adversely affected"[3] or whose "rights"[4] are affected, both regulators and courts have evolved a set of principles for making such determinations. To say that the outcomes have been consistent and uncontroversial would be to dissemble, but there is, nonetheless, a body of jurisprudence that provides general and, at times, clear guidance.

Now, however, the centre of attention has changed to the federal regulatory sphere and the National Energy Board in particular. The precipitating cause, as Rowland Harrison has previously outlined in these pages,[5] has been section 55.2 of the *National Energy Board Act*.[6] This provision was inserted as part of the amendments to the Act contained in the much-criticized 2012 omnibus legislation, the *Jobs, Growth and Long-term Prosperity Act*.[7] In reaction to the extent of the demand for participatory opportunities at the Joint Review Panel's consideration of the Northern Gateway Pipeline application, the government clearly

1 David Mullan, *Emeritus* Professor, Faculty of Law, Queen's University.
2 For discussion, see David J. Mullan, "Regulators and the Courts: A Ten Year Perspective" (2013), 1 ERQ 13, at 15-19. See, in particular, *Kelly v Alberta (Energy Resources Conservation Board)*, 2011 ABCA 325, 515 AR 201.
3 See *e.g. Alberta Utilities Commission Act*, SA, c A-37.2, s 9.
4 *Administrative Procedures and Jurisdiction Act*, RSA 200, c A-3 (as amended), s 1.
5 Rowland J. Harrison, Q.C., "Enbridge Line 9 Reversal" (2014), 2 ERQ 129.
6 *National Energy Board Act*, RSC 1985, c N-7, [NEB Act].
7 *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19, s 83.

intended to provide the Board (and future Joint Review Panels) with the statutory tools to limit participatory opportunities.

Nonetheless, given the Alberta experience, the terms of section 55.2 are interesting. It provides that on an application for a certificate,

> … the Board shall consider the representations of any person who, in the Board's opinion, is directly affected by the granting or refusing of the application, and it may consider the representations of any person who, in its opinion, has relevant information or expertise. A decision of the Board as to whether it will consider the representations of any person is conclusive.[8]

At one level, it is clear that there is no longer (if there ever were) the possibility of general public access to participatory rights at an NEB hearing on an application for a certificate. However, in conferring discretion on the Board to consider the representations of anyone who "has relevant information or expertise", the potential exists for broader participation than countenanced under some of the various Alberta regimes.

Subsequently, the Board issued guidelines as to how it would interpret both limbs of the entry points to participation at hearings on an application for a certificate.[9] As discussed by Harrison, the first test of the new regime (leaving aside the immediate and vociferous criticism of the legislation by various public interest groups) was Enbridge Pipelines Inc.'s application for approval of reversal of part of Line 9B, a Capacity Expansion Project in relation to the entirety of Line 9, and the transportation of heavy crude oil through a reversed Line 9.

b. The New Regime in Operation – The Enbridge Line 9 Hearing

As part of the process leading to the public hearing of these applications, the Board established a procedure for determining whether a person came within either of the two section 55.2 entry points. Anyone seeking participatory rights was required to submit a form responding to requests for what the Board regarded as information relevant to the determination of status. For these purposes, the Board created two classes of participant: intervenors with rights of audience at the hearing itself and those merely entitled to submit a comment. Moreover, in completing the form, potential participants were required to indicate which level of involvement they were seeking with the Board entitled to disregard that choice at least to the extent of assigning those applying to be intervenors to the commentary category.[10]

177 individuals and organizations submitted applications to participate. Perhaps surprisingly for those anticipating a very restrictive approach in the interpretation and application of section 55.2, the Board granted 158 applications as requested. In addition, eleven seeking intervenor status were restricted to a letter of comment. Only eight were denied standing outright.[11] Nevertheless, there was criticism as reflected in the title of an article on the Canadian Centre for Policy Alternatives website: "Pipeline Reversal Protestors Muzzled; NEB limits public input at oil pipeline reversal hearings."[12]

Aside from complaints about the Board's exclusion of the eight and the assignment of comment

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8 There is an interesting divergence between section 55.2 and the provisions of the *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52, also enacted as part of the *Jobs, Growth and Long-term Prosperity Act*. Section 2(2) of that Act defines "interested person" in terms of someone who in the opinion of the regulator is "directly affected" or "has relevant information and expertise". However, under section 28, all interested persons have the right to a participatory opportunity at hearings where a certificate is required under section 58 of the *National Energy Board Act*. This contrasts with section 52.2 under which the Board still has discretion to hear from those it has determined to have "relevant information and expertise." In the Ruling on Participation in *The Trans Mountain Expansion Project*, Hearing Order OH-001-2014 (April 2, 2014) at 5, the National Energy Board noted this difference but then described it as having no practical significance.

9 Section 55.2 Guidance – Participation in a Facilities Hearing, <http://www.neb-one.gc.ca/prtcptn/pblchrng/prtcptnthrhrnggdncs52_2-eng.html>.

10 Hearing Order OH-002-2013, Enbridge Pipelines Inc. (Enbridge), *Line 9 Reversal and Line 9 Capacity Expansion Project*, Application under Section 58 of the *NEB Act* (February 19, 2013), at paras 28-33.

11 Hearing Order OH-002-2013, Procedural Update No 2 – Ruling on Participation and Updated Timetable of Events (May 22, 2013).

12 Joyce Nelson, "Pipeline Reversal Protesters Muzzled; NEB Limits Public Input at Oil Pipleine Reversal Hearings" (October 1, 2013), online: Canadian Center for Policy Alternatives <https//www.policyalternatives.ca/publications/monitor/pipeline-reversal-protestors-muzzled>.

status to some applying to be intervenors, the author, Joyce Nelson emphasised the low number of applications for status, something attributed to not only a perception on the part of the public of an intention to put a lid on public participation but also the short time limit for the submission of applications to participate and the complex and user unfriendly nature of the form that had to be completed. Indeed, the article was written against the backdrop of an application to the Federal Court of Appeal for review of three interlocutory decisions of the Board on the Line 9 applications.

c. The Line 9 Process in the Federal Court of Appeal

The applicants for judicial review were the Forest Ethics Advocacy Association, an environmental organization founded in 2000 and with roots in the Friends of Clayoquot Sound, and now with offices in San Francisco and Bellingham, Washington as well as British Columbia,[13] and Donna Sinclair, one of the eight persons denied status. The rulings challenged were:

1. The Board's exclusion from the scope of the hearing of the "environmental and socio-economic effects associated with upstream activities, the development of the Alberta oil sands, and the downstream use of oil transported by the pipeline";

2. The process used to determine participation rights, and, more specifically, the requirements of the application to participate form; and

3. The rejection of Donna Sinclair's application to participate seemingly only as a commenter,[14] not an intervenor.

The applicants had two bases for each of these challenges: freedom of expression as guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms* and administrative law unreasonableness. Indeed, associated with the challenge to the second ruling was a claim for a declaration that section 55.2 was itself unconstitutional as violating the section 2(b) guarantee.

By the time this application for judicial review was heard, the hearings on Line 9 had been completed and a decision made allowing Enbridge's applications subject to conditions.[15] Nonetheless, the Court of Appeal proceeded to hear the case and, on October 31, 2014, four days after the hearing, delivered judgment rejecting all three limbs of the application.

In *Forest Ethics Advocacy Association v National Energy Board*,[16] Stratas J.A., delivered the judgment of the panel. Before reaching the merits of the interlocutory rulings, he made various "procedural" rulings deserving comment.

First, he denied standing to the Association, describing it as a classic "busybody."[17] Given the Association's record of involvement in environmental causes, this may at first blush seem somewhat of an overstatement or far too ready a rejection of the status and capacities of the Association. However, the reality was that it had not been involved in the proceedings before the Board in any capacity. According to Stratas J.A., there was also nothing in the materials filed by the Association indicating involvement in section 2(b) issues such as the ones it was now seeking to raise. In terms of the second limb of the Supreme Court's test for public interest standing,[18] the Association's record did not reveal a "real stake or a genuine interest"[19] in the matters it was now raising; a generalized history of advocacy on behalf of environmental causes was obviously not enough. Moreover, Stratas J.A. then noted that, at least as far as participatory rights were concerned, there was someone with standing

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13 For a description of the current organizational framework, see "ForestEthics is now operating as an international coalition: Coalition FAQs", online: ForestEthics <http://forestethics.org/forestethics-now-operating-international-coalition-coalition-faqs>.

14 Her Application to Participate is accessible on the National Energy Board's website. Copy also available on request. In completing the form, Ms. Sinclair did not fill in the section requiring applicants to identify the capacity in which they were applying to be recognized. However, other parts of her responses indicated that she wanted no more than an opportunity to make a written submission.

15 Enbridge Pipelines Inc., *Reasons for Decision* (6 March 2013), OH-002-2013.

16 *Forest Ethics Advocacy Association v National Energy Board,* 2014 FCA 245 [*Forest Ethics*].

17 *Ibid* at para 33.

18 As articulated most recently in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524.

19 *Forest Ethics*, *supra* note 16 at para 34.

before the Court: Ms. Sinclair. The Association therefore lost out on the third public interest standing criterion as well. In short, the lesson is that standing will not be accorded readily to organizations that come to the party late not having participated or attempted to participate in regulatory proceedings before bringing an application for judicial review as a public interest litigant.

Secondly, he held that neither the Association nor Ms. Sinclair could rely on the claim that the three interlocutory rulings or section 55.2 itself violated section 2(b) of the *Charter*. These were matters on which the Board should have had the opportunity to rule. Not only did the Board have the capacity to deal with such *Charter* questions[20] but Supreme Court precedent[21] indicated that the invocation of that capacity was an almost invariable condition precedent to the bringing of a judicial review application relying on assertions of *Charter* violations. Indeed, it appears as though the applicants, aware of this possibility, attempted to finesse this form of prematurity argument by seeking an adjournment of the application so that it could be joined with an application for judicial review of the Board's participatory rulings in another matter (the Kinder Morgan Trans Mountain Expansion Project application) in which the Board had actually ruled that neither section 55.2 nor its participatory determinations in that matter violated section 2(b) of the *Charter*.[22] The Federal Court rejected that application for an adjournment.

In relation to the need to advance such *Charter* arguments before the Board, the Court ruled in a manner that should inform regulatory agencies in both the energy sector and elsewhere that have the capacity to deal with *Charter* questions:

> Had the constitutional question been raised before the Board, the Board could have received evidence relevant to it, including any evidence of justification under section 1 of the Charter. The Board would also have had the benefit of cross-examinations and submissions on the matter, along with the opportunity to question all parties on the issues. Then with those advantages, it would have reflected and weighed in on the matter and expressed its views in its reasons. In its reasons, it could have set out its factual appreciations, insights gleaned from specializing over many years with the myriad complex cases it has considered, and any relevant policy understandings. At that point, with a rich, fully-developed record in hand a party could have brought the matter to this Court on judicial review.[23]

Stratas J.A. then held that the normal principles requiring an initial confrontation of the issue before the agency were not overcome by the seeking of a declaration of unconstitutionality, a remedy that only the Court and not the agency could formally award. All this is indicative of a general theme that underpins the whole of the judgment: respect for the decision-making imperatives of the Board and its specialized jurisdiction and expertise. As a consequence, however, one of the principal issues raised by the application was not determined and must now await the further decision of the Court on the application for judicial review of the Board's rulings in the Kinder Morgan application.

Once the *Charter* challenges were excised from the application, the Court was left with the administrative law grounds of challenge – that each of the three rulings was unreasonable – a challenge that seemingly accepted that, on each, unreasonableness rather than correctness was the standard of review by reference to the presumptions and criteria emerging from *Dunsmuir v New Brunswick*[24] and its progeny.

(i) The Scope Ruling

In its Hearing Order of February 19, 2013, the

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20 As established in principle by *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54, [2003] 2 SCR 504, and confirmed in this case by section 12(2) of the *National Energy Board Act* and its conferral of authority on the Board of exclusive jurisdiction to hear all issues of fact and law, including constitutional issues, that arise in its proceedings.

21 See *Mackay v Manitoba*, [1989] 2 SCR 357. See also Stratas J.A.'s earlier judgment in *Canada (Attorney General) v Quadrini*, 2010 FCA 246, [2012] 2 FCR 3.

22 Hearing Order OH-001-2014, Trans Mountain Pipeline ULC (Trans Mountain), Application for Trans Mountain Expansion Project (Project), Ms. Lynne M Quarmby and others – notices of motion – dated 6 and 15 May 2014, Ruling No 34.

23 *Supra* note 16 at para 42.

24 *Dunsmuir v New Brunswick,* 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

NEB, in Appendix I – List of Issues, stated:

> The Board will not consider the environmental and socio-economic effects associated with upstream activities, the development of oil sands, or the downstream use of the oil transported by the pipeline.[25]

However, it invited suggestions for amendments to the List of Issues. This produced a number of responses and some revisions.[26] However, there was no change to the matters specifically excluded from consideration. In its letter of April 4, 2013, the Board justified those exclusions by reference to a range of considerations and, most notably, the absence of any connection between some of the matters excluded and the project for which approval was being sought, the Board's lack of jurisdiction, the regulatory and policy responsibilities of jurisdictions other than the Board, and the uncertainties or speculative nature of the lines of inquiry relating to some of the excluded issues.[27]

In holding that neither the Board's initial scope ruling nor its subsequent rejection of participation for the purposes of raising the issue of climate change was unreasonable, Stratas J.A. endorsed the applicants' concession that the appropriate standard of review was that of unreasonableness. This was a case of the Board interpreting its empowering statute and, in particular, section 52(2) dealing with the considerations that are or might in the Board's discretion or opinion be relevant to the making of a recommendation to the Governor in Council at the conclusion of the hearing of any application. Since *Dunsmuir* and *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*,[28] there was a strong presumption of unreasonableness review in such situations, including any determination of a tribunal or board on issues of relevance. Moreover, he also held by reference to a range of considerations that this was a situation in which the margin of appreciation appropriate under the reasonableness standard was a wide one. Among those considerations were the discretionary or subjective terms in which section 52(2) referenced factors relevant to any consideration of the application and the factually suffused nature of the Board's task. He also linked sections 52(2) and section 55.2, 2012 additions to the Act intended to

> … empower the Board to regulate the scope of proceedings and parties before it more strictly and rigorously.[29]

In any consideration of whether exclusions in a preliminary scope ruling were reasonable, those objectives loomed large. When coupled with the Board's own sense of its jurisdictional capacities and limits and the limits arising out of the nature of the particular application before it, there was no case for setting aside any aspect of the scope ruling as unreasonable.

(ii) Establishing Participatory Rights

When the Court came to the process for establishing who was entitled to participatory rights including the form that applicants were required to complete, the issue of the standard of review was not nearly so clearcut despite the concession of reasonableness review by the applicants. Here, Stratas J.A. characterized the issue as a procedural one and then discussed the current controversy over whether correctness is the universal standard of review for procedural fairness issues.[30] Ultimately, he determined that the Board's choice as to how to proceed in determining participatory entitlement was entitled to a significant margin of appreciation or deference. Among the factors considered relevant was the experience and expertise possessed by the Board in devising procedures appropriate for complex regulatory hearings in which the values of public participation and the need to deal with applications to be dealt with

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25 *Supra* note 10 at Appendix I.

26 Hearing Order OH-002-2013 – Procedural Update No 1 – List of Issues and Application to Participate Form, at 1-7 and Appendix I.

27 *Ibid* at 7.

28 *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association,* 2011 SCC 61, [2011] 3 SCR 654.

29 *Forest Ethics, supra* note 16, at para 69.

30 The ambivalence of the Supreme Court on this issue is amply illustrated by the judgment of LeBel J., for the Court, in *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502, at paras 79 (correctness) and 89 (deference to procedural rules and rulings). It is also reflected in the differing approaches of Evans J.A. in *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48, at paras 34-42, and Stratas J.A. himself in *Maritime Broadcasting System Ltd. v Canadian Media Guild*, 2014 FCA 59, at paras 50-56, discussed by Stratas J.A. in *Forest Ethics*, *supra* note 16 at paras 70-73.

31 *National Energy Board Act*, section 23(1). Also, section 55.2 states that the Board's determination as to participatory

in a timely and efficient manner sometimes had to be balanced against each other. He also referred to the open-textured nature of the legislative criteria for according participatory rights as also justifying latitude in the nature of the information that the Board could demand of applicants in assessing whether to allow participation. As well, the Board's decision in such matters came within the reach of the Act's privative clause.[31]

In then moving to a reasonableness or deferential assessment of the contents of the form and the requirements it imposed, Stratas J.A. noted the necessary link between the request for information and the scope ruling. To the extent that the Board was entitled to a margin of appreciation on the scope of the hearing, that margin of appreciation also extended to the Board's assessment of what information it should require of applicants as to their connection to the matters in issue or within the scope of the hearing. That aside, he was obviously not impressed by arguments that the required form was complicated and excessively long, and therefore acted as a deterrent to those who might otherwise have considered applying for participatory status. Making participation dependent on effort and ensuring that participants did not view the hearings as an opportunity to raise anything they wished irrespective of relevance and degree of connection were laudable rather than unreasonable objectives. He also saw the Board's demands as consistent with the objectives of section 55.2. The project of conducting hearings that were more focussed and efficient justified the Board being rigorous in the kind of information it required particularly of those such as Ms. Sinclair who sought participatory rights not as persons directly affected but as possessors of "relevant information and expertise."

In fact, there were serious questions that could be raised about the process for determining participatory rights that do not surface in Stratas J.A.'s judgment such as a fifteen day deadline for the submission of applications for participatory status from the date of the unveiling of the questionnaire. It is also a questionable allocation of resources for the Board to require and then assess detailed responses to a wide-ranging questionnaire from those whose only claim is not for intervenor status but the right to submit a comment to the Board.[32] On the other hand, the claims that the questionnaire was too complicated are almost certainly overblown at least for those who are literate in English or French and internet savvy, and, in any event, counteracted at least to some extent by a feature of the process also not mentioned in the Stratas judgment: the designation of a member of the Board's staff as a Process Advisor for those contemplating applying for participatory status.[33]

(iii) Denial of Status to Donna Sinclair

Donna Sinclair's Application to Participate revealed her as living in North Bay which was not in the vicinity of Line 9. Her wish to make some form of written submission was based on her concerns about Enbridge's spill record, her faith-based belief in the sacred nature of land, and a special familiarity with and empathy for aboriginal peoples and their beliefs and ambitions, all reflected in her work as a journalist and author of many books.[34] In its rejection of her application,[35] the Board categorized her as having only "a general public interest in the proposed Project" and emphasized her lack of physical proximity to the project. More generally, the Board stated the principles on which it would evaluate participatory claims based on possession of "relevant information and expertise". The first imperative was that the proposed intervention must be relevant to the issues that the Board had defined as relevant to the application. Secondly, the Board would assess whether or not allowing the applicant participatory rights "will add value to the Board's assessment."[36] In other words, in terms of its discretion over participatory rights for those who offered relevant information and expertise, the Board was indicating that participation would not be permitted when that information and expertise replicated what was

rights is "conclusive."

32 See *e.g.* Andrew Gage"NEB should abandon undemocratic limits on public comment" (April 10 2013), online: West Coast Environmental Law, <http://wcel.org/resources/environmental-law-alert/neb-should-abandon-undemocratic-limits-public-comment> (updated 7 August 2013).

33 *Supra* note 10 at 5 and Appendix VIII.

34 *Supra* note 14.

35 *Supra* note 11 at 12.

36 *Ibid* at 3.

being provided by others or came within the Board's own specialized or expert knowledge. In terms of structuring the Board's discretion, there is nothing offensive about these general operating principles and nothing surprising about the Board's decision to reject Ms. Sinclair's Application to Participate.

Indeed, this was how Stratas J.A. viewed the matter. First, he noted that a decision on Applications to Participate had both substantive and procedural components. It was substantive in the sense that it depended in part on an evaluation of whether the nature of the participation was at all relevant or material to the issues before the Board. It was procedural in the sense that it concerned whether the applicant would receive some kind of a hearing either as an intervenor or a commenter. After again noting the jurisprudential debate over the standard of review applicable, here too, he accepted that, irrespective of how one characterized the issue, the Board's assessment of individual applications was entitled to "a significant margin of appreciation."[37]

> The Board engaged in factual assessment, drawing upon its experience in conducting hearings of this sort and its appreciation of the type of parties that do and do not make useful contributions to its decisions.[38]

He then noted that the Board's reasons revealed that it was very conscious of the fact that it was required in making such decisions to balance the importance of providing participatory opportunities against the need for focussed and efficient hearings. Moreover, in so far as the decision on participation implicated values underlying "freedom of expression" protected by section 2(b) of the Charter, even though section 2(b) was not mentioned, the Board's approach to the determination of applications to participate was consistent with an appreciation of those values and the need to balance them against countervailing concerns.[39] With specific reference to the exclusion of Ms. Sinclair, he viewed the justification advanced by the Board as an "acceptable and defensible outcome."[40]

d. Conclusions

As an exercise in process design and application, the Board's decision on participatory rights in the Line 9 hearings passed muster in the Federal Court of Appeal at least in administrative law terms and by reference to the interpretation and application of one of the two limbs of section 55.2, the limb governing access to the process on the part of those offering "relevant information or expertise". Even though the Board's rulings were subjected to a reasonableness or deferential standard of review rather than review on a correctness basis, the Court's decision assuredly offers considerable comfort to the Board in terms of its according of a considerable margin for manoeuvre in the crafting of processes and principles for the determination of participatory entitlements in hearings subject to section 55.2.

However, this is clearly not the end of the matter. Left for another day is the issue of whether the relevant amendments to the Act, and the processes and interpretive standards adopted by the Board infringe the *Charter*'s section 2(b) guarantee of "freedom of expression". Indeed, as noted, the Board's detailed ruling on these questions on an interlocutory motion in the Kinder Morgan Application is currently the subject of judicial review applications.

Also dangling even from a purely administrative law perspective is the question of the standards that the Board established and applied in the Line 9 application for determining whether an applicant qualified for participatory entitlements as of right as someone "directly affected"; Ms. Sinclair's application was not brought under that limb of section 55.2. In making such judgments, the Board stated that it

> … looks at how the person uses the area where the project will be located, how the project will affect the environment and how the effect on the environment will affect the person's use of the area. The closer these elements are connected (their proximity), the more likely the person is directly affected. An effect that is too remote, speculative or not likely

37 *Supra* note 16 at para 82.
38 *Ibid.*
39 *Ibid* at 83, with reference to *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395, at para 24, and its prescription of reasonableness review for decision-making that engages *Charter* values.
40 *Ibid.*

> to impact the applicant's interests will not lead to a finding that an applicant is directly affected.[41]

In Line 9, the application of this test resulted, for example, in the denial of intervenor status to persons whose claim was based on residency in Toronto potentially affected by a spill.[42] However, they were allowed to provide a letter of comment. Similarly, those asserting entitlement based on business interests that would benefit from approval of the project were limited to letters of comment.[43]

Here too, litigation emerging from the participatory rulings in the Kinder Morgan application will almost certainly provide a forum for consideration of the test for determination of whether someone is "directly affected." For that hearing, there were 2118 Applications to Participate and 468 were denied outright.[44]

Also of significance in the Kinder Morgan application is the question of whether the exclusions from the scope of the hearing in Line 9, a case involving a conversion in the use of an existing pipeline, are transferrable to an application involving pipeline expansion. In an expansion context, is there a reasonable justification for exclusion from consideration of the "environmental and socio-economic effects associated with upstream activities, the development of oil sands, or the downstream use of the oil transported by the pipeline"? Is the issue of climate change equally off-limits at this hearing? Indeed, it seems clear that the Kinder Morgan scope ruling[45] is also connected to issues raised by some of those granted intervenor status at the public hearing of this application: the apparent refusal of the Board to require Trans Mountain to answer more than 5 percent of questions posed by intervenors[46] and the removal of an oral cross-examination phase from the hearing.[47] These, of course, are procedural issues that reach well beyond the initial grant of status decisions and that will give rise to yet further examination by the Federal Court.

Standards of Judicial Review in Energy Regulatory Decision-Making

The judgment in *Forest Ethics Advocacy Association* is an important landmark in the evolution of the law respecting the standard of judicial review to be applied to the decisions and rulings of energy regulators. Certainly, in accepting that reasonableness is the almost immutable standard to be applied when an energy regulator is interpreting its home statute, the Court is merely reiterating what has been apparent since *Dunsmuir* and *Alberta Teachers*. However, in extending the standard of reasonableness review to the interpretation and application of provisions in home legislation that are either procedural or of a mixed procedural and substantive nature, Stratas J.A. was wading into somewhat more turbulent waters but nonetheless reflecting a growing body of jurisprudence rejecting a universal correctness standard for the review of issues raising questions of procedural fairness. Also significant in the approach taken by the Court was its holding that, in terms of the emerging (or emerged) conception of reasonableness review as a context-sensitive inquiry, the three interlocutory rulings were with respect to statutory provisions where the regulatory body should be afforded a wide (as opposed to more limited) margin of appreciation. Finally, the Court resisted the argument that reasonableness review as to the scoping decision of the Board should be conducted by reference to the traditional nominate grounds of judicial review and, in particular, on the basis of what in effect would be correctness review of whether the Board had in its scope or list of issues ruling excluded impermissibly a legally relevant (and, indeed, mandatory) consideration.

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41 *Supra* note 11 at 3.
42 *Ibid* at 5-7.
43 *Ibid* at 7-8.
44 *Supra* note 8 at 1.
45 Hearing Order OH-001-2014, Trans Mountain Pipeline ULC, Trans Mountain Expansion Project (2 April 2014) at 4 and Appendix I.
46 See "Energy Executive Blasts Kinder Morgan Review as "Fraudulent," Quits", online: <http://dogwoodinitiative.org/blog/fraudulent-process> containing a November 2, 2014 letter to the National Energy Board, from Marc Eliesen, former CEO of B.C. Hydro and Chair of Manitoba Hydro, withdrawing as a participant in the Kinder Morgan hearing.
47 See Hearing Order OH-001-2014, Trans Mountain Pipeline ULC (Trans Mountain), Application for the Trans Mountain Expansion Project (Application), Notices of motion from Ms. Robyn Allan and Ms. Elizabeth May to include cross-examination of witnesses, Ruling No 14 (7 May 2014).

All of this should be of considerable comfort to energy regulators across the country, though not those challenging the decisions or rulings of regulators; for them, the prospects of successful judicial review or statutory appeal have become that much more daunting. Indeed, the judgment also underscores remedial aspects of judicial review that both support the integrity of the decision making processes of regulatory agencies and generally confine applications for judicial review to the final (as opposed to interlocutory) decisions of these agencies. The first message has already featured in the previous section of this review: Do not come to the Court on *Charter* challenges to either an agency's empowering statute or its interpretation and application of that statute until such time as you have raised that issue with the agency itself. The second message, though not applied in that case partly because the point was not taken by the Board or Enbridge, is that even challenges to rulings excluding participatory rights should generally be postponed until such time as the regulatory agency has rendered its final decision on an application. Seeking judicial review of interlocutory rulings by agencies and tribunals fragments the administrative process and is therefore presumptively covered by the prematurity bar.

Affording deference to energy regulators in the discharge of their core functions extends beyond the domain of facilities approval to rate setting as is evident from two cases argued before the Supreme Court of Canada on December 3, 2014 and still under reserve. In both *ATCO Gas and Pipelines Ltd. v Alberta (Utilities Commission)*[48] and *Ontario Energy Board v Ontario Power Generation Inc.*,[49] the respective Courts of Appeal accepted that the relevant energy regulator was entitled to the benefit of deferential reasonableness review in interpreting and applying the provision conferring authority to fix rates charged by regulated utilities on the basis of what is "just and reasonable". Over the years, however, various methodologies have been developed for the carrying out of rate of return regulation. To some, those methodologies represent a common law regime which underpins the relevant statutory provisions. Seen in that light, any departure from the perceived common law methodologies is regarded as either necessarily unreasonable or to be countenanced only if appropriately justified by the regulator. Indeed, this is how the Ontario Court of Appeal viewed what it perceived as a departure by the Energy Board from an accepted methodology for assessing the appropriateness of costs incurred by the regulated utility. As a consequence, the Court, reversing a majority of the Divisional Court, held that this element of the Board's rate fixing exercise was unreasonable. This can be seen as contrasting with the rather more fluid approach taken by the Alberta Court of Appeal in *ATCO* to its assessment of the Alberta Utilities Commission's treatment of whether costs arising out of the regulated utility's pension plan were prudently incurred.

Indeed, though the Ontario Court of Appeal in *Ontario Power Generation* specifically stated that it was conducting reasonableness review, analysis of the judgment suggests that in reality it was an instance of disguised correctness review to the extent that the Court regarded the Board's methodology in assessing the prudence of the regulated utility's compensation costs as unjustifiable by reference to the Board's own precedents previously endorsed as reasonable in an earlier case by the Court of Appeal.[50] Whether this was an accurate characterization of both the precedents and the Board's treatment of costs in the particular circumstances is obviously an issue at stake in the Supreme Court of Canada. However, accepting that characterization, what the Court has done, in terms of the Stratas judgment in *Forest Ethics Advocacy Association*, is applied a context-sensitive version of reasonableness review in which the range of options available to the Board is not wide but narrowed or confined considerably by reason of the Board's own past jurisprudence.

It remains to be seen how the Supreme Court of Canada will sort all of this out in the context of the two most significant energy regulation

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48 *ATCO Gas and Pipelines Ltd. v Alberta (Utilities Commission)* 2013 ABCA 310, 2013 CarswellAlta 1984, leave to appeal to SCC granted, [2013] SCCA No 459 and appeal heard on December 3, 2014.

49 *Ontario Energy Board v Ontario Power Generation Inc.* 2013 ONCA 359, 116 OR (3d) 793 (*sub nom. Power Workers' Union, Canadian Union of Public Employees, Local 1000 v Ontario (Energy Board)*), rev'g. 2012 ONSC 729, 109 OR (3d) 576, leave to appeal to SCC granted, [2013] SCCA No 339 and appeal heard on December 3 2014. (For elaboration see Gordon E. Kaiser, "The Prudence Doctrine Goes to the Supreme Court of Canada: the Alberta and Ontario Appeals will be Heard at the Same Time" (Summer 2014), 2 ERQ 205.)

50 *Enbridge Gas Distribution Inc. v Ontario (Energy Board)*, 2010 OAC 4.

judicial review cases to come to that Court since the controversial 2006 Stores Block case (*ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board)*[51]). There, a majority of the Supreme Court applied a correctness standard to an issue which seemed at the core of the then Board's authority, the question of whether ratepayers were entitled to a share in the proceeds of an asset previously in the rate base. In conducting review, the majority treated the issue as one of jurisdiction generating automatic correctness review. In contrast, the minority was of the view, even in a pre-*Dunsmuir* world, that the standard of review should be the now discredited patent unreasonableness.

In the meantime, at least one judge (Fraser C.J.A.) of the Alberta Court of Appeal has confronted the ramifications of the Stores Block judgment as it bears upon standard of review: *ATCO Gas and Pipelines Ltd. v Alberta (Utilities Commission)*.[52] For Fraser C.J.A., the appeals from Utilities Commission cost orders in two separate regulatory proceedings reduced themselves to a contest between two conceptions of the entitlement of regulated utilities to recover their legal costs. The Commission's position was that the costs provision in the relevant legislation applied to regulated utilities and justified the Commission assessing legal costs incurred in participating in those proceedings by reference to a scale of costs created by one of its Rules. In contrast, the regulated utilities contended that they were not covered in law by the costs provision and the relevant Rule but rather by the normal principle of regulatory law that regulated utilities were entitled to the recovery of all costs (including legal costs) prudently incurred as part of their regulated activities including those arising out of participation in regulatory proceedings.

At one level, the case is highly context sensitive and depends essentially on a reading of the specific costs regime applicable to the Alberta Utilities Commission: section 21(1) of the *Alberta Utilities Commission Act*.[53] However, the judgment of Fraser C.J.A. is more generally significant in at least three respects. First, it contains a useful elaboration of the history of energy utility regulation in Alberta and gas and electricity regulation in particular. Secondly, her judgment involves a detailed consideration of what she perceived as a clash or tension between the regulatory compact (developed initially under common law) establishing the principles of cost recovery for regulated utilities traditionally as part of rate of return regulation, and the reading of provisions in regulatory legislation that might derogate from the principles of that compact. Thirdly, the judgment, as already noted, re-evaluates Stores Block and the categorization of issues as ones of "true" jurisdiction attracting correctness review even in a post-*Dunsmuir* world.

On the standard of review issue, Fraser C.J.A. refused to classify the costs issue as one of "true" jurisdiction. It involved the Commission interpreting its home or constitutive statute and therefore presumptively attracted reasonableness review. In this context, she in effect treated Stores Block as an unsatisfactory precedent that could no longer be relied upon safely in the aftermath of *Dunsmuir* and its progeny. In other words, the majority decision in Stores Block classifying allocation of rate base disposition proceeds as jurisdictional should no longer be regarded as binding now that the Supreme Court had indicated that the classification of an issue as truly jurisdictional should be exceptional and generally not applied to tribunals and agencies interpreting their own statutes. In this context, she contrasted the matter in issue here from that which the Court of Appeal had confronted in *Shaw v Alberta (Utilities Commission)*.[54] There, according to Fraser C.J.A., the issue was one of true jurisdiction in the sense that was at stake was whether amendments to the legislation had in effect transferred authority with respect to the consideration of overriding public interest in a needs assessment for transmission lines from the regulator to the legislative or executive branch of government. In other words, in terms of *Dunsmuir*, this issue could be classified as one involving the resolution of a competing or duelling jurisdictions issue subject generally to

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51 *ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board),* 2006 SCC 4, [2006] 1 SCR 140.

52 *ATCO Gas and Pipelines Ltd. v Alberta (Utilities Commission),* 2014 ABCA 397.

53 *Supra* note 3 s 21(1).

54 *Shaw v Alberta (Utilities Commission),* 2012 ABCA 378, 539 AR 315. See, however, in contrast, *Williams Energy (Canada) Inc. v Alberta Utilities Commission*, 2014 ABCA 51, treating as subject to reasonableness review the issue of whether the Commission could respond to an application to set rates for the use of a pipeline without an order from the Lieutenant Governor in Council. However, in reviewing the Commission's decision on this point, the Court's analysis reads as correctness review.

correctness review.

If now part of the general principles of standard of review analysis recognized and applied by the Alberta Court of Appeal, this does amount to an important refining and narrowing of the concept of true jurisdiction in that province. Whether that is so depends on how one reads the other two judgments of the Alberta Court of Appeal. Certainly, it is difficult to treat Martin J.A.'s concurring judgment as supporting the Chief Justice's analysis since he appeared to engage in correctness standard of review analysis of the legal components of the costs awards in each of the proceedings. Côté J.A., in concurring with Fraser C.J.A. in the result, albeit on a much more limited compass, nonetheless did so within the confines of a reasonableness standard. However, that standard was applied to the merits of the Commission's costs awards and not to the question of whether section 21 included Commission authority over the legal costs of regulated utilities. While acceptance of the existence of that capacity was implicit in his judgment (and explicit in that of Martin J.A.), it is quite unclear whether Côté J.A. reached that conclusion on a reasonableness or correctness basis, since Fraser C.J.A. ultimately addressed the merits of that question by reference to both reasonableness and correctness standards.

As for the regulatory compact analysis, it is also unclear as to what has emerged from the judgment. At one level, Fraser C.J.A. seems to treat the statute's costs provisions and the Rule as having liberated the Commission from the shackles of the regulatory compact and conferred a much broader discretion on the Commission with respect to the criteria on which costs would be awarded. However, at the end of her judgment, she was careful to point out that the two proceedings out of which the appeals arose were Commission-initiated hearings into broader regulatory issues and approaches and not a conventional rate of return hearing or hearing on an application by a regulated utility. How the statutory provision and the costs Rule should be applied in those contexts was not argued on these appeals.

Côté J.A. was even more restrained doubting whether it was appropriate to read the costs provision and Rule as justifying in all instances an approach to costs awards unbounded by the regulatory compact and the test of legal costs prudently incurred. Rather, his concurrence was very specifically restricted to the reasonableness of the costs awarded in the particular proceedings before the Commission, proceedings which were not in any direct sense concerned with establishing a rate of return. In those contexts, he was not prepared to set aside the Commission's approach as being unreasonable.

In partial dissent, Martin J.A. seemed to adopt an approach that differed in principle from that of the Chief Justice. In a sense, he saw the costs provision of the Act and the Rule as having to be read consistently with the regulatory compact and the entitlement of the regulated utility to recover costs reasonably incurred. In determining regulated utility legal costs in any case (including these policy focussed and Commission-initiated proceedings), the test of costs prudently incurred governed. However, to the extent that the Commission's Rule and application of the Rule in this case could, with the exception of the denial of costs from an earlier phase of one of the two proceedings, be regarded as consistent with the demands of the regulatory compact, there was no basis for setting aside the Commission's awards.

Obviously, this difference of approach among the three judges leaves open for another day a comprehensive treatment of the Commission's costs jurisdiction as it applies to regulated utilities.

The Duty to Consult Aboriginal Peoples

a. Defining and Refining the Role of Regulatory Bodies[55]

The parameters of the Crown's constitutional duty to consult and, where appropriate, accommodate aboriginal peoples is of critical importance to energy regulators, government departments and agencies having statutory authority that affects the rights and interests of aboriginal peoples, as well as proponents seeking approval from either regulators or government departments or agencies for projects that potentially have an impact on those rights and interests. Devising appropriate procedures and substantive approaches that fulfill this duty is a complex process. Among the design challenges is the current position of the Supreme Court of

55 For a comprehensive discussion, see Keith B. Bergner, "The Crown's Duty to Consult and the Role of the Energy Regulator" (2014), 2 ERQ 15.

Canada that, absent explicit legislative conferral of statutory authority, regulatory agencies do not possess the capacity to fulfil the Crown's constitutional obligation[56] though it does appear as though the consultation processes of such agencies and, through them, proponents may be invoked by the Crown as at least in part meeting the Crown's own obligations. A further layer of complexity is added by reason of the fact that, while regulators have at least in some circumstances the ability to assess as part of an application approval process whether the Crown's duty to consult has been fulfilled,[57] that is a responsibility that may be withdrawn from them as in the case of the Alberta Energy Regulator.[58]

As a consequence, one of the features of the evolution of the law and practice of the duty to consult during 2014 has been the way in which the newly minted Alberta Aboriginal Consultation Office has been working to establish a legally compatible and compliant relationship with the Alberta Energy Regulator with respect to the duty to consult on Regulator proceedings that implicate land and natural resource management affecting aboriginal rights and interests.[59] Indeed, this has not been left entirely in the hands of the Office and the Regulator in the sense that, in October, the Ministers of Energy, and the Environment and Sustainable Development issued a revised Ministerial Order under the Regulator's constitutive statute, the *Responsible Energy Development Act*[60] directing the Energy Regulator as to its responsibilities with respect to consultation and, in particular, coordination with the work of the Aboriginal Consultation Office.[61] Already questions have been raised about the meaning and reach of this *Direction*[62] and undoubtedly further refinements and specificity can be expected as the relationship between the Regulator and the Office develops. Ultimately, of course, the main question will be whether they, with the assistance of the relevant ministries, establish a working relationship and set of protocols which not only are workable (in the sense of being practical and efficient) but also meet the legal obligations found in the ever-growing body of case law.

b. Case Law Developments

As governments and participants in various regulatory processes continue to struggle with procedural design issues, litigation in the arena of the duty to consult continues apace. A great deal of that litigation is now focussed on whether the Crown has on the facts of the particular situation complied with the constitutional duty to consult and, where appropriate, accommodate aboriginal peoples. Many of these cases involve complex evidential inquiries and very detailed application of the criteria established in the leading Supreme Court cases on whether the duty is even triggered, how intense the consultation duty is, and whether, on the facts as found, the appropriate standards have been met.[63] However, during 2014 and the very early part of 2015, there were a number of cases that addressed some of the continuing uncertainties in this area. In this context, I will refer to three in particular.

(i) Hupacasath First Nation v Minister of Foreign Affairs Canada [64]

While not directly involving energy regulation,

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56 *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650.

57 *Ibid* at 68-70.

58 *Responsible Energy Development Act*, SA 2012, c R-17.3, s 21:
The Regulator has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the Constitution Act, 1982.

59 See *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management* (July 28, 2014) at 7. See also *Government of Alberta Proponent's Guide to First Nations Consultation Procedures for Land Dispositions* (September 3, 2014). (For other discussion, see Hannah Roskey, "Alberta Government Releases Guidelines to Clarify First Nations Consultation Process" (Fall 2014), 2 ERQ 265.)

60 *Supra* note 58, s 67.

61 See *Aboriginal Consultation Direction, An Appendix to Energy Ministerial Order 105/2014* and *Environment and Sustainable Resource Development Ministerial Order 53/2014* (October 31, 2014), replacing *Energy Ministerial Order 141/2013* (November 26, 2013).

62 See Giorilyn Bruno and Nigel Bankes, "A Revised Aboriginal Consultation Direction issued to the Alberta Energy Regulator", online: Ablawg <http://ablawg.ca/2014/12/08/a-revised-aboriginal-consultation-direction-issued-to-the-alberta-energy-regulator/>.

63 See, for example, *Adam v Minister of the Environment*, 2014 FC 1185 and *Fort McKay First Nation v Alberta (Minister of Environment and Sustainable Resource Development)*, 2014 ABQB 393, 98 Alta LR (5th) 1.

64 *Hupacasath First Nation v Minister of Foreign Affairs Canada,* 2015 FCA 4.

this Federal Court of Appeal judgment raises an issue as to the exercises of power that the duty to consult reaches. In this instance, it was the entry into and bringing into effect of an investment treaty with the People's Republic of China. The source of authority for both actions was the Royal Prerogative.

The First Nation brought an application to review this exercise of prerogative power under section 18.1 of the *Federal Courts Act*.[65] It asserted that the government should have consulted with the First Nation before entering into and ratifying the treaty. The basis for this was an assertion that the Treaty and some of its details had the potential to affect adversely the rights and interests of the First Nation.

In delivering the judgment of the Federal Court of Appeal affirming the judgment of Crampton C.J. of the Federal Court dismissing the application for judicial review,[66] Stratas J.A. addressed a number of preliminary issues. He decided each of these issues in favour of the First Nation applicant/appellant. First, pure exercises of prerogative power as well as orders made under an exercise of prerogative power were reviewable under section 18.1.[67] Secondly, the issue of the lawfulness of the exercise of at least this aspect of the prerogative power with respect to treaties and foreign relations was justiciable; it was within the ken of the Courts. Thirdly, the duty to consult and, where appropriate, accommodate aboriginal peoples could apply in the context of the exercise of prerogative powers in general and treaty and foreign relations powers in particular. Where, however, the First Nation failed in both Courts was in not providing adequate justification of the contention that the entry into and ratification of the Treaty had a sufficient impact on the First Nation's rights and interests; any effect was, in terms of the tests laid down in the jurisprudence,[68] "non-appreciable" and "speculative". In dismissing the appeal, Stratas J.A. did, however, leave open the possibility of the First Nation bringing an application for judicial review of a decision or action taken under the Treaty which it could demonstrate had had adverse consequences for aboriginal rights and interests.

(ii) Mikisew Cree First Nation v Governor in Council[69]

Among the judgments referred to by Stratas J.A. in *Hupacasath*, released on January 9, 2015, was that of Hughes J. of the Federal Court delivered less than a month earlier on December 19, 2014 in *Mikisew Cree First Nation v Governor in Council*. This was an application for judicial review stemming from two of the 2012 federal omnibus statutes and, in particular, the provisions respecting environmental assessment, species at risk, and navigable waters. The First Nation claimed that, as these measures diminished the extent of environmental and other protection for the rivers and lakes within its traditional lands and used for the fishing, trapping and navigation, the government was obliged by the duty to consult the First Nation at some point in the legislative process.

Despite the obstacles posed by existing jurisprudence on judicial review of the legislative process, Hughes J. held that, in some circumstances, the immunity from review for the introduction and passage of legislation had to yield to the constitutional imperatives of the duty to consult and, where appropriate, accommodate. While that duty did not extend to the preparation of and introduction of legislation in Parliament, it was triggered once the legislation was introduced. At that point, provided there was a sufficient impact on the rights and interests of aboriginal peoples, the duty arose. As a precondition of the passage of the legislation, the duty had to be met. Moreover, here, as opposed to *Hupacasath*, Hughes J. was of the view that there was a sufficient possibility of an adverse impact on the rights and interests of the First Nation as a result of the operation of some of the provisions of the omnibus legislation. Nonetheless, in recognition of the uncertainty of any such impact, the duty to consult was at the lower end of the procedural spectrum. Also, Hughes J. was of the opinion that the most that the Court should do in response to the failure to consult in this instance was to issue a declaration to that effect. To issue an injunction (or presumably to declare the relevant aspects of the legislation constitutionally invalid)

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65 *Federal Courts Act,* RSC 1985, c F-7.

66 2013 FC 900, 438 FTR 210.

67 Refusing to follow the Ontario Court of Appeal in *Black v Canada (Prime Minister)* (2001), 54 OR (3d) 215.

68 And, in particular, *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650, at para 46.

69 *Mikisew Cree First Nation v Governor in Council,* 2014 FC 1244.

would not sufficiently respect the constitutional relationship among the courts, the legislative, and the executive branches of government.

In combination, the judgments of the Federal Court of Appeal and Hughes J., provided they are not appealed successfully, represent a confirmation of the theory that the constitutional duty to consult and, where appropriate, accommodate binds the Crown across the spectrum of governmental action whether taken under the royal prerogative, by way of Act of Parliament, and, if in those two situations, also by way of subordinate legislation or order-in-council.[70] This is an important rounding of the circle on the scope of this constitutional duty that has such importance for energy regulation.

(iii) Tsilhqot'in Nation v British Columbia[71]

Undoubtedly, the most important aboriginal rights judgment of 2014 was *Tsilhqot'in Nation v British Columbia*. A full analysis of the reach of this decision is beyond the scope of this review of administrative law cases of significance for energy law and regulation. However, suffice it to say, that not only did the Court find that there had been a failure to consult the affected First Nation with respect to the rights arising out of its now established land claim[72] but also that, in the case of successfully asserted land claims, the accommodation aspect of the constitutional duty came close to a requirement of consent to any derogation from the rights associated with the successful claim.[73] This adds a whole new dimension (or gives clarity) to the notion of accommodation and will undoubtedly have ramifications for a whole range of litigation involving the constitutional duty. ■

70 On the more general issue of the authority of Cabinet to determine questions of law in regulatory matters and the standard of review applicable to any such determinations, see *Canadian National Railway Co. v Canada (Attorney General)*, 2014 SCC 40, 458 NR 150, a case arising out of the review jurisdiction of the Governor in Council over the Canadian Transportation Agency.

71 *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44, 459 NR 287.

72 *Ibid* at paras 95-97.

73 *Ibid* at para 97, it is asserted that a failure to consult can be cured by securing consent.

ELECTRONIC EVIDENCE AND E-LITIGATION IN REGULATORY TRIBUNALS

*Philip Tunley**

Introduction

This paper describes a range of current practices, priorities, trends and aspirations among selected administrative tribunals, particularly in Ontario, in relation to electronic evidence, and electronic litigation, based on a recent, informal survey.[1]

What is readily apparent is that different tribunals are at widely different stages in the process of adapting to the challenges and opportunities presented by the digital age in litigation. Less easy is the task of understanding why these differences arise, in terms of the circumstances and priorities of different tribunals; how the most successful initiatives in this area have come about; and what patterns emerge to guide ongoing efforts towards innovation?

Much has been written on these issues in the context of court proceedings, particularly in relation to e-discovery in civil proceedings, and electronic search and seizure in criminal cases. Compendious statutes, rules, guidelines and some case law now exist to inform adjudication of disputes in those two discreet areas. However, very little existing literature or case law explores the extension or application of these emerging principles and rules in a tribunal context. Still less do they address areas in which tribunals are increasingly taking the lead over our courts in e-litigation issues, including e-disclosure in enforcement proceedings, on-line access to records of proceedings, and electronic hearings. Most important, the policies underlying (and impeding) these initiatives at the tribunal level – access to justice, fairness, the cost of innovation, efficiencies in the adjudicative process, the "open tribunal" principle, and tribunal effectiveness, to name but a few – must be identified in order to evaluate existing initiatives, and to establish priorities for ongoing improvement.

This paper offers only modest, early contributions to the tasks at hand.

First, it reports some recent legislative changes, tribunal rules and precedents, and internal administrative practice innovations at selected Ontario tribunals, that illustrate the potential for digital innovation in tribunal litigation, as well as some pitfalls. This review is organized according to the following stages common to the process of various tribunals:

1. Investigation and electronic records;
2. E-disclosure in enforcement proceedings;
3. Electronic document production and exchange (e-discovery);

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1 All credit and thanks are due to the tribunal members, staff and practitioners who took the time with me to share their knowledge, experience and insights about these topics. You know who you are. However, the views and analysis in the paper are those of the author, and in no way represent the views or analysis of any of the tribunals referred to. Similarly, all responsibility for oversights and flaws in the analysis presented here rests entirely with the author.

4. Electronic hearings and electronic evidence;
5. Deliberation, collaboration, and tribunal decision-making; and
6. Electronic access to tribunal records and proceedings.

Second, the discussion of these initiatives notes significant ways in which the principles applied in court proceedings have been or can be extended to tribunals, as well as ways in which specific tribunals currently do things differently. It notes that many of the more recent innovations are taking place in tribunals that are expanding their enforcement and compliance activities, and highlights some common themes and challenges identified by the tribunal members, staff, and practitioners surveyed. It also highlights implications for lawyers and paralegals who appear as advocates before tribunals.

1. Investigation and Electronic Records

Several tribunals have recently updated, or are in the process of updating, their e-investigation regime, including resources, techniques, policies, rules and even the authorizing statutes involved.

This is particularly seen among the major economic regulators that have a significant enforcement or compliance jurisdiction, such as securities commissions and energy boards, but others involve strictly administrative functions. In the case of employment matters, workplace investigations may either be initiated at the early stages of an arbitration or tribunal process, or they may be entirely private, contractual undertakings. This describes a wide spectrum of legal contexts, which of course affects both the nature and formality of the investigations involved, and their legal analysis.

At the enforcement end of this spectrum, the legal analysis should start with the increasingly detailed guidance found in the *Criminal Code* and related case law. The emerging criminal jurisprudence is guided by the protection of privacy interests against unreasonable search and seizure under s. 8 of the *Charter*. It has long been recognized by the Supreme Court that privacy interests may be given lesser protection in the context of regulated businesses.[2] In addition, many administrative investigative measures are less intrusive than their *Criminal Code* counterparts. Nevertheless, I would argue that important principles drawn from the criminal cases and statutes can be applied in a tribunal context, particularly in respect of the treatment of electronic data and devices.

For example, *R. v. Morelli*[3] established that, not surprisingly, there is a high expectation of privacy in a personal computer seized from a residence. Fish J commented that "[i]t is difficult to imagine a search more intrusive, extensive, or invasive of one's privacy than the search and seizure of a personal computer." Then in *R. v. Cole*,[4] the same concern was applied when an employer seized an employee's workplace laptop computer and CDs containing images and temporary internet files. The Court held that an employee also has a reasonable expectation of privacy relating to personal use of a work-issued laptop, because the nature of the information stored can be meaningful, intimate, and connected to the individual's core privacy interests. While the employer's personnel policies, guidelines, and rules can diminish this privacy interest, it has been held that they do not eliminate it entirely.[5] These principles are general in nature, and can surely be expected to be applied when similar issues arise in the context of administrative investigations or inspections.

Some criminal case law relating to the authorization of searches of computers also seems to be readily applicable to tribunals. For example, *R. v. Jones*[6] requires a high degree of specificity in a warrant for the search of a computer. It requires that the authorization focus not simply on the computer as a thing to be seized, but rather on what could be searched for on the computer, once it is in the control of investigators. The Court suggests the authorization should detail the type of evidence sought, rather than the types of files or folders that could be examined.

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2 See for example *Comité paritaire de l'industrie de la chemise v Potash*, [1994] 2 SCR 406.
3 *R v Morelli,* [2010] 1 SCR 253.
4 *R v Cole,* [2012] SCJ No 53.
5 See *R v Gomboc*, [2010] 3 SCR 211.
6 *R v Jones,* 2011 ONCA 632.

Similarly, in *R. v. Vu*,[7] the Court held that a warrant to search a location must be explicit in order to authorize the search of a computer found at that location. While acknowledging that generally a warrant to search a specified location includes authorization to examine any receptacle or object found which may contain the evidence sought, the Court held that "our law of search and seizure [should not] treat a computer as if it were a filing cabinet or a cupboard". Investigators must demonstrate that a computer search is justified, including the grounds for believing that the computer contains the information sought. The Supreme Court concluded that, in effect, "the privacy interests at stake when computers are searched require that those devices be treated, to a certain extent, as a separate place". Since the warrant descriptions of equipment and documentation that could be seized in this case did not describe either the two computers or the cell phone in issue, it was held that the evidence derived from those devices was illegally obtained.

It should surely be expected that tribunals will also be required to show clear, express statutory authority, as well as specific authorization language, setting the parameters for any search of computers or similar electronic devices that could be expected to contain private information, such as the employer-issued laptop computer in *R. v. Cole*, iPads and smartphones.

However, regulators may wish to take steps in their rules and practices to expressly distinguish certain computer systems that are expected to be dedicated to the regulated business, for example because they are represented or required to be in place as a basis for obtaining a license. If an appropriate regulatory regime is in place, it could be argued that privacy issues either do not arise at all, or are much reduced, and that inspection of certain business systems or production of data from them should be available without the formalities of a warrant.

Another issue of general application is addressed by the Supreme Court in *R. v TELUS Communications Co.*,[8] although not by majority on all points. That case deals with access to e-mails or text messages from a telecommunications service provider. It considers whether these messages are "private communications" within the meaning of s. 183 of the *Criminal Code*, and how they may be "intercepted" (or "acquired") in more than one location, including the telecommunication provider that is the "conduit" for their transmission. Unfortunately, the decision does not address whether "interception" includes acquisition after the messages are stored. Again, a caution for administrative investigators and tribunals should be to ensure that their statutory and authorization language includes authority for "interception" of such messages, if necessary. Absent such statutory authority, the Ontario Superior Court of Justice, applying common law criteria, refused to issue a "Norwich Order" to compel production by a telecommunications service provider of cell phone records and text messages. Those documents were alleged to be relevant to disciplinary proceedings by a charitable health care provider, involving an allegedly improper sexual relationship between one of its employees and one of its clients.[9]

The Ontario Securities Commission ("OSC") is involved both in criminal and administrative investigations, which raises the need for additional internal controls to maintain appropriate separation between the two. It is currently updating its investigative methods for both. A key part of this initiative for administrative investigations will be the inclusion of rule amendments prescribing the formats in which electronic documents are to be produced to the OSC by regulated securities market participants. It is expected that the new rules will be based on existing initiatives by the Alberta Securities Commission ("ASC") and by the US Commodities Futures Trading Commission ("CTFC").

Noteworthy in both the ASC and CTFC rules,[10] and critical for the investigative stage, are the various requirements to produce electronic documents in their "native" formats, and specifically to do so in a manner that preserves the "metadata" of the original records that are commonly relevant to the tribunal's

7 *R v Vu* 2013 SCC 60, [2013] 3SCR 657.
8 *R v TELUS Communications Co.*, 2013 SCC 16, [2013] 2 SCR 3.
9 *Community Living v TBay Tel et al.*, 2011 ONSC 2734.
10 The text of the ASC rule and a staff explanatory notice can be found here:
<http://www.albertasecurities.com/Regulatory%20Instruments/4731765-v1-ASC_Notice_15-503Final-Package.pdf>.
The CFTC rule can be found here:
<http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/file/enfdatadeliverystandards030614.pdf>.

proceedings. This includes, for example, the dates and times of audio file recordings of telephone calls related to securities market activities. These provisions mirror similar provisions in civil e-discovery guidelines and case law, relating to the preservation and production of relevant metadata in the context of civil disputes.

In other respects, these rules adopt and expand upon requirements previously found, for example, in *Criminal Code* provisions such as ss. 487(2.1). That provision permits a person authorized by warrant to search a computer system to:

a. "use or cause to be used any computer system at the building or place to search any data contained in or available to the computer system;

b. reproduce or cause to be reproduced any data in the form of a print-out or other intelligible output;

c. seize the print-out or other output for examination or copying; and

d. use or cause to be used any copying equipment at the place to make copies of the data."

Subsection 487(2.2) goes on to require every person in control of such computer system to permit the person carrying out the search to use it or cause it to be used "to search any data contained in or available to the computer system for data" specified in the warrant, "to obtain a hard copy of the data and to seize it," and to copy it electronically.

This type of provision is necessary in many circumstances to ensure that investigators have access to electronic data in the systems in which it is created and stored. To be effective, investigators need to know what kind of data they are looking for, and they need either their own technical staff or the co-operation of on-site technical staff, in calling that data up for review and copying. However, many existing statutes that empower tribunals in relation to inspections or investigations contain more limited authority. For example, recent revisions to the *Ontario Energy Board Act*[11] result in separate provisions empowering inspectors (ss. 105-112), as distinct from investigators (ss. 112.01-112.06), although both may be appointed by the Ontario Energy Board ("OEB"). Under this scheme, an inspector is authorized to make copies of electronic data or to require that copies "be provided to him or her on paper or in a machine-readable medium or both." By contrast, the authority to directly "use any data storage, processing or retrieval device or system used in carrying on business in order to produce information or evidence ... in any form" is only available to an investigator, and only then where a specific warrant has been obtained.[12] It would seem unfortunate if the express provision for "use" of the systems in the case of investigations were interpreted to exclude authority to make similar "use" of core business systems in the course of routine regulatory inspections.

All tribunals, but particularly those that have significant powers of investigation for enforcement or compliance purposes, need to consider carefully whether and how to incorporate similar requirements, format protocols, and capabilities into their own statutory regime, rules, authorization practices, and investigative resources.

The same complex electronic document format and evidentiary considerations that arise in formal investigations may, however, also arise even for tribunals or agencies at the extreme administrative end of the spectrum with less intrusive powers. For example, the Law Society of Upper Canada's ("LSUC") Trustee Services department now has to deal with a variety of electronic records when it takes over the practice files and accounts of a deceased or incapacitated member. The court orders that the LSUC routinely obtains for this purpose are increasingly required to detail these issues. Recent orders authorize and require the LSUC to take possession of "all practice-related materials or client property of any kind whatsoever," including "electronic data and any electronic devices containing" such materials. The orders also require financial institutions and other third parties to provide financial records of the member "be they stored in printed, electronic, magnetic or any other form." They require any person with possession or knowledge of "information about or access to" electronic data or devices containing client

11 *Ontario Energy Board Act,* SO 1998, c 15, Schedule B.
12 *Ibid,* ss 108(6),112.02(1).

information or financial records to cooperate with the LSUC. They also define "electronic devices" to include "computers, external storage devices, smartphones, or any other device capable of storing" such information electronically, "whether or not such device also contains [the member]'s personal data." These orders give the LSUC broad powers to manage, store and distribute, all such materials and/or wind up the practice of the member without further order of the court.

In order to access, store, analyze, and otherwise manage these electronic data collections appropriately, tribunals of every kind increasingly require access to expert staff and specialized equipment. The critical choice of whether to develop these resources in-house, or to contract for them case by case, seems to be driven by various considerations. The number and complexity of cases managed by the OSC has caused that Commission to develop a sophisticated capability in house. The specialized nature of law firm IT, as well as the importance of solicitor client privilege and trust funds, is a key factor in the LSUC's decision to keep its resources in-house. By contrast, the OEB, which has fewer compliance cases that are usually somewhat less complex, uses externally contracted resources.

In one recent case, the OEB made use of a specialized IT forensics group established elsewhere within the Ontario government. The development of this kind of resource on a basis that can be shared by various smaller agencies and tribunals may be an important option, as a means to overcome the cost barriers to innovation that many tribunals face. However, it could raise issues about ownership, confidentiality and protection of the data collected, record retention, and the ability to establish the chain of custody and integrity of the data from the point of seizure to its introduction in evidence. These issues should be addressed in a protocol or in the statutory scheme.

2. E-disclosure in Enforcement Proceedings

The increasing use by tribunals of rules encouraging production and seizure of documents in electronic form, and particularly in native formats that preserve the metadata relevant to an anticipated evidentiary hearing, has implications for the subsequent disclosure process.

In enforcement and compliance proceedings, the OSC and OEB both already make disclosure, primarily in electronic form. In the case of the OEB, paper documents gathered in the course of an inspection or investigation process are typically reproduced in searchable PDF format, so that the entire disclosure process is electronic. This is a by-product of the OEB's regimes for electronic document production and exchange, electronic hearings, and for access to the record of its proceedings over the internet, which are described below. These procedures make use of the searchable PDF format for a number of reasons: that format combines both the document image and searchable text: it can be read with a wide range of software, including programs that are free; and it can be loaded directly, or readily converted for loading, into most of the more commonly used litigation support software programs.

The rules and practices of both the OSC and the OEB also recognize, at least implicitly, a requirement to disclose any metadata gathered electronically that will be relied upon as relevant to the proceeding. This flows directly from the existing rules of both tribunals, which among other things define the "documents" to be disclosed to include relevant electronic documents of any kind.[13] If the conversion of a document from its native format to a standard, such as PDF, would omit or destroy relevant metadata, then either the document should be disclosed in its native format, or the relevant metadata should also be disclosed by some other means. In practice, both tribunals recognize this requirement in appropriate cases.

Notably, however, these highly developed processes reflect the fact that both the OSC and the OEB in enforcement proceedings deal primarily with sophisticated market participants, who are usually represented by capable private counsel. The LSUC, by contrast, often deals with unrepresented solo or small firm members, as well as lay complainants, who have no interest or capability to receive disclosure electronically. Although changes are under consideration, currently, disclosure is

13 See for example the definition of "document" in Rule 1.01 of the OEB's *Rules of Practice and Procedure for Enforcement Proceedings*.

available from the LSUC primarily in hard copy only. The same is true, so far as I am aware, in most if not all other professional disciplinary tribunals in Ontario, although there are recent indications that some are in transition.

I would anticipate that changes in this area will be driven first by the increasing use of electronic investigation methods. This is because it surely makes no sense today to print up in hard copy all the fruits of such investigations for disclosure, if a regulator does not need to do so. However, another major driver is likely to be changes in the pre-hearing and hearing processes adopted by tribunals, which are discussed below. To be effective, any methods ultimately adopted need to be consistent from the earliest investigative or originating process, through the pre-hearing and hearing process, to the ultimate decision-making and record preservation stages.

3. Electronic Document Production and Exchange

Document production and exchange usually occur whenever a tribunal is adjudicating a contested process involving two or more parties. In a tribunal context, the inclusion of electronic documents in this process can raise all of the same issues that arise in the disclosure process, discussed in the previous section of this paper, and in the e-discovery process in our civil courts.

There is ample case law and literature on e-discovery issues that arise in a court setting, and it need not be reviewed here. The present focus is whether and how some of the problems raised by these issues can be addressed in a tribunal context.

In that regard, the most obvious problem is that of potentially disproportionate e-discovery requirements that has arisen in some civil cases, as a result of a pre-trial requirement to search all possibly relevant electronic sources. What is perhaps most interesting are the ways that two very different processes for document production and exchange in senior Ontario tribunals avoid this problem.

Before the Ontario Labour Relations Board ("OLRB"), the basic production requirement is found in Rule 8.3 of its Rules of Procedure. That Rule simply requires each party to exchange and file, not later than 10 days before the hearing, one copy "of all documents upon which it will be relying in the case". Obviously, even without any specific mention in the Rule, that obligation could include any electronic document, including any metadata, on which the party wishes to rely. As such, the decision whether to include such materials or not rests, in the first instance, with the producing party. However, the OLRB process does permit any party to bring a motion for a direction requiring additional document production from another party. Given the timing of the production obligation in Rule 8.3, just prior to a hearing, these motions for production are typically heard by the hearing Panel of the OLRB. As such, that Panel is in a position to make an informed assessment of the relevance (or otherwise) of the request, and also take into account any impacts on the hearing schedule or other considerations of disproportionate burden in making a decision on the motion.[14]

A slightly different approach is used by the OEB, but to the same effect. In proceedings governed by its general *Rules of Practice and Procedure*,[15] an applicant must pre-file written evidence to support its claims. Any further document production by another party or intervenor is then obtained on request by filing interrogatories under Rules 26 and 27. Pre-filed evidence, interrogatory questions, and responses must all be filed with the OEB, both in hard copy and electronic (PDF) format, as the pre-hearing process unfolds. Where any request is refused on any ground, or made subject to conditions (for example, regarding confidentiality), a motion to compel production or impose appropriate terms is available, and again is typically brought before the Panel that is seized ultimately with determining the proceeding on its merits.

The OLRB procedure is designed for discreet, contractual disputes, usually between two private parties. The OEB procedure

14 A similar process is also applied in labour arbitrations pursuant to s. 49(12(b) of the *Labour Relations Act*, SO 1995 c 1, Schedule A.

15 Ontario Energy Board, *Rules of Practice and Procedure(Revised November 16, 2006, July 14, 2008, October 13, 2011, January 9, 2012, January 17, 2013 amd April 24, 2014)*, online: OEB <http://www.ontarioenergyboard.ca/oeb/_Documents/Regulatory/OEB_Rules_of_Practice_and_Procedure.pdf>. The Board also has separate rules for enforcement proceedings, available here: <http://www.ontarioenergyboard.ca/oeb/_Documents/Regulatory/Rules_Practice_Procedure_Enforcement_Proceedings.pdf>.

also accommodates diverse and often far-ranging inquiries, in which many parties and intervenors with widely differing interests can participate. Nevertheless, by vesting control of document production in the hearing panels, both production regimes adopted by these tribunals appear to have largely avoided the problems of disproportionality and cost that have arisen in civil e-discovery cases before our courts. The tribunal seized with the hearing is usually in the best position to assess relevance, and other matters that go into a proportionality analysis. Another factor, perhaps, is the fact that the lawyers who appear before these tribunals regularly are specialized, often well known to each other, and well known to the tribunals concerned. This creates some pressure to approach issues reasonably and in a manner that solves problems, rather than seeking to exploit them.

Other tribunals looking to expand the use of e-discovery techniques in their proceedings will do well to consider these and perhaps other models.

4. Electronic Hearings and Electronic Evidence

The first way in which digital technology increasingly affects tribunal hearings is in relation to the hearing process.

Under ss. 5.1 and 5.2 of the *Statutory Powers Procedure Act*,[16] a tribunal whose rules make provision for such may hold a "written hearing" or an "electronic hearing." In the case of "electronic" hearings, ss. 5.2(4) provides that during such a hearing, "all the parties and the members of the tribunal participating in the hearing must be able to hear one another and any witnesses throughout the hearing." For the most part, use of this authority to hold "electronic" hearings by Ontario tribunals appears to involve hearings by conference telephone call. Most tribunals surveyed do not appear to make use of this authority, beyond occasional hearings by conference call, usually on procedural issues.

The Rules and practice of the OEB in regard to written and oral hearings are quite typical in most respects, but its use of electronic hearing technology is increasing.

Under the OEB Rules, the definition of "writing" includes electronic media, and the definition of "electronic hearing" includes a hearing held by conference call "or some other form of electronic technology allowing persons to communicate with one another." These provisions suggest some overlap between holding a hearing in writing or electronically. They also acknowledge the availability of electronic means of communication other than a conference telephone call.

Implicit in these definitions, I suggest, are a number of important hearing choices that are not developed in any tribunal Rules so far as I am aware. These include:

1. whether to limit the "hearing" to pre-filed material, including submissions;
2. whether such pre-filed material might include audio, or audio-visual recordings of pre-hearing proceedings, such as a technical conference under the OEB's Rule 25, or pre-hearing examinations of witnesses;
3. whether to include provision for any additional oral communication among counsel, witnesses, and the hearing Panel, either in relation to evidence, or to submissions, or both;
4. whether to also include provision for any visual connection among counsel, witnesses and the hearing Panel during the evidence, or the submissions, or both;
5. whether to allow for examination of witnesses, either pre-hearing and filed as part of the written evidence, or as part of a live audio or audio-visual hearing process, or both; and
6. how, if at all, to provide for any public access to the hearing process.

In practice, the authority provided under the OEB's Rule 4, which allows hearing Panels to tailor procedural orders to the particular circumstances of a given case, has been used to create a wide range of hearing procedures. These have involved an increasing use of electronic communication technologies, especially during the pre-hearing stages. However, in one recent OEB hearing, the Panel also arranged to

16 *Statutory Powers Procedure Act,* RSO 1990, c S22, as amended.

hear the oral evidence of an expert who was out of the jurisdiction at the time, by video-conference.[17] LSUC discipline proceedings have allowed similar arrangements, including allowing one party absent from the jurisdiction to make oral submissions using Skype. Another very recent LSUC procedural order made provision for one day of a lengthy forthcoming hearing to be held at an undisclosed location at which certain witnesses had taken refuge to avoid deportation, with provision that those proceedings "will be video conferenced or webcast to a hearing room" at the LSUC.[18]

The second way in which digital technology potentially affects tribunal hearings is in relation to digital evidence. This survey did not identify any examples of tribunal decisions addressing such issues. However, there seems to be no reason to expect that the experience of tribunals will be materially different than that of the courts, either in relation to the issues encountered, or the frequency with which they arise (which in both contexts seems to be rarely).

In general, electronic documents are not different in kind from paper documents in terms of their evidentiary value or use. Take as an example the recent case law dealing with the use of Facebook postings, particularly in personal injury insurance litigation. Although the existing cases have mostly arisen at the discovery stage,[19] the anticipated use of this kind of evidence at trial is surely straightforward: screenshots of the relevant posts will be printed up, and put to the plaintiff in cross-examination as a series of admissions against interest.[20] The same approach will apply, for example, to most defamatory publications on the internet, and to most other electronic evidence issues that arise in practice.[21] The key issues for examining counsel and the tribunal will be to show how the document is relevant to the case; how the relevant aspects of the document can be connected to, and identified by, one or more witnesses in the case; whether those relevant aspects can be proven with a hard copy print-out of the document, or only by putting an electronic copy into evidence; and whether it is necessary to use experts to either prove the electronic document in evidence, or to display any of its demonstrative evidentiary qualities.

In most cases, it will only be if an electronic copy must be proven that special problems might arise. For example, in the defamatory website example, if there is something interactive on the website which contributes to the defamatory impact of the published words, then counsel may have to display the website interactively (if it is still live on the internet) or recreate its relevant interactive features in the hearing room (if it has been taken down). The case of relevant metadata is similar: counsel will likely have to introduce in evidence an identical copy of the electronic document (preferably in its native format, with the metadata demonstrably intact) and display the relevant metadata through an appropriately informed witness (usually the investigator or forensic expert who seized or copied it from the computer systems in which it was found). Another commonly cited example is deleted data, that has been forensically recovered from the computer systems in which it was created and later deleted. All these examples, to a greater or lesser degree, require an element of expertise on the part of the witness who introduces the document, to confirm that the exhibit copy is an accurate and complete copy or representation of the original, and to demonstrate the relevant features or content of the document before the trier of fact.

In some cases, a tribunal will have an advantage over our courts in assessing and using this kind of evidence. This may be so either because of its expert knowledge of the business or other context in which the document is originally created, or because of its ability to act on

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17 *Horizon Utilities Corporation*, EB-2014-0002.

18 *LSUC v Hohots,* Order dated November 19, 2014 and Reasons, November 21, 2014, available online: <https://www.canlii.org/en/on/onlst/doc/2014/2014onlsth220/2014onlsth220.html?searchUrlHash=AAAAAQAITENOMjIvMTQAAAAAAQ>.

19 A convenient and excellent summary is found in David Campbell's article, "#OMG-Evidence! The law of discovery of social media in personal injury cases", (Fall 2014), *The Advocates' Journal*, 29.

20 See for example the recent criminal case admitting such evidence at trial in *R v Nde Soh*, 2014 NBQB 20 (CanLII).

21 For electronic evidence issues, generally, Underwood and Penner's text, *Electronic Evidence in Canada*, is a useful resource, and the Uniform Law Conference of Canada prepared a useful "Uniform Electronic Evidence Act, 1998" which addresses some of these issues, and can be found here: <http://ulcc.ca/en/uniform-acts-new-order/older-uniform-acts/749-electronic-evidence/1924-electronic-evidence-act>.

evidence that may not be strictly admissible as evidence in a court.[22] In addition, tribunals may anticipate that the same or similar types of electronic evidence will be relevant to proceedings before them. They will, therefore, have an opportunity in some circumstances to develop rules or decision criteria regarding the proof of particular kinds of electronic evidence that they expect or require in particular cases.

5. Deliberation, Collaboration, and Tribunal Decision-Making

Electronic evidence and processes could also offer a number of potential benefits to tribunal members in the course of deliberation and decision-making.

For many tribunals with members who live and work across the province, it makes the record much more portable. It also allows the use of numerous electronic resources to share documents, and work collaboratively on a decision from remote locations. At a more basic level, it saves the cost, inconvenience, and environmental impacts of making, and ultimately storing, numerous paper copies. It would allow better security for tribunal records and hearing materials, by enforceable electronic means. It could also reduce related travel costs and delays in decision-making, by allowing participation by tribunal members in the entire post-hearing process via remote electronic connection.

These benefits of course assume that tribunal members can work effectively together by remote electronic means, and are willing to learn the programs and techniques that would enable them to do so. They may be of greater or less interest to different tribunals, depending upon composition and the decision-making process they currently follow.

6. Electronic Access to Tribunal Records and Proceedings

In my experience, the benefits of electronic litigation that are easiest to achieve, and perhaps the most significant to parties, counsel, tribunals and the public, relate to the provisions for electronic access to proceedings.

A leader in this aspect of e-litigation, so far as I am aware, is the OEB. The key to its success appears to involve three relatively simple innovations. First, the OEB has adopted a guideline for electronic filing of all regulatory documents.[23] This guideline adopts as the standard document format the readable .pdf, described above, and it is routinely applied by procedural order both to documents filed in advance, and to exhibits marked during hearings before OEB Panels. Second, the OEB arranges, at its cost, for daily transcripts to be prepared for all hearings before it, and provides electronic copies in standard formats to be e-mailed to all parties and intervenors involved in the hearing. Third, the OEB makes all these materials publicly available on its website, in real time as a given hearing proceeds.

The OEB's hearing arrangements also typically include simultaneous live audio streaming of oral proceedings over its website.

Obviously, these arrangements have required an investment by the OEB in its website, and specifically in a portal for e-filing, as well as an organized facility for web-publishing all documents related to a given proceeding. They also involve accepting and internalizing the cost of the daily transcripts. However, the benefits to parties and their counsel, and to any members of the public or other stakeholders who wish to follow a given proceeding, are enormous.

In that context, the OEB's system seems to work well, and generally to have the support of both the stakeholders and their counsel who are regularly involved in its proceedings. A similar system is being implemented by the OSC, and the model is worth serious consideration by all other tribunals who preside over a regulated business or professional sector. No doubt cost concerns will be a major consideration, although in general a diminishing one as technology costs decline, especially for proven systems. Another battleground may be the issue of public access, as many professional bodies, in particular, continue to resist public scrutiny and to downplay the benefits that flow from an open, public process.

Another side-benefit, however, is the cost saving realized in terms of preserving and

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22 For example, under ss 15(1) of the *Statutory Powers Procedure Act*.

23 The current version is available here: <http://www.ontarioenergyboard.ca/oeb/_Documents/e-Filing/RESS_Document_Guidelines_final.pdf>.

storing the record of the tribunal's proceedings. This is resolved in most cases simply by using the web-record as the permanent archive of each proceeding, and moving it to an archive off-line (which may either be web-accessible, or not) as its immediate public interest fades. In some cases, this has become the standard way for tribunals to operate internally, so that any non-public records of counsel for the tribunal or its members can also be stored electronically if so advised.

Conclusions

Many tribunals in Ontario appear to be moving towards increasing use of digital evidence and litigation support methods at all stages of their proceedings.

Although there has been little co-ordination, and the current priorities of each tribunal seem to be different, the most successful innovations today appear to have the potential for broader application and adoption by other tribunals. The potential benefits for a tribunal affect everything from evidence gathering to informing the public about what tribunals do. They include benefits for parties, for counsel and others who appear before tribunals, for tribunal members, and for the public and other stakeholders.

This survey suggests the time is right for greater exchange of information and coordination in the assessment and adoption of these innovations, to overcome cost barriers and maximize the benefits involved. ■

NEB TRANS MOUNTAIN DECISION

Richard King, Patrick Welsh** and Rebecca Hall-McGuire****

Overview

On October 23, 2014 the National Energy Board ("NEB" or the "Board") issued Ruling No. 40 (the "Ruling") in response to a Notice of Motion ("Motion") and a Notice of Constitutional Question ("NCQ") filed by Trans Mountain Pipeline ULC ("Trans Mountain") in connection with the Trans Mountain Expansion Project (the "Project"). The NCQ dealt with the operational conflict between certain municipal by-laws and certain provisions of the *National Energy Board Act* (the "*NEB Act*") .[1]

In its Ruling, the Board concluded it has the legal authority to consider constitutional questions relating to its own jurisdiction. The Board also determined that the doctrine of federal paramountcy, or alternatively the doctrine of interjurisdictional immunity, applied and rendered certain City of Burnaby by-laws (the "By-Laws") inapplicable to the extent they conflicted with sections 73 and 75 of the *NEB Act* (which allowed Trans Mountain to carry out certain work in support of its Project). The Ruling forbids the City of Burnaby (the "City" or "Burnaby") from, *inter alia*, interfering and obstructing Trans Mountain from exercising its authority under the *NEB Act*. The Federal Court of Appeal subsequently denied the City's application for leave to appeal.

Background: The Trans Mountain Project & Preferred Route

On December 16, 2013 Trans Mountain applied to the NEB pursuant to sections 52 and 58 of the *NEB Act* for a certificate of public convenience and necessity (and related orders) approving the Project. The Project involves construction of 987 kilometres of new buried pipeline in British Columbia and Alberta, and the reactivation of 193 kilometres of existing pipeline.[2] On April 2, 2014 the NEB issued hearing order OH-001-2014, setting out procedural steps and timelines, and granting the City intervener status.[3]

Trans Mountain's initial application proposed the construction of two delivery lines to the Westridge Marine Terminal through a residential neighbourhood in Burnaby (within Trans Mountain's existing right-of-way), using conventional pipeline construction techniques. During the course of consultations (as part of the NEB process), it became evident that stakeholders and interested parties preferred a route that avoided Burnaby's urban areas, and utilized trenchless construction. As a result, Trans Mountain subsequently revised its preferred route to travel directly to the Westridge Marine Terminal, through Burnaby Mountain Conservation Area (the "Preferred Route"), utilising trenchless construction.[4] As a result of this change to the preferred route, Trans Mountain was required to carry out additional engineering, environmental, socioeconomic, and geotechnical studies (the "Mandated Field Work", more particularly described below) in order to assess the Preferred Route. In light of the requirement for new information, the Board issued Procedural Direction No. 4, allowing Trans Mountain until December 1, 2014 to carry out and file the results of the Mandated Field Work.[5]

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1 *National Energy Board Act*, RSC 1985, c N-7 ["*NEB Act*"].

2 *Trans Mountain Pipeline ULC and City of Burnaby* (Trans Mountain Notice of Constitutional Question Reasons for Decision) (23 October 2014), OH-001-2014 (Ruling No 40) (NEB) at 2.

3 *Trans Mountain Pipeline ULC* (Hearing Order) (2 April 2014) OH-001-2014 (NEB).

4 Ruling No. 40, *supra* note 2 at 2.

5 *Trans Mountain Pipeline ULC* (Procedural Direction No 4) (15 July 2014) OH-001-2014 (NEB).

Ruling No. 28 – Confirming Interpretation of Section 73(a) of the *NEB Act*

Following Procedural Direction No. 4, Trans Mountain attempted to obtain approval from the City to access the lands in question. The City took the position that the physical work required to complete the Mandated Field Work (which involved, *inter alia*, the drilling of boreholes for geotechnical investigations, conducting soil surveys, tree removal and clearing brush, and the drilling of a series of vertical walls to ascertain groundwater conditions) would be contrary to the By-Laws.[6] Among the By-Laws that the Mandated Field Work would violate was the *Burnaby Parks Regulation Bylaw 1979*[7] (the "*Parks Bylaw*"), which *inter alia*, prohibited any person from damaging, destroying or polluting any personal property, tree, shrub, plant, turf or flower in any park.

On July 25, 2014, Trans Mountain wrote to the NEB requesting confirmation of its rights to access lands for the purpose of conducting the Mandated Field Work under paragraph 73(a) of the *NEB Act*.[8] On August 19, 2014, the Board issued Ruling No. 28, which confirmed that Trans Mountain had the power to enter the Burnaby Mountain Conservation Area and carry out the Mandatary Field Work, subject to the requirement in section 75 of the *NEB Act* that Trans Mountain do as little damage as possible and make full compensation for any damage caused.[9]

Work Done Following Rule No. 28 and the Resulting Notice of Motion

On August 20, 2014, Trans Mountain wrote to Burnaby and advised that it intended to proceed with the Mandated Field Work on August 22. Burnaby's response to this letter indicated that Trans Mountain's section 73 rights were subject to compliance with the By-Laws (including the Parks Bylaw).[10]

On August 28, 2014, Trans Mountain commenced work in the Burnaby Mountain Conservation Area. Shortly thereafter, City staff issued Trans Mountain with two Orders to Cease Bylaw Contraventions, and served a By-Law Notice on a Trans Mountain employee citing damage or destruction to trees or plants contrary to the Parks Bylaw.[11] On September 3, 2014 Trans Mountain filed its Motion with the NEB requesting an order pursuant to sections 12, 13, and 73(a) of the *NEB Act*, directing the City to comply with paragraph 73(a) of the *NEB Act* and forbidding the City from denying/obstructing access to the lands in question.[12] The Board responded, advising Trans Mountain to file an NCQ posing the following questions:

1. Does the Board have the legal authority to determine that Burnaby's specific bylaws that Trans Mountain is alleged to have breached are inapplicable, invalid, inoperative in the context of Trans Mountain's exercise of its powers under paragraph 73(a) of the *NEB Act*?

2. If so, on the facts before the Board, should the Board find that those bylaws are inapplicable, invalid, or inoperative?

3. If the Board can and does make a finding that those bylaws are invalid, inapplicable, or inoperable in the particular case, does the *NEB Act* provide the Board, as a statutory tribunal, with the authority to forbid Burnaby from enforcing those or any other by-laws in the future (for example, what is the scope of the authority under section 13 of the *NEB Act*, and does it encompass the remedy sought against Burnaby)?

4. If so, do the facts before the Board support granting such at order?

On September 26, 2014, Trans Mountain resubmitted its Motion with the NCQ, as directed by the NEB. The Hearing occurred on October 9, 2014 and the Board issued its Ruling on October 23, 2014 in which it addressed each of the four NCQ issues.

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6 Trans Mountain Pipeline ULC and City of Burnaby (Interpretation of 73(a) of National Energy Board Act) OH-001-2014 (19 August 2014) (Ruling No 28) at 2 (NEB).
7 City of Burnaby, bylaw No 7331, *Burnaby Parks Regulation Bylaw 1979* (26 March 1979) ["*Parks Bylaw*"].
8 Ruling No 40, *supra* note 2 at 3.
9 Ruling No 28, *supra* note 6 at 4.
10 *Burnaby (City) v Trans Mountain Pipeline ULC,* 2014 BCSC 1820 at para 24 ["*Burnaby*"]
11 Ruling No 40, *supra* note 2 at 4.
12 *Trans Mountain Pipeline ULC* (Notice of Motion) (3 September 2014) OH-001-2014 (NEB).

Issue 1: Whether the Board has the legal authority to decide the issues

The City argued that the Board only had the power to determine legal and constitutional questions regarding its own enabling legislation and was therefore not able to determine legal constitutional questions regarding provincial or municipal legislation.[13] As such, Burnaby argued that the Board was not able to determine that Burnaby's By-Laws are inapplicable, invalid or inoperable and that the matter properly belonged before a provincial superior court.[14] Trans Mountain, on the other hand, submitted that sections 11, 12, and 13 of the *NEB Act* provide the Board with legal authority over the issues as these provisions establish the NEB as a court of record "with full and exclusive jurisdiction to inquire into, hear, and determine any matter within its jurisdiction, whether a matter of law or fact."[15]

The Board rejected Burnaby's position and concluded that it did, in fact, have the legal authority to consider constitutional questions relating to its own jurisdiction. The Board found that subsection 12(2) of the *NEB Act* was determinative of the issue. Subsection 12(2) of the *NEB Act* states: "For the purposes of this Act, the Board has full jurisdiction to hear and determine all matters, whether of law or fact" (emphasis added). The Board also went on to note that case law from the Supreme Court of Canada ("SCC") supported this conclusion.[16] Relying on the 1991 SCC's decision in *Cuddy Chicks Ltd v Ontario (Labour Relations Board)*, the Board stated that where a tribunal has jurisdiction over the subject matter, parties, and remedy, it may treat an impugned provision as invalid "for the purpose of the matter before it."[17] As the Board had jurisdiction over the subject matter, the parties, and the remedy, it therefore had jurisdiction on the issue and the ability to declare the By-Laws invalid, inoperative, or inapplicable for the purpose of the Trans Mountain matter before it. The subject matter at issue was "an application to order Corridor Study Access to the Subject Lands in relation to a proposed pipeline route."[18] The parties came within the purview of the NEB because they relate to project routing and access required to complete necessary surveys. The Board had jurisdiction over the remedy as a result of the statutory language of sections 11, 12(2), 13(b), and 73(a) of the *NEB Act*.[19]

The Board's ruling also referred to an earlier decision of the BC Supreme Court ("BCSC") in respect of a motion brought by Burnaby to enjoin Trans Mountain from continuing to carry on its Mandated Field Work in contravention of the City By-Laws. The BCSC declined to issue the injunction, finding no irreparable harm and stating among other things that the matter was properly before the NEB.[20] The BCSC went on to note that pursuant to the SCC's ruling in *Cuddy Chicks*, the NEB would have the jurisdiction to treat the City's By-Laws as invalid for the purpose of the dispute between Burnaby and Trans Mountain.[21]

Question 2: Whether Burnaby's By-Laws should be inapplicable, invalid, or inoperative

In relation to this question, the Board considered the applicability of the doctrines of federal paramountcy and interjurisdictional immunity.

Federal Paramountcy

The doctrine of federal paramountcy, as

13 Ruling No 40, *supra* note 2 at 6.
14 *Ibid*.
15 *Ibid* at 5.
16 The Board referenced *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854, 140 DLR (4th) 193*; Dunsmuir v New Brunswick,* [2008] 1 SCR 190, 2008 SCC 9*;* and *Westcoast Energy Inc v Canada (National Energy Board)*, [1988] 1 SCR 322, 156 DLR (4th) 456.
17 *Cuddy Chicks Ltd v Ontario (Labour Relations Board)*, [1991] 2 SCR 5 at paras 13-17 ["*Cuddy Chicks*"]. See also Ruling No 40, *supra* note 2 at 8.
18 Ruling No 40, *supra* note 2 at 8.
19 The Board stated it has jurisdiction over the remedy at 8 and notes that the basis for this conclusion is further described in its answers to questions 2-4 (see Ruling No 40, *ibid* at 8-18).
20 *Burnaby, supra* note 10 at para 16. See also Ruling No 40, *ibid* at 8. It is notable that at the time Burnaby filed its injunction motion, Trans Mountain had already filed its Motion with the NEB on essentially the same matters.
21 *Burnaby*, *supra* note 10 at para 40. Brown J. stated "Therefore, although [the NEB] could not issue a declaration that s. 73 of the *Act* or the Burnaby bylaws were invalid, nonetheless, the NEB would be able to treat the impugned provision as invalid for the purposes of the matter before it." See also Ruling No 40, *supra* note 2 at 8.

articulated by the SCC in *Canadian Western Bank,* provides that "when the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility."[22] This doctrine applies in two circumstances: (i) where it is impossible to comply with both a federal and provincial law, such that compliance with one results in a violation of the other; and (ii) where application of the provincial law would frustrate the purpose of the federal law.[23]

The City of Burnaby argued that there was no impossibility of dual compliance because the Parks Bylaw did not forbid access to the Burnaby Mountain Conservation Area to carry out studies.[24] Further, the City submitted that the Board should not give too broad an application to paramountcy on the basis of frustration of federal purpose. Citing *Canadian Western Bank*, Burnaby stated that the mere fact that Parliament has legislated in an area does not preclude provincial legislation from operating in the same area. Trans Mountain responded by indicating that it was impossible to carry out the Mandated Field Work (and thereby satisfy the information requirements under the *NEB Act*) without breaching the By-Laws.

The Board concluded that there is a conflict between both the operation and purpose of the By-Laws and paragraph 73(a) of the *NEB Act*. The Parks Bylaw prohibits any tree cutting, vegetation clearing, and borehole drilling.[25] The Board accepted Trans Mountain's evidence, finding that these activities were necessary in order to carry out the Mandated Field Work and provide the Board with the requisite information.[26] Thus, the Board found that it was simply not possible for Trans Mountain to comply with both the requirements to provide information mandated by the *NEB Act* and the Burnaby By-Laws, and that therefore there was an operational conflict. The Board also found that this conflict between the federal and municipal laws had the purpose of frustrating the federal purpose of the *NEB Act*. The purpose of the requirements under the *NEB Act* is to provide the Board with sufficient information to determine whether a particular project is in the public interest; by prohibiting Trans Mountain from being able to conduct the surveys and examinations, Burnaby had frustrated this federal purpose.

Interjurisdictional Immunity

As explained recently by the SCC in *Bank of Montreal v Marcotte*, "Interjurisdictional immunity operates to prevent a law enacted by one level of government from impermissibly trenching on the 'unassailable core' of jurisdiction reserved for the other level of government".[27] Where the doctrine applies, the otherwise validly enacted law (in this case, the City By-Laws) is "read down" such that it no longer applies to the extra-jurisdictional matter.[28]

In its submissions, Burnaby noted that the SCC had cautioned that the doctrine of interjurisdictional immunity should only be used in situations covered by precedent and that the doctrine must not be used to undermine cooperative federalism.[29] Further, Burnaby argued that Trans Mountain had not demonstrated that the By-Laws would impair the core of a federal power.[30]

Trans Mountain argued that carrying out the Mandated Field Work for the purpose of informing the route of an interprovincial pipeline falls within the "core" of a federal power and the application of the By-Laws impairs the federal power. Further, Trans Mountain submitted the facts of the case had already been covered by precedent in *Campbell-Bennett v*

22 *Canadian Western Bank v Alberta*, [2007] 2 SCR 3, 2007 SCC 22 at para 69 [*Canadian Western Bank*].
23 *Ibid*.
24 Ruling No 40, *supra* note 2 at 10.
25 Section 5 of the Parks Bylaw, *supra* note 7 states: "no person shall cut, break, injure, damage, deface, destroy, foul, or pollute any personal property or any tree, shrub, plant, turf or flower in or on any park".
26 Ruling No 40, *supra* note 2 at 12.
27 *Bank of Montreal v Marcotte*, 2014 SCC 55 at para 62.
28 Peter Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough, ON: Carswell, 2007) at 15-28 as cited in Ruling No 40, *supra* note 2 at 13.
29 Ruling No 40, *supra* note 2 at 10. The Ruling notes that the City of Burnaby relied on *Canadian Western Bank*, *supra* note 22.
30 Ruling No 40, *supra* note 2 at 10.

Comstock Midwestern Ltd.[31]

The Board found that the regulation of interprovincial pipelines is a core area of federal jurisdiction, and that the By-Laws impaired the Board's ability to make a decision regarding the public convenience and necessity of the interprovincial pipeline.[32] The Board likened the situation to the SCC case of *Construction Montcalm Inc. v Quebec (Minimum Wage Commission)*,[33] and stated that like the location of aerodromes being essential to the federal government's power over aeronautics in *Construction Montcalm*, technical information about pipeline routing is essential to the federal government's power over interprovincial pipelines.[34] Finally, the Board concluded that the trenching on federal jurisdiction was sufficiently serious to warrant reading down. This was based on the Board's findings of fact that Trans Mountain required more than mere access to the land, because in order to satisfy the filing requirements, Trans Mountain had to engage in physical activities contrary to the By-Laws, and section 75 of the *NEB Act* presumed some waste and physical damage. Therefore, the Board declared the ByLaws inapplicable to the extent they impaired the work to be done by Trans Mountain under the authority of the *NEB Act*.[35]

Question 3: Whether the Board has the authority to forbid Burnaby from enforcing its ByLaws

On this issue, Trans Mountain submitted that the NEB had full authority, pursuant to section 13 of the *NEB Act*, to forbid Burnaby from enforcing its By-Laws in a manner that undermined the rights provided to Trans Mountain by paragraph 73(a) *NEB Act*. The City took the position that the Board has no such authority to prevent another level of government from enforcing its By-Laws.[36]

The Board disagreed with Burnaby, concluding that paragraph 13(b) of the *NEB Act*, which states that the Board "may forbid the doing or continuing of any act, matter or thing that is contrary to this Act or any such regulation, certificate, licence, permit, order or direction" provided sufficient authority. The Board noted that paragraph 73(a) permits a company to enter Crown and non-Crown land to make surveys and examinations. Therefore, the Board concluded, Parliament intended to confer the authority to forbid a municipality from acts that contravened paragraph 73(a).[37]

Question 4: Whether the Board should forbid Burnaby from enforcing its By-Laws

The City submitted that the facts did not support an order forbidding Burnaby from enforcing its By-Laws and that this was particularly true in light of the fact that the NEB had not mandated how the required information must be collected or the where the required studies must take place.[38] Further, the City took the position that the Board should not make such an order without considering the environmental harm the proposed work would cause.[39]

The Board rejected these submissions, finding that the affidavit evidence from Trans Mountain's Project Lead provided "compelling and specific reasons justifying such an order."[40] In particular, the Board accepted the affidavit evidence indicating that the Mandated Field Work could not be conducted without minimal disturbances to the subject lands, and that Trans Mountain had made numerous attempts to cooperate with Burnaby, none of which were reciprocated.[41] Further, the Board explicitly rejected Burnaby's submission that it had not mandated the location or required information, and referred to Ruling No. 28, which included attachments detailing the Mandated Field Work to be done

31 *Campbell-Bennett v Comstock Midwestern Ltd.*,[1954] SCR 207.
32 Ruling No 40, *supra* note 2 at 14.
33 *Construction Montcalm Inc. v Quebec (Minimum Wage Commission)*, [1979] 1 SCR 754.
34 Ruling No 40, *supra* note 2 at 14.
35 *Ibid* at 15.
36 *Ibid*.
37 The Board states that "in the Board's view, Parliament intended that the Board have authority over both the subject matter (which is about temporary access to complete survey work for a federal undertaking) and the remedy" see Ruling No 40, *ibid* at 16.
38 *Ibid* at 17.
39 *Ibid*.
40 *Ibid*.
41 *Ibid*.

and location of the survey work to be performed. Finally, the Board rejected Burnaby's submission that it must consider the environmental impacts of an order to prevent Burnaby from enforcing its By-Laws. The Board noted that the studies and examinations were not designated projects, and it was not persuaded an environmental assessment would be necessary. The Board did note, however, that the Mandated Field Work to inform the environmental assessment of the project are required under the *Canadian Environmental Assessment Act, 2012*[42].

Application for Leave Denied in the Federal Court of Appeal and BC Court of Appeal

On October 29, 2014 Burnaby filed an application for leave to appeal Ruling No. 40 to the Federal Court of Appeal. In its application, Burnaby argued that the Board did not have jurisdiction to forbid Burnaby from enforcing its By-Laws or to determine constitutional questions relating to the interpretation of sections 73 and 75 of the *NEB Act*. On December 12, 2014 the Federal Court of Appeal denied Burnaby's application for leave.[43]

Burnaby also sought leave to appeal the BCSC decision (noted above) to the BC Court of Appeal ("BCCA"). On November 27, 2014, the BCCA dismissed Burnaby's application for leave and stated that the application was "a collateral attack on the ruling of the NEB" and that the issues raised by Burnaby had "been dealt with by a binding and conclusive order of the NEB".[44]

Implications of Ruling No. 40

On their face, the Burnaby By-Laws were not extraordinary – seeking only to prevent disturbance of vegetation and natural features within municipal parks and conservation areas. However, because the By-Laws' prohibitions operated to prohibit Trans Mountain from carrying out physical work in order to generate information for the NEB's regulatory process, the By-Laws were found to be in conflict with the federal statutory regime, and the paramountcy doctrine applied.

Obviously, the NEB's Ruling (and subsequent denial of leave to appeal by the Federal Court of Appeal) provides greater certainty to federally-regulated pipeline companies in circumstances where municipal by-laws (either intentionally or incidentally) seek to prohibit companies from carrying out work required for the federal regulatory process. It also confirms that federally regulated pipeline companies have the power to access public and private lands (without the owner's consent) for the purposes of performing surveys and investigations under section 73 of the *NEB Act*.

However, the Ruling also applies more broadly to other sectors where municipal by-laws encroach upon federal undertakings, adding to a fairly lengthy list of recent case law including *2241960 Ontario Inc v Scugog (Township)*[45] and *Burlington Airpark Inc v Burlington (City)*[46] where in both cases the Courts upheld the operation of municipal by-laws requiring clean fill to be used at federal aerodromes; and *Detlor v Brantford*,[47] where the Court upheld municipal bylaws prohibiting certain "development fees" sought to be imposed by an aboriginal community on land developers. The Board's reasoning may also provide guidance to municipal authorities considering ways to minimize the shipments of oil by rail through municipalities. Shipments of crude-by-rail have increased significantly in recent years in Canada, and a number of municipal politicians (in light of the Lac-Mégantic disaster) have made public pronouncements about taking steps to eliminate crude-by-rail shipments. Most railways in Canada are interprovincial or international lines, and therefore fall within the jurisdiction of the federal government.[48] As such, in light of Ruling No. 40, municipal authorities will have to take a close look at any attempt to eliminate that risk by municipal by-law. ■

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42 *Canadian Environmental Assessment Act, 2012,* SC 2012, c 19 s 52.

43 *City of Burnaby v The National Energy Board and Trans Mountain Pipeline ULC* (12 December 2014), Ottawa 14-A-63 (FCA) available online:< http://www.osler.com/uploadedFiles/14-A-63%2020141212-Order.pdf>.

44 *Burnaby (City) v Trans Mountain Pipeline ULC*, 2014 BCCA 465.

45 *2241960 Ontario Inc v Scugog(Township)*, 2011 ONSC 2337 (Ont Div Ct), [2011] OJ No 2445.

46 *Burlington Airpark Inc v Burlington (City)*, 2014 ONCA 468.

47 *Deltor v Branford*, 2013 ONCA 560.

48 Standing Senate Committee on Energy, the Environment and Natural Resources, *Moving Energy Safely: A Study of the Safe Transport of Hydrocarbons by Pipelines, Tankers and Railcars in Canada* (August 2013), online: www.parl.gc.ca. See also Rui Fernandes, *Transportation Law* (Toronto: Aerospark Press, 1991) (2011-Rel 1), ch 20 at 20-3.

NORFOLK AND ALTALINK: ONTARIO AND ALBERTA REGULATORS REFINE MERGERS AND ACQUISITIONS STANDARDS[1]

Ron Clark and Zoë Thoms***

The past year saw noteworthy developments around the regulation of mergers and acquisitions in the electricity sector in both Ontario and Alberta. The energy regulators of those provinces each considered the approval of significant acquisitions of utilities within their respective jurisdictions. In July 2014, the Ontario Energy Board (OEB) concluded a 15-month hearing into a bid by the publicly owned Hydro One to acquire Norfolk Power, a local electricity distribution company (LDC).[2] In November 2014, the Alberta Utilities Commission (AUC) ruled on an application for approval of the sale of AltaLink's transmission assets and business to a foreign private investor.[3] Both transactions involved complex commercial agreements, the terms of which were unique to the parties involved. Despite the differences, however, there was one common element with which both regulators had to grapple – purchase incentives. In both deals, the purchasers offered a premium on the purchase price. Hydro One also offered a 1% reduction from 2012 rates and a five-year rate freeze as an additional incentive for existing Norfolk Power customers. Other utilities intervening in each of the proceedings argued that the purchase price premium ran afoul of the criteria governing the approval of mergers and acquisitions. Would the regulators permit the purchasers to offer these types of bids?

Hydro One and Norfolk Power: Consolidation in Ontario's Electricity Distribution Sector

Hydro One's bid for Norfolk Power is another step in the long path toward consolidation in Ontario's electricity distribution sector. As part of the restructuring of Ontario's power sector around the year 2000, legislation required municipalities to "corporatize" their distribution assets and, in this process, many merged to become bigger or simply sold to Hydro One. During that process, Ontario's electricity distribution sector contracted from over 300 distributors in the 1990's to around 90. Since then, a continuing trend of mergers and sales has further reduced the number to a little over 70 today. In December 2012 the provincially appointed Distribution Sector Review Panel issued a report calling for further consolidation of the sector including, as a last resort, forced amalgamations, into eight to twelve larger regional distributors. The

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1 An earlier version of this article previously appeared on the Aird & Berlis LLP website www.airdberlis.com
2 *Hydro One Inc. and Norfolk Power Distribution Inc.,* EB-2013-0196/EB-2013-0187/EB-2013-0198, online: OEB <http://www.hydroone.com/RegulatoryAffairs/Documents/EB-2013-0187/dec_order_HONI_NPDI_20140703.pdf> [*Norfolk*].
3 *Altalink Investment Management Ltd. and SNC Lavalin Transmission Ltd. et al.(28 November 2014), (Application for Approval)*AUC Decision 2014-326 [*AltaLink*].

backlash among municipalities and numerous LDCs was immediate and the Minister of Energy quickly assured the industry that there would be no forced amalgamations or sales.

Despite the disavowal of the Distribution Sector report, consolidation and efficiencies were on the front burner again moving into 2013. That year Hydro One signed an agreement to purchase Norfolk Power (announced April 2, 2013) and subsequently made an application to the OEB for approval of that deal.

In assessing whether or not to approve an acquisition of a public utility, the OEB applies a "no harm" test. The no harm test arises from an earlier OEB decision, the *Combined Proceedings*,[4] and requires that the OEB consider whether a proposed acquisition would be consistent with the OEB's legislated objectives as set out in the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (the "OEB Act").[5] At the time the Combined Proceeding was decided, the OEB Act only provided for the first two of what are currently five objectives:[6]

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
4. To facilitate the implementation of a smart grid in Ontario.
5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.[7]

In the Norfolk decision, the Board determined that only the first two objectives were relevant to the issues raised. [8] The OEB went on to consider, however, the application under the present-day no harm test of the three objectives added to the OEB Act after the *Combined Proceedings* decision. The Board concluded that because it is required by law to be guided by all five of the objectives, the no harm test should not be limited to the first two objectives, but must be applied having regard to all five. [9]

Under the terms of the deal with Norfolk Power, Hydro One proposed to pay a premium of $39.1 million above the $53.9 million net book value.[10] As well, Hydro One offered a 1% reduction from 2012 rates and a five-year rate freeze for Norfolk customers.[11] Intervenors made a number of arguments that completion of the transaction with these incentives would not satisfy the no harm test. Key issues for the intervenors were the potential for large rate increases at the end of the five-year period and concerns that the premium paid on the purchase price would result in higher rates not only for Norfolk (eventually) but for all Hydro One customers.[12]

The OEB rejected these arguments and found that, in applying the no harm test it was not relevant to consider whether the purchase price has been set at an appropriate level since future rates would be determined without reference to the purchase price paid. It was the OEB's policy that the premium would not find its way into future rates.[13] The OEB also dismissed the argument that the purchase price was set at a

4 *Combined Proceedings (5 August 2005)*, EB-2005-0018/0234\0254\0257, online: OEB <http://www.ontarioenergyboard.ca/documents/cases/RP-2005-0018/decision_310805.pdf> [*Combined Proceedings*].
5 *Ibid* at 6-7; *Norfolk*, *supra* note 1at 10-13;
6 *Combined Proceedings*, *supra* note 4 at 12-13.
7 *Ontario Energy Board Act, 1998*, SO 1998, c 15, s 1.
8 *Norfolk, supra* note 1 at 13.
9 *Ibid* at 12-13.
10 *Ibid* at 14.
11 *Ibid* at 12.
12 *Ibid* at 14-15.
13 *Ibid* at 15.

level that would create a financial burden on Hydro One on the basis of the proportion of the purchase price to Hydro One's asset base ($39.1 million to $20.8 billion).[14]

With the Norfolk decision, the OEB confirmed that incentives such as rate reductions and freezes and price premiums are fair game as the province contemplates further consolidation in the electricity distribution sector. According to the OEB, its policy and oversight will prevent any feared rate increases on account of the purchase price premium.

Foreign Investment in Alberta's Electricity Transmission Sector: Buffett's Bid for AltaLink

In 2002, Quebec-based SNC-Lavalin acquired Alberta's largest electricity transmission company which continued as AltaLink.[15] In 2013, following a series of corruption scandals, SNC-Lavalin announced a new strategic direction whereby it would focus on its core engineering and construction business and divest itself of non-core holdings, including AltaLink.[16] In May 2014, SNC-Lavalin concluded a deal with Warren Buffett's US-based Berkshire Hathaway for the purchase of AltaLink.[17] This deal, involving a foreign investor, triggered a review by the Competition Bureau of Canada and Industry Canada, both of which approved the transaction.[18] The final hurdle for the parties to clear was approval by the AUC.

Like the OEB, the AUC applies a "no harm" test in evaluating an application to approve the acquisition of a utility. The no harm test and other factors considered by the AUC evolved from a number past decisions[19] and include:

1. Whether there will be any impact to the rates and charges passed on to customers.
2. Whether any operational benefit or risk arises related to the acquiring party's utility experience.
3. Whether the financial profile of the utility will be impacted for the purposes of attracting capital.
4. In the case of AltaLink, whether the utility will remain sufficiently legally, financially and operationally separate from the acquiring party.
5. Whether the AUC will maintain sufficient regulatory oversight of the utility.
6. Whether the management and operational expertise will remain in place post-transaction.
7. Whether the transaction will result in any cost impacts for customers relating to such things as tax and pension funds.
8. That the acquiring party wishes to be in the utility business in Alberta whereas the divesting party does not.
9. That customers are, to the maximum extent possible, to be protected against any negative ramifications arising from the transactions.
10. That customers are not entitled to a level of post-transaction regulatory certainty they would not have realized if the transaction had not been approved.
11. That customers are at least no worse off after the transaction is completed after consideration of the potential positive and negative impacts of the proposed share transactions.[20]

The no harm test is applied in two stages. First the AUC assesses whether the transaction results in harm to customers. If the AUC determines that it will, the AUC proceeds to the second stage and considers whether any identified harms can be mitigated through

14 *Ibid* at 16.
15 *TransAlta and AltaLink (28 March 2002).*, AUC Decision 2002-038.
16 SNC-Lavalin, News Release, "SNC-Lavalin Announces its Strategic Plan" (2 May 2013), SNC- online: <http://investors.snclavalin.com/en/news-releases-and-ir-calendar/news-releases/2085/>.
17 SNC-Lavalin, News Release, "*SNC-Lavalin enters into agreement to sell its equity stake in Altalink for $3.2 billion –transaction unlocks significant value in support of company's strategic plan*"(1 May 2014), online:SNC-Lavalin:<http://www.snclavalin.com/en/snclavalin-enters-into-agreement-to-sell-its-equity-stake-in-altalink-for-32-billion-transaction-unlocks-significant-value-in-support-of-the-companys-strategic-plan>.
18 *AltaLink*, *supra* note 3 at para 4.
19 These factors arise from seven separate prior decisions of the AUC which are set out in further detail at paragraphs 108-109 and the footnotes n81 – n86 in *AltaLink*.
20 *AltaLink*, *supra* note 3 at paras 108-109.

approval conditions.[21]

A number of utilities intervened in the application arguing, among other issues, that the purchase premium offered by Berkshire Hathaway of $3.2 billion on an approximate book value of about $800 million raised a potential negative impact on customer rates and service that remained unresolved. Even if the purchaser was prohibited from including the premium in rate base they argued, the purchaser may seek recovery in an indirect manner that would have an impact on the future costs included in the utility revenue requirement and rates. Otherwise, they asked, how would the purchaser recoup its substantial investment? [22]

One intervening utility argued that the AUC ought to impose the following condition on any approval to address this concern:

> None of the Applicants, nor any related entity nor successor of them, shall seek to recover from customers the premium over net book value paid for the shares of NewCo pursuant to the Share Purchase Agreement.[23]

The AUC dismissed these concerns stating that the proposed transaction did not fail the no harm test simply because a premium over book value had been offered.[24] Reliability and service quality matters would remain subject to AUC oversight, as would the prudency of AltaLink's costs and the justness and reasonableness of the rates approved in AltaLink's tariff.[25] Further, the AUC refused to impose the recommended condition that none of the applicants should seek to recover the purchase price premium on the bases that the AUC's ongoing regulatory oversight made such a condition unnecessary.[26] In November 2014, the AUC issued its decision approving the transaction and the final hurdle was cleared for the parties to conclude their deal.

Ontario and Alberta Regulators Clear the Way for Purchase Premiums

The deals to acquire Norfolk Power and AltaLink differed in many respects. Hydro One is a publicly owned company pursuing a consolidation strategy in Ontario's LDC sector while Berkshire Hathaway is a private, foreign-owned company acquiring the largest transmission business in Alberta. Both of the proposed transactions, however, included incentives of purchase price premiums, and in the case of Norfolk Power, a 1% rate reduction and five-year rate freeze. In both cases, the issue of purchase price premiums were raised by intervening utilities as a possible breach of the no harm test used by the OEB and AUC to evaluate utility mergers and acquisitions. In both cases, the OEB and AUC determined that their on-going oversight was sufficient to ensure that customers would not suffer the feared harms of rate increases or negative impacts to service reliability. In particular, the regulators noted that rates would be determined based on book value without reference to premiums paid.

While it is certainly true that Norfolk Power and AltaLink continue to be subject to regulation by the OEB and AUC respectively, the reality is that these utilities will be under constant pressure by their shareholders, whether public or private, to obtain a return on the purchase price premium. The regulators will have to be vigilant in their oversight to prevent any indirect attempts at recovery once the splash made by these acquisitions fades and the newly acquired utilities move forward with their business. ■

21 *Ibid* at para 110.
22 *Ibid* at paras 219, 227.
23 *Ibid* at para 222.
24 *Ibid* at para 231.
25 *Ibid* at para 133.
26 .*Ibid* at para 231.

COLDWATER INDIAN BAND: ABSENT EXCEPTIONAL CIRCUMSTANCES, COURTS SHOULD NOT INTERFERE WITH ONGOING ADMINISTRATIVE PROCEEDINGS

*Héloïse Apesteguy-Reux**

***C**oldwater Indian Band et al v The Minister of Indian Affairs and Northern Development et al* was heard and decided on November 25, 2014.[1] The Federal Court of Appeal overturned the Federal Court's decision to allow, in part, a judicial review application brought by the Coldwater Indian Band ("Coldwater") and grant certain declaratory relief.

Coldwater's application arose from a request by Kinder Morgan Canada Inc. ("Kinder Morgan") to the Minister of Indian Affairs and Northern Development to retroactively consent to the assignment of two easements for oil pipelines. The easements, located on one of Coldwater's reserves, were granted in 1950s in favour of Trans Mountain Oil Pipeline Company and required the consent of the Minister in order to be assigned.

With the decision still before the Minister, Coldwater filed a judicial review application requesting, *inter alia,* an order prohibiting the Minister from giving his consent to the assignment of the easements as well as a declaration that the Minister was legally bound to follow Coldwater's directions in respect of whether or not to grant consent.

In a decision dated November 7, 2013,[2] the Federal Court judge found that the Minister did not have an absolute duty to follow the instructions of Coldwater and refuse to consent to the assignments. However, the Court also held that the Minister was required to re-examine whether Coldwater's consent was required, particularly with respect to the second easement – which had remained unused since granted – in order to determine whether it was in Coldwater's and the public's interest to withhold consent. The judge also found that the Minister should consider whether the unused easement had expired for non-use, and "whether re-negotiation with Kinder Morgan for terms more favourable to Coldwater" was required.

Coldwater appealed, requesting a declaration that the Minister was required to follow Coldwater's instructions and seeking an order prohibiting the Minister from providing the consent.

Kinder Morgan cross appealed, requesting that the judge's decision be set aside and the application for judicial review dismissed. Kinder Morgan submitted that the application

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1 *Coldwater Indian Band v Canada (Indian Affairs and Northern Development)*, 2014 FCA 277 [*Coldwater*].

2 *Coldwater First Nation v Canada (Indian Affairs and Northern Development)*, 2013 FC 1138.

for judicial review was premature and that the judge exceeded his jurisdiction in ordering declaratory relief.

The Minister requested that the appeal be dismissed, but did not take a position on the cross appeal in written submissions. At the hearing, the representative for the Minister agreed that the application for judicial review was premature.

The Court of Appeal held that the judicial review application was premature and should be dismissed, as should Coldwater's appeal. The Court found that there was "no basis for the Federal Court or this court to interfere with the administrative process which requires the Minister to decide whether he should consent to the two assignments sought by Kinder Morgan."[3] There were no "exceptional circumstances" justifying an intervention in the ongoing administrative process.[4]

Coldwater's arguments as to why its application was justified had included the following: the Minister would be acting contrary to his fiduciary duty to First Nations and thus outside his jurisdiction; the Minister's consent might "invigorate" the second easement agreement, which might otherwise have expired; and the consent might grant Kinder Morgan a legal interest in the reserve that could not afterwards be undone. Coldwater further argued that the Constitutional nature of the Minister's fiduciary obligations made the intervention of the Federal Court appropriate.

The Court of Appeal found that Coldwater's arguments did not amount to "exceptional circumstances" allowing a court to interfere with an administrative process prior to the exhaustion of remedial recourses available by way of the administrative process itself. Citing its decision in *Canada (Border Services Agency) v C.B. Powell Ltd.,*[5] the Court noted that the threshold for "exceptional circumstances" justifying interference was high, and that very few circumstances would be found to be exceptional:

> Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception […] Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted […][6] (emphasis as added by the Court of Appeal in *Coldwater*)

The Court did not see any irreparable harm or prejudice in having the Minister decide as to whether or not to grant the consents, further noting that it was satisfied that the Minister could in fact grant the remedy requested by Coldwater (i.e., that consent to assignment be refused).

Again citing *C.B. Powell,* the Court explained the rationale for limiting early recourse to the judicial system:

> This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway....[7]

The Court observed that Coldwater's judicial review application had indeed resulted in the delay of the Minister's decision as well as, the Court presumed, significant costs to the parties. The Court added that there was a

3 *Coldwater, supra* note 1 at para 8.
4 *Ibid* at para12.
5 *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61, [2011] 2 FCR 332.
6 *Coldwater*, *supra* note 1 at para 9.
7 *Ibid* at para 13.

"real likelihood" that regardless of the decision arrived at by Minister, a judicial review application to quash the decision would be brought.[8]

Overall, the Court's decision is a clear pronouncement in support of the principle that an applicant seeking a court's intervention in an administrative proceeding must show exceptional or special circumstances that cannot await the conclusion of the tribunal's proceeding.[9] As long as an administrative process allows an applicant's concerns to be raised and an effective remedy to be granted, a court will be reluctant to exercise its discretion to intervene. Coldwater was not successful in arguing that allowing the Minister to render a decision could result in consequences that could not afterwards be undone and thus that early judicial intervention was required. Moreover, the Court's finding that the Minister could grant the very remedy sought by Coldwater demonstrated that an effective remedy was possible without judicial involvement. The Coldwater decision thus serves as a reminder that absent exceptional circumstances, courts are unlikely to interfere with an ongoing administrative process. ■

8 *Ibid* at para 14.
9 See Sara Blake, *Administrative Law in Canada*, 5th ed (Canada: LexisNexis, 2011), at 239.

THE WASHINGTON REPORT

*Robert S. Fleishman**

Energy regulatory developments in the United States impact numerous sectors of the energy industry and address a wide swath of issues. We reported on key federal and state energy regulatory developments in the United States during 2013 in the Winter 2014 volume of the ERQ. This report highlights significant developments in 2014 which should be of interest to readers of the ERQ.

I. LNG Exports

Because of the huge amount of shale gas in the United States there is a substantial push to export liquefied natural gas (LNG); thus, 2014 was an extremely active year at two key agencies - the U.S. Department of Energy (DOE) and U.S. Federal Energy Regulatory Commission (FERC).

A. DOE

DOE adopted in 2014 a new process to implement its authority under Section 3 of the *Natural Gas Act*[1] to determine that an application to export LNG to a non-Free Trade Agreement ("non-FTA") country is not inconsistent with the public interest.[2] Previously, DOE would issue an export authorization conditioned on the outcome of the review of the proposed export under the *National Environmental Policy Act* ("NEPA"). Under the new procedures, DOE will not conditionally approve export authorizations. Instead, DOE will act on applications to export LNG to non-FTA countries only after the NEPA review is completed.[3] Rather than processing applications to export LNG to non-FTA countries in the published order of precedence, DOE will take up the applications "in the order they become ready for final action."[4] By "final action," DOE means that "DOE has completed the pertinent NEPA review process and [...] DOE has sufficient information on which to base a public interest determination."

An application will be deemed to have completed the NEPA review process: (1) for those projects requiring an Environmental Impact Statement (EIS), 30 days after publication of a Final EIS; (2) for projects for which an Environmental Assessment has been prepared, upon publication by DOE of a Finding of No Significant Impact; or (3) upon a determination by DOE that an application is eligible for a categorical exclusion from NEPA pursuant to applicable DOE regulations. DOE expects that the new process will enhance its ability to judge the cumulative market impacts of an LNG export request because "projects that have undertaken the expense to complete NEPA review are, as a group, more likely to proceed than those that have not."[5] DOE will apply the new procedures to applications to export natural gas from the lower 48 United States to non-FTA countries but not to applications for authorization to export LNG from the State of Alaska.

B. FERC

In 2014, FERC granted applications by several prospective exporters of LNG for authorization under Section 3 of the *Natural Gas Act* to develop, construct and operate new or expanded liquefaction facilities, and authorization under Section 7(c) of the *Natural Gas Act* to construct new interstate pipelines to transport natural gas supplies to

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1 15 USC § 717.
2 *Liquefied Natural Gas Export Decisions*, 79 Fed Reg 48132, (2014).
3 *Ibid* at 48133.
4 *Ibid* at 48135.
5 *Ibid*.

the liquefaction facilities. As required under Section 3, FERC's authorizations are based upon an analysis, pursuant to NEPA, as to whether there are significant environmental impacts from the proposed facilities and how such significant impacts should be mitigated. In addition to protests by, and arrests, of environmental activists near FERC in each of these proceedings, environmental advocates led by the Sierra Club challenged the adequacy of FERC's NEPA analysis.

The most significant issues raised by Sierra Club relate to whether NEPA requires FERC to: 1) analyze, as an indirect effect of the proposed project, induced production of natural gas, in particular from shale gas basins using hydraulic fracturing and similar extraction mechanisms; and 2) analyze the cumulative impacts of all proposed LNG export facilities in analyzing any particular proposed project. FERC has consistently ruled that these effects are not "reasonably foreseeable" within the meaning of NEPA and relevant court precedents and has not addressed these effects in its decisions authorizing the LNG projects. Sierra Club has appealed these FERC authorizations to the D.C. Circuit[6] and is expected to ask the court to find that FERC failed to satisfy its obligations under NEPA and that NEPA requires FERC to consider the effects of proposed export facilities on natural gas production throughout the United States.

II. Obama Administration Climate Action Plan, Review of EPA actions on GHG emissions and emissions standards, and Related Issues

A. Administrative Efforts Under President Obama's Climate Action Plan

With the Republican Party gaining control of the U.S. Senate in November 2014, the chances of significant federal legislation addressing climate change have become remote. The Obama Administration continues to push forward aggressively with the strategies outlined in the President's 2013 Climate Action Plan,[7] and President Obama could leave office with the most aggressive, far-reaching environmental legacy of any previous President.[8]

In June 2014, the U.S. Environmental Protection Agency (EPA) proposed new rules to regulate emissions of greenhouse gases from existing and modified power plants under Section 111(d) of the federal *Clean Air Act*.[9] The proposal would implement one of the key features of the Climate Action Plan. As we wrote previously,[10] EPA proposed a rule in January 2014 that would establish greenhouse gas performance standards for new stationary sources; that effort is still underway and is expected to be finalized in 2015.[11] The new proposal, the "Clean Power Plan," would cover a significantly larger sector of sources than the new source rules, and, by 2030, would reportedly cut carbon emissions from the power sector 30 percent below 2005 levels. EPA would set a "carbon intensity" goal for each state to meet by 2030, while allowing states to develop their own plans for achieving the goals; these initial plans are to be submitted to EPA by June 30, 2016. If it is promulgated, the rule would have a significant impact on, among other things, utility regulation for decades to come.

Although EPA is touting the benefits of the proposal and the flexibility it provides the regulated community, it has already generated huge controversy—and even litigation, despite the fact that the regulations have yet to be finalized. Murray Energy Corp. and twelve coal-producing states filed suit to stop the rulemaking in the which has original jurisdiction over certain Clean Air Act challenges[12]; a separate challenge filed by the state of Nebraska has been dismissed on procedural grounds.[13] Assuming the draft rules are finalized, more legal challenges are certain to follow, likely continuing beyond President Obama's term in office.

The Climate Action Plan also called for

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6 *Sierra Club v FERC*, No 14-1249 (DC Cir filed 17 November 2014); *Sierra Club v FERC*, No 14-1190 (DC Cir filed 29 September 2014).

7 Executive Office of the President, *The President's Climate Action Plan* (June 2013), online: The White House <http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>.

8 Coral Davenport, *Obama Builds Environmental Legacy with 1970 Law* (26 November 2014), online: New York Times <http://nyti.ms/1Ft87H6>.

9 *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed Reg 34830 (2014).

10 Robert S. Fleishman, "The Washington Report," *Energy Regulation Quarterly* (5 May 2014), online: Energyregulationquarterly.ca http://www.energyregulationquarterly.ca/regular-features/the-washington-report-2 [*The Washington Report*].

11 *Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units*, 79 Fed Reg 1430 (2014).

12 *In re Murray Energy Corp.*, No 14-1112 (DC Cir filed 18 June 2014); *West Virginia v EPA*, No 14-1146 (DC Cir filed 1 August 2014).

13 *Nebraska v EPA*, No 4:14-cv-3006, 2014 WL 4983678 (D Neb 2014).

expanded multilateral and bilateral efforts to address climate change on an international level. The Administration took a major step in this regard on November 11, 2014, when President Obama and President Xi Jinping of China jointly announced a cooperative deal to reduce greenhouse gas emissions from both countries: the U.S. targeting a 28 per cent reduction from 2005 levels by 2025, and China to achieve peak emissions around 2030 while increasing the share of non-fossil fuels in energy to approximately 20 per cent.[14] The two leaders also expressed their intent to enter into a binding protocol or similar legal instrument binding on all participating parties at the United Nations Climate Conference to be held in Paris in 2015. Like the Clean Power Plan, any commitments made at the Climate Conference would effectively fall to President Obama's successor for implementation, and media outlets are characterizing climate action measures as a potential hot-button issue in the 2016 Presidential election.[15]

B. U.S. Supreme Court Review of EPA Rules

We previously reported[16] on the U.S. Supreme Court's ruling in *Environmental Protection Agency v EME Homer City Generation, L.P.*,[17] a *Clean Air Act* case where the Court upheld EPA's latest effort to force upwind states to reduce emissions contributing significantly to pollution in downwind states. EPA did not fare as well in the Court's next Clean Air Act opinion, *Utility Air Regulatory Group v Environmental Protection Agency*,[18] which represented only a partial victory for EPA.

In that case, the Court rejected EPA's application of the *Clean Air Act* to require a stationary source to obtain a Prevention of Significant Deterioration (PSD) permit or a Title V "major source" permit based solely on potential greenhouse gas (GHG) emissions. The Court, however, upheld EPA's determination that a GHG emissions source that would otherwise require a PSD permit, known as an "anyway" source, can be required to use "best available control technology" emissions standards to control those GHG emissions.

Although the Court's opinion makes clear that EPA can regulate stationary source GHGs under the *Clean Air Act*, it also indicates the divided Court's willingness to view EPA's regulations with a critical eye, particularly its attempts to tailor regulations in a manner beyond Congress' explicit intentions.

C. Coal Ash

On December 19, 2014, the EPA issued its final rule governing the storage and disposal of coal combustion residuals (CCR) (*i.e.* "coal ash," by electric utilities). This long-awaited rule was developed pursuant to Subtitle D of the *Resource Conservation and Recovery Act* and establishes comprehensive requirements for the disposal of coal ash at both existing and new CCR landfills and surface impoundments.[19] It establishes national minimum criteria for existing and new CCR landfills, and for existing and new CCR surface impoundments. These criteria include location restrictions, design and operating criteria, groundwater monitoring and corrective action, closure requirements, and post-closure care, and recordkeeping, notification, and internet posting requirements.[20]

III. Fracking

Hydraulic fracturing ("hydrofracking" or "fracking") remains a controversial practice subject to a regulatory patchwork primarily imposed by states and localities.[21] This regulatory framework is due to a law that specifically exempts fracking from federal oversight.[22] Consequently, many of the decisions relating to fracking have come from state courts. One of the most significant fracking decisions in 2014 was *Wallach v Town of Dryden*, in which the New York Court of Appeals held that local governments have the power to ban fracking activities under their authority to enact zoning ordinances.[23]

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14 Office of the Press Secretary, Press Release, *U.S.-China Joint Announcement on Climate Change* (12 November 2014), online: The White House <http://www.whitehouse.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change>.
15 See, e.g., Coral Davenport, *In Climate Deal with China, Obama May Set 2016 Theme* (12 November 2014), online: New York Times <http://nyti.ms/1wVb7vf>.
16 *The Washington Report*, *supra* note 10.
17 134 S Ct 1584 (2014).
18 134 S Ct 2427 (2014).
19 Envtl. Prot. Agency, *Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities* (19 December 2014), online: EPA <http://www2.epa.gov/sites/production/files/2014-12/documents/ccr_finalrule_prepub.pdf>.
20 *Ibid* at 10-14.
21 See, e.g., *Wallach v Town of Dryden*, 23 NY (3d) 728 (2014), reargument denied, 24 NY (3d) 981 (2014) [*Wallach*].
22 42 USC § 300h(d)(1)(B)(ii) (2014).
23 *Wallach*, *Supra* note 21.at 754-55.

The state's highest court applied its three-part framework set forth in *Frew Run Gravel Products Inc. v Town of Carroll*[24] and found that the plain language, statutory scheme, and legislative history of the statewide Oil, Gas, and Solution Mining Law (OGSML) supported localities' ability to adopt fracking bans.[25] Specifically, the court said that the OGSML is "most naturally read as preempting only local laws that purport to regulate the actual operations of oil and gas activities, not zoning ordinances that restrict or prohibit certain land uses within town boundaries."[26] Furthermore, the court said that

> it is readily apparent that the OGSML is concerned with the Department's regulation and authority regarding the safety, technical and operational aspects of oil and gas activities across the state . . . nothing in the various provisions of the OGSML indicat[e] that the supersession clause was meant to be broader than required to preempt conflicting local laws directed at the technical operations of the industry.[27]

In December 2014, New York became the largest oil and gas producing state to ban fracking. The governor and its commissioners for health and the environment did so based on health concerns.[28]

Also in 2014, several localities adopted fracking bans, including Mendicino and San Benito counties in California,[29] and the cities of Denton, Texas, and Athens, Ohio.[30] Just days after the City of Denton passed its fracking ban, the Texas General Land Office and Texas Oil and Gas Association sued to prevent it from enforcing the ban.[31] Moreover, the Chairwoman of the Texas Railroad Commission said that she plans to issue fracking permits for activities in the City of Denton despite its fracking ban.[32]

The Illinois Department of Natural Resources (IDNR) published rules that regulate fracking, which opens the door to fracking activities within the state.[33] The rules are the IDNR's third attempt to codify the *Hydraulic Fracturing Regulatory Act*,[34] which was signed into law in 2013 and applies to all wells in which fracking may take place in Illinois.

The Nevada Commission on Mineral Resources (NCMR) issued regulations governing fracking activities in the state.[35] The rules were issued on the heels of a federal court refusing to grant an injunction to prevent the NCMR from issuing its fracking regulations.[36] The court said that it lacked subject matter jurisdiction to review the challenge because final agency action, which is a jurisdictional prerequisite to obtaining judicial review, had not yet occurred because leases had not yet been issued by the Bureau of Land Management.[37]

IV. Gas-Electric Coordination and FERC Order 1000

A. Natural Gas Scheduling and Electric Transmission Orders

In 2014, FERC issued three interrelated orders addressing issues that arise from the scheduling practices of interstate natural gas pipelines

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24 *Frew Run Gravel Products v Town of Caroll,* 71 NY (2d) 126 (1987).
25 *Wallach*, *supra* note 21 at 753.
26 *Ibid* at 746.
27 *Ibid* at 749-50.
28 Alan Neuhauser, *New York, Citing Health Risks, Moves to Ban Fracking* (2014 December 17), online: US News <http://www.usnews.com/news/articles/2014/12/17/new-york-citing-health-risks-to-ban-fracking>.
29 Keith Goldberg, *Calif. County Fracking Bans Set Stage for Statewide Brawl* (7 November 2014), online: Law360 <http://www.law360.com/projectfinance/articles/594594>.
30 Molly Hennessy-Fiske, *In Denton, Texas, Voters Approve "Unprecedented" Fracking Ban* (7 November 2014), online: LA Times <http://www.latimes.com/nation/la-na-texas-fracking-20141108-story.html>; Laura Arenschield, *Athens Votes to Ban Fracking* (6 November 2014), online: Columbus Dispatch <http://www.dispatch.com/content/stories/local/2014/11/05/athens-votes-to-ban-fracking.html>.
31 *Patterson v City of Denton*, No D-1-GN-14-004628 (Tex Dist Ct 53d filed 5 November 2014).
32 Nicholas Sakelaris, *Railroad Commission Head Talks Denton Frack Ban, What Agency Did Wrong* (7 November 2014), online: Dallas Business Journal <http://www.bizjournals.com/dallas/blog/2014/11/railroad-commission-head-talks-denton-frack-ban.html?page=all>.
33 Illinois Department of Natural Resources, *Hydraulic Fracturing* (last visited 30 January 2015), online: IDNR <http://www.dnr.illinois.gov/OILANDGAS/Pages/Hydraulicfracturing.aspx>.
34 Ill Pub Act No 98-22 (2013).
35 Nevada. Commission on Mineral Resources, *Adopted Regulation of the Commission on Mineral Resources*, (effective 24 October 2014); online: NCMR <http://minerals.nv.gov/uploadedFiles/mineralsnvgov/content/Programs/Oil_and_Gas/R011-14A_Final_Approved_By_Legislative_Commission.pdf>.
36 *Reese River Basin Citizens Against Fracking, LLC v Bureau of Land Management.*, No 3:14-cv-00338-MMD-WGC, 2014 WL 4425813 (D Nev 8 September 2014).
37 *Ibid* at 3-4.

and electric transmission operators. The Commission's concern is the potential impact on the reliable and efficient operation of electric transmission systems and interstate natural gas pipelines, divergences between the start times of the natural gas and electric operating days, and mismatches in the timelines for scheduling interstate natural gas pipeline transportation service and wholesale electric sales made by gas-fired generators on the next day. The Commission is also concerned about existing scheduling practices of interstate natural gas pipelines and the application of some Commission regulations by pipelines which may not provide sufficient flexibility to meet the needs of natural gas-fired generators, and may be limiting the capacity available to shippers (including natural gas-fired generators).

1. FERC Proposal on Natural Gas and Electricity Scheduling

FERC issued a Notice of Proposed Rulemaking proposing revisions to its regulations to better coordinate the scheduling of natural gas and electricity markets in light of increased reliance on natural gas for electricity generation.[38] The revised rules would start the natural gas operating day earlier, move back the timely nomination cycle and increase from two to four the number of intraday nomination opportunities to help shippers adjust to changes in demand. Comments on FERC's proposed rulemaking were filed on November 28, 2014.

2. Proceeding Examining ISO and RTO Scheduling Practices

FERC also initiated a proceeding under Section 206 of the *Federal Power Act* to examine whether day-ahead scheduling practices by Independent System Operators and Regional Transmission Organizations are just and reasonable.[39] Following FERC's issuance of a final rule in the *Coordination* rulemaking, each ISO and RTO must: (1) make a filing that proposes tariff changes to adjust the time at which the results of its day-ahead energy market and reliability unit commitment process (or equivalent) are posted to a time that is sufficiently in advance of the Timely and Evening Nomination Cycles, respectively, to allow gas-fired generators to procure natural gas supply and pipeline transportation capacity to serve their obligations, or (2) show cause why such changes are not necessary. In their responses, each ISO and RTO must explain how its proposed scheduling modifications are sufficient for gas-fired generators to secure natural gas pipeline capacity prior to the Timely and Evening Nomination Cycles.

3. Show Cause Proceeding Regarding Posting of Offers to Purchase Capacity

Finally, FERC initiated a show cause proceeding pursuant to Section 5 of the *Natural Gas Act*, requiring all interstate pipelines to submit filings to the Commission either revising their tariffs to provide for the posting of offers to purchase released capacity or otherwise demonstrating that they are in full compliance with the Commission's regulations regarding posting of offers to purchase released capacity.[40] Section 284.8(d) of the Commission's regulations states that pipelines "must provide notice of offers to release or purchase capacity [and] the terms and conditions of such offers[…], on an internet website, for a reasonable period."

B. FERC Order 1000

FERC Order No. 1000 and its progeny adopted significant regulatory reforms that will materially impact the planning, development and operation of electric transmission infrastructure in North America.[41] In 2014, a three-judge panel of the D.C. Circuit unanimously upheld Order No. 1000 on grounds that the Order and its reforms were within FERC's scope of authority under the *Federal Power Act*, supported by substantial evidence, and not arbitrary and capricious.[42]

Pursuant to Order No. 1000: (1) public utility transmission providers must participate in an open and nondiscriminatory transmission planning process for the development of new transmission facilities, on a regional basis; (2) regional transmission plans must identify transmission needs driven by public policy requirements; (3) adjacent regions must establish procedures to share planning data and identify more efficient interregional solutions to transmission needs; (4) incumbent transmission providers no longer have a right of first refusal to construct new regional transmission facilities; and (5) the costs of new transmission will be allocated to the beneficiaries of new transmission facilities "in

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38 *Coordination of the Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities*, 18 CFR Part 284, 146 FERC ¶ 61,201 (20 March 2014).
39 *California System Operator Corporation*, 146 FERC ¶ 61,202, Docket No ELI4-22000 (20 March 2014).
40 *Posting of Offers to Purchase Capacity*, 146 FERC ¶ 61,203, (20 March 2014).
41 *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC ¶ 61,051 (21 July 2011) [*Order No 1000*].
42 *South Carolina Public Service Authority v FERC*, 762 F.3d 41 (DC Cir 2014) [*South Carolina Public Service Authority*].

a manner that is at least roughly commensurate with estimated benefits."[43]

In upholding Order No. 1000, the court deferred to FERC's interpretation of its authority under Section 206 of the Federal Power Act to regulate "practices" affecting FERC-jurisdictional rates. Transmission planning, the court ruled, is a "practice" that affects FERC-jurisdictional transmission rates. Accordingly, the court found FERC properly exercised its authority in requiring transmission providers to participate in specific transmission planning processes.

The court rejected arguments that FERC had not demonstrated that it was necessary to adopt the transmission planning reforms set forth in Order No. 1000. The court found substantial evidence of a theoretical threat of unjust and unreasonable transmission service rates in the event Order No. 1000 was not adopted. FERC's determination of the necessity of transmission planning reform was adequately supported by prior Commission transmission rulemakings and by comments submitted by DOE, industry consultants, and FERC technical conferences.

The court agreed with FERC that it had the authority under Section 206 of the *Federal Power Act* to direct transmission providers to remove rights of first refusal from their transmission tariffs. The court determined that it was reasonable for FERC to conclude that rights of first refusal pose a barrier to entry that made the transmission market inefficient and increased costs for transmission customers. Rights of first refusal were properly determined to be a "practice" affecting wholesale transmission service rates and therefore within FERC's authority to regulate.

The court upheld FERC's decision that the costs of new transmission must be allocated among the beneficiaries and found that the language and context of *Federal Power Act* Section 206 does not limit FERC's authority to oversee practices involving prior commercial relationships. Petitioners argued that Section 206 precluded the Commission from allocating costs "beyond pre-existing commercial relationships." Yet, the Court found that "Section 206 empowers the commission to fix any 'practice' affecting rates, and the Commission reasonably understood beneficiary-based cost allocation—or its absence—to be a practice affecting rates." Thus, the Court held that the "use of 'any' to describe 'rate,' 'public utility,' and 'transmission' bestows authority on the Commission that is not cabined to pre-existing commercial relationships of any given utility."[44]

Order No. 1000 requires regional planning to include consideration of transmission needs driven by public policy requirements. Petitioners challenged this requirement as impermissibly vague. The court said that FERC had simply directed that each region develop mechanisms for addressing public policy requirements and that this was sufficient to satisfy any requirements for legal specificity in the agency's action.

FERC has issued a series of orders implementing its rule across the country.

V. Dodd-Frank and CFTC Developments

The Commodity Futures Trading Commission (CFTC or Commission) experienced significant turnover in leadership during 2014 with the appointment of three new commissioners, including new Chairman Timothy Massad.[45] Statements and actions of the newly comprised Commission suggest that it may be more willing to work with industry participants to minimize the effect of the Dodd-Frank Wall Street Reform and *Consumer Protection Act* (Dodd-Frank) on commercial end users, including energy companies, than the previous Commission headed by former Chairman Gary Gensler.[46] Notable energy-related CFTC developments are discussed below.

A. Proposed Interpretation of the "Swap" Definition's Seven-Part Test for Forwards with Volumetric Optionality

In response to requests from market participants, on November 13, 2014, the CFTC together with the Securities and Exchange Commission (SEC) proposed an interpretation[47] of the seven-part test for forward contracts with embedded volumetric optionality, as set forth in the agencies' joint rulemaking

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43 Order No 1000, *supra* note 41 at paras 6-10.

44 *South Carolina Public Service Authority, supra* note 42 at 84.

45 Sharon Brown, a securities lawyer, was appointed to fill an open Democratic seat. J. Christopher Giancarlo, a brokerage executive, was appointed to fill an open Republican seat. *See* U.S. Commodity Futures Trading Comm'n, *Commissioner Terms of Office*, online: CFTC <http://www.cftc.gov/About/Commissioners/TermsofOffice/index.htm>.

46 For example, Chairman Massad has described his responsibility as both to "meet the congressional mandate of bring this [the swaps industry] out of the shadows, and build conditions that allow the market to thrive. Markets thrive when private actors find it beneficial to trade." *See* Aaron Timms, *New CFTC Boss Timothy Massad Goes Soft on Regulation* (13 November 2014), online: Institutional Investor <http://www.institutionalinvestor.com/inside-edge/3400359/new-cftc-boss-timothy-massad-goes-soft-on-regulation.html>.

47 *Forward Contracts with Embedded Volumetric Optionality*, 79 Fed Reg 69073 (proposed 20 November 2014).

further defining "swap" under Dodd-Frank.[48] The test's seventh prong has become the subject of intense scrutiny in requiring that "[t]he exercise or non-exercise of the embedded volumetric optionality [be] based primarily on physical factors, or regulatory requirements, that are outside the control of the parties and are influencing demand for, or supply of, the nonfinancial commodity," for a contract with embedded volumetric optionality to be classified as a forward.[49] Commentators were concerned that the test, principally the seventh prong, classified as swaps certain commercial contracts that did not need to be regulated as such and introduced needless uncertainty regarding the regulatory treatment of commercial contracts with embedded volumetric optionality.[50]

The new proposal would make the seventh prong easier to satisfy, thereby reducing the likelihood of a commercial contract with embedded volumetric optionality being treated as a swap subject to regulation under Dodd-Frank. Specifically, it would modify the prong to read: "The embedded volumetric optionality is primarily **intended, at the time that the parties enter into the agreement**, contract, or transaction, to address physical factors or regulatory requirements that **reasonably** influence demand for, or supply of, the nonfinancial commodity."[51] The bolded language represents changes from the original test and relieves parties from having to anticipate the reason an embedded option might be exercised at some point in time in the future. The public comment period for the interpretative proposal ended on December 22, 2014.

B. Final Rule Exempting Utility Special Entity Swaps from the Lower Swap Dealer Threshold Applicable to Dealing with Special Entities

On September 17, 2014, the CFTC approved a final rule[52] that amends the CFTC's definition of "swap dealer," the entity subject to the highest level of CFTC regulation under Dodd-Frank, to permit persons who enter into "utility operations-related swaps"[53] with "utility special entities"[54] to exclude those swaps from the determination of whether that person has exceeded the $25 million *de minimis* swap dealing threshold specific to dealing with special entities. Instead, such swaps must only be counted for determining whether the general, $8 billion dealing *de minimis* threshold applies (if the swaps constitute dealing and are not otherwise eligible for another exemption from the determination). The final rule effectively codifies no-action relief previously issued by CFTC staff in March of 2014.[55]

C. Proposed Margin Rules for Uncleared Swaps

On October 3, 2014, the CFTC re-proposed margin rules for uncleared swaps entered into by registered swap dealers and major swap participants that are not banks (the U.S. Prudential Regulators[56] have proposed comparable rules that would apply to banks).[57] The CFTC initially proposed rules on the subject in 2011 but re-proposed the rules in response to comments received and the publication of the Final Policy Framework for Margin Requirements for Non-Centrally Cleared Derivatives, published in September 2013 by

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48 *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 Fed Reg 48208 (2012).
49 *Ibid* at 48238.
50 See, e.g., *Statement of Commissioner Wetjen*, 79 Fed Reg 69077 (2014).
51 *Ibid* (emphasis added).
52 *Exclusion of Utility Operations-Related Swaps with Utility Special Entities from De Minimis Threshold for Swaps with Special Entities*, 79 Fed Reg 57767 (2014) (to be codified at 17 CFR pt 1).
53 A "utility operations related swap" would be a swap to which at least one of the parties is a utility special entity that is using the swap to hedge or mitigate commercial risk, and that is related to an exempt commodity. In addition, the swap must be an electric energy or natural gas swap, or associated with the operations or compliance obligations of a utility special entity as set forth in the CFTC's final rule.
54 A "utility special entity" is defined as a special entity (generally, certain governmental entities, pension plans, government plans or endowments) that owns or operates electric or natural gas facilities, electric or natural gas operations or anticipated electric or natural gas facilities or operations; supplies natural gas or electric energy to other utility special entities; has public service obligations or anticipated public service obligations under federal, state, or local law or regulation to deliver electric energy or natural gas service to utility customers; or is a federal power marketing agency as defined in Section 3 of the FPA, 16 USC § 796(19).
55 See CFTC Letter, *Staff No-Action Relief: Revised Relief from the De Minimis Threshold for Certain Swaps with Utility Special Entities,* No 14-34 (21 March 2014), online: CFTC <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-34.pdf>.
56 The "Prudential Regulators" are the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency.
57 See *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, 79 Fed Reg 59898 (proposed 3 October 2014) (to be codified at 17 CFR pts 23 and 140).

the Basel Committee on Banking Supervision and the Board of the International Organization of Securities Commissions.[58] Notably, the new proposal would not require non-financial end users, a category that encompasses most energy companies, to post margin for swaps executed with swap dealers or major swap participants. The comment period for the proposed rulemaking closed on December 2, 2014.

D. Proposed Amendment of Recordkeeping Rule for Members of Swap Execution Facilities

On November 4, 2014, the CFTC proposed to amend Commission Rule 1.35(a)[59] to provide permanent relief from compliance with certain recordkeeping requirements applicable to members of swap execution facilities (SEFs).[60] Most notably, the proposal would codify existing staff no-action relief that relieves unregistered members (*i.e.*, entities who transact on SEFs that are not registered as swap dealers or major swap participants) from the requirements to keep records of text messages and to store all required records in a form and manner that is identifiable and searchable by transaction. The comment period for the proposed rulemaking closed on January 13, 2015.

E. CFTC Ownership and Control Final Rule and FIA Tech Rollout

The CFTC published final rules for ownership and control reporting on November 18, 2013.[61] The new rules include significantly expanded data requirements and tight reporting deadlines that, will affect the way futures commission merchants and swap dealers collect and report data as part of their reporting obligations under CFTC rules.

In response to the new rulemaking, the trade group Futures Industry Association ("FIA") has created a web-based application called "FIA Tech"[62] that will allow firms to manage account ownership and control data and report required information to the CFTC. Specifically, FIA Tech facilitates the reporting obligations for Forms 102,[63] 40[64] and 71.[65]

F. Proposed Position Limits Rule

As previously reported,[66] the CFTC reopened the comment period for its position limits proposal in conjunction with a staff roundtable to consider certain issues related to physical commodities (including energy commodities).[67] The CFTC asked market participants to comment on the following topics: 1) hedges of a physical commodity by a commercial enterprise, including gross hedging, cross-commodity hedging, anticipatory hedging, and the process for obtaining a non-enumerated exemption; 2) the setting of spot month limits in physical-delivery and cash-settled contracts and a conditional spot-month limit exemption; 3) the setting of non-spot limits for wheat contracts; 4) the aggregation exemption for certain ownership interests of greater than 50 percent in an owned entity; and 5) aggregation based on substantially identical trading strategies. The comment period closed on August 4, 2014 and the proposed rule is still pending.[68]

VI. FERC Enforcement and compliance

FERC's Office of Enforcement (Enforcement) focused its 2014 efforts in four principal areas: (1) fraud and market manipulation; (2) serious violations of mandatory reliability standards; (3) anticompetitive conduct, and (4) conduct threatening the transparency of regulated markets.[69] In 2014, Enforcement continued to prosecute matters under FERC's authority to impose civil penalties of up to $1 million per

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58 See Basel Comm. on Banking Supervision, *Margin Requirements for Non-Centrally Cleared Derivatives* (September 2013), online: Bank for International Settlements <http://www.bis.org/publ/bcbs261.pdf>.
59 *Records of Commodity Interest and Related Cash or Forward Transactions,* 17 CFR § 1.35(a)(1).
60 *Records of Commodity Interest and Related Cash or Forward Transactions*, 79 Fed Reg 68140 (2014).
61 *Ownership and Control Reports, Forms 102/102S, 40/40S, and 71*, 78 Fed Reg 69178 (2013) (to be codified at 17 CFR pts 15, 17, 18, and 20).
62 "OCR" stands for Ownership and Control Reporting.
63 Reporting entities must file a Form 102A when an account becomes reportable; a Form 102B when an account reaches a "Reportable Trading Volume Level" of 50 or more contracts on a designated contract market or SEF with the same product identifier during a single trading day; and a Form 102S for a swap counterparty or customer consolidated account with a reportable position.
64 Form 40s must be filed by owners and controllers upon special call by the CFTC.
65 Form 71s must be filed by originators of an omnibus volume threshold account or an omnibus reportable sub-account.
66 *The Washington Report*, *supra* note 10.
67 *Position Limits for Derivatives and Aggregation of Positions*, 79 Fed Reg 71973 (2014).
68 In December 2014, the CFTC reopened the comment period again with respect to certain issues as they pertain to agricultural commodities. The reopened comment period closed on January 22, 2015.
69 Federal Energy Regulatory Commission, *2014 Report on Enforcement*, FERC Docket No AD07-13-008 (20 November 2014), online: FERC <http://www.ferc.gov/legal/staff-reports/2014/11-20-14-enforcement.pdf>. The Report provides additional transparency and guidance for regulated entities and the public.

day for market manipulation and fraud.[70] FERC opened 17 new investigations and obtained monetary penalties and disgorgement of unjust profits totaling $29 million. Notable matters are briefly described below.

A. BP America Inc. *et al.*

On August 5, 2013, FERC ordered BP America Inc., BP Corporation North America Inc., BP America Production Company, and BP Energy Company (collectively, BP) to show cause why BP should not be: (1) found to have illegally manipulated a certain natural gas market in Houston from September to November 2008; (2) assessed penalties totaling $28 million; and (3) forced to disgorge $800,000 in unjust profits.[71] On October 4, 2013, BP filed an answer denying all wrongdoing and requesting that FERC dismiss the proceeding, or, in the alternative, set the matter for a full evidentiary hearing before an administrative law judge at the agency. On May 15, 2014, FERC rejected BP's request to dismiss the proceeding citing the existence of genuine issues of material fact and ordered that the matter be set for a hearing.

On June 13, 2014, BP filed a request for rehearing of FERC's order rejecting BP's motion to dismiss the proceeding and ordering a public hearing. BP argued that the order improperly expands FERC's jurisdiction beyond the statutory limits of the *Natural Gas Act*. FERC issued an order on July 14, 2014 granting BP's rehearing request for the limited purpose of affording additional time for consideration of the matters raised without addressing BP's specific request for FERC to rehear the May 15, 2014 order. FERC further stated that the specific rehearing request would be addressed in a future order.[72]

On September 22, 2014, FERC Enforcement Staff submitted testimony by three witnesses who analyzed BP's trading activity during the relevant period.[73] All of them witnesses agreed that BP engaged in manipulation, citing, among other things, markedly changed market activity by BP following Hurricane Ike from September through November 2008. The hearing before the ALJ is scheduled to commence on March 30, 2015, and the ALJ's Initial Decision is scheduled for issuance on or before August 14, 2015.

B. Lincoln Paper and Tissue *et al.*

On August 29, 2013, FERC issued orders[74] assessing civil penalties of $5 million, $7.5 million, and $1.25 million against Lincoln Paper and Tissue LLC (Lincoln), Competitive Energy Services, LLC ("CES"), and Richard Silkman (Silkman), CES' managing partner, respectively, alleging that these parties manipulated ISO New England's demand response markets.[75] The orders also sought disgorgement of unjust profits of approximately $380,000 from Lincoln and $170,000 from CES.

On December 2, 2013, FERC filed petitions in the U.S. District Court for the District of Massachusetts seeking orders affirming the imposition of penalties against Lincoln, CES, and Silkman.[76] FERC sought relief in federal district court after the parties did not pay the assigned penalties within the allotted 60 day period.

On February 14, 2014, Lincoln moved to dismiss FERC's complaint, arguing that: (1) FERC's claim for civil penalties is barred by the five-year statute of limitation in Section 2496; (2) FERC lacks jurisdiction over Lincoln's conduct; (3) FERC failed to provide fair notice of the conduct it now considers improper; and (4) FERC's complaint fails to plead its claim with particularity.[77] The motion raises a number of important legal questions relating to FERC's authority to police electricity markets.

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70 See *Prohibition of Energy Market Manipulation,* 16 USC § 824v(a) (2012); *Prohibition on Market Manipulation* 15 USC § 717c-1 (2012).

71 *BP America Inc.*, 144 FERC ¶ 61,100 (Docket No IN13-15-000) (2013).

72 Order Granting Rehearing for Further Consideration at 1, *BP America Inc.*, FERC (Docket No IN13-15-001) (14 July 2014).

73 Direct testimony was submitted by Dr. Rosa M. Abrantes-Metz, Dr. Patrick J. Bergin, and Dr. Ehud I. Ronn.

74 *Lincoln Paper & Tissue, LLC*, 144 FERC ¶ 61, 162 (2013); *Competitive Energy Services LLC*, 144 FERC ¶ 61, 163 (2013); *Richard Silkman*, 144 FERC ¶ 61, 164 (2013).

75 "Demand response" refers to a reduction in customers' consumption of electricity from their anticipated consumption in response to an increase in the price of electricity or to incentive payments designed to induce lower electricity consumption.

76 Petition for an Order Affirming the Federal Energy Regulatory Commission's August 29, 2013 Order Assessing Civil Penalty Against Lincoln Paper and Tissue, LLC, *FERC v Lincoln Paper & Tissue, LLC*, No. 1:13-cv-13056-DPW (D Mass) (2 December 2013). The motion argues, among other things, that FERC's position is time-barred by the applicable statute of limitations and that FERC lacks jurisdiction over demand response. CES and Silkman also filed motions to dismiss.

77 Lincoln Paper and Tissue, LLC's Motion to Dismiss Complaint, *FERC v Lincoln Paper & Tissue, LLC*, No. 1:13-cv-13056-DPW (D Mass) (14 February 2014).

The motion, for example, argues that FERC lacks jurisdiction over the relevant transactions because the States have exclusive control over demand response regulation under 16 U.S.C. § 824(a).[78]

On June 2, 2014, FERC moved to stay the proceedings in light of the United States Court of Appeals for the D.C. Circuit's issued decision in *Elec. Power Supply Ass'n v. FERC*[79] (Order No. 745, discussed below), which vacated FERC's final rule on demand response compensation in organized wholesale energy markets.[80] However, the district court judge denied FERC's motion to stay.

C. Barclay's Bank PLC

On July 16, 2013, FERC assessed civil penalties totaling $435 million and ordered $34.9 million in disgorgement against Barclays Bank PLC (Barclays) and further assessed civil penalties totaling $18 million against certain individual traders for allegedly manipulating energy markets in and around California between 2006 and 2008.[81] The penalty ordered against Barclays marks the largest of its kind in the agency's history. Barclays and the individual traders have denied FERC's allegations and elected to challenge the penalties in federal court.

On October 9, 2013, FERC petitioned the U.S. District Court for the Eastern District of California to issue an order affirming the assessment of penalties against Barclays and the individual traders. Barclays and the individual traders responded on December 16, 2013 by filing a motion to dismiss FERC's petition.[82] The motion raises a number of important legal questions relating to FERC's authority to police electricity markets. The motion, for example, argues that FERC lacks jurisdiction over the relevant transactions because they were commodity futures transactions over which the Commodity Futures Trading Commission (CFTC) has exclusive jurisdiction under the *Commodity Exchange Act*, and because they did not result in physical delivery or transmission of electricity, as the movants claim is required for FERC jurisdiction under the FPA. FERC filed a brief opposing Barclay's and the individual traders' motion to dismiss on February 14, 2014 and Barclay's accordingly filed a reply brief on March 21, 2014.[83] The motion is still pending before the court.

D. Up-To Congestion Investigations, Settlements, and Proceedings

FERC has also focused on investigating "gaming" of market rules in the PJM market under the Anti-Manipulation Rule with respect to so-called Up-to Congestion ("UTC") transactions. FERC defines UTC transactions as a "product that enables a trader to profit if the congestion price spread between two nodes changes favorably between the Day Ahead Market (DAM) and the Real Time Market (RTM)."[84] To be profitable, the spread change must exceed the costs of the trade. Notable investigations and settlements are discussed below.

1. Oceanside Power, LLC

In 2013, FERC settled allegations that Oceanside Power, LLC and an individual trader ("Oceanside") violated the Anti-Manipulation Rule by allegedly entering into UTC transactions in PJM markets designed to appear to be spread trades for the purpose of collecting "Marginal Loss Surplus Allocation" (MLSA) payments provided for in PJM's tariff.[85] Oceanside agreed to pay a $51,000 civil penalty and to disgorge $29,563, plus interest.[86] The trader also agreed not to trade in FERC regulated electricity markets, or in products or instruments that are based on the price of electricity for one year.

2. Powhatan Energy Fund, LLC

On December 17, 2014, FERC issued an Order to Show Cause and Notice of Proposed Penalty against Powhatan Energy Fund, LLC, HEEP Fund Inc. CU Fund Inc., and the companies' principal trader (collectively, "Powhatan Respondents").[87] The order alleged that the Powhatan Respondents engaged in

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78 *Ibid* at 3.
79 753 F.3d 216 (DC Cir 2014), petition for cert. filed, No 14-840 (US 15 January 2015).
80 *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No 745, 134 FERC ¶ 61,187 (2011), order on reh'g, Order No 745-A, 137 FERC ¶ 61,215 (2011).
81 *Barclays Bank PLC*, 144 FERC ¶ 61041 (2013).
82 Notice of Motion and Motion to Dismiss, *FERC v Barclays Bank PLC*, No 2:13-cv-02093-TLN-DAD (ED Cal) (16 December 2013).
83 Petitioner's Opposition to Respondents' Motion to Dismiss, *FERC v Barclays Bank PLC*, No 2:13-cv-02093-TLN-DAD (ED Cal) (14 February 2013).
84 FERC, *Electric Power Markets: PJM* (26 November 2013), online: FERC <http://www.ferc.gov/market-oversight/mkt-electric/pjm.asp>.
85 *In re PJM Up-To Congestion Transactions*, 142 FERC ¶ 61,088 (2013).
86 *Ibid* at P1.
87 *Powhatan Energy Fund LLC*, 149 FERC ¶ 61261(Docket No IN15-3-000) (2014).

manipulative UTC trading by "plac[ing] UTC trades in opposite directions on the same paths, in the same volumes, during the same hours for the purpose of creating the illusion of bona fide UTC trading and thereby to capture large amounts of MLSA that PJM distributed at that time to UTC transactions with paid transmission," and proposed civil penalties totaling almost $29 million against the companies and $1 million against the trader.[88]

The Order to Show Cause and Notice of Proposed Penalty comes after months of public disagreement between the Powhatan Respondents and FERC. On August 5, 2014, FERC issued a Notice of Alleged Violation against the Powhatan Respondents alleging violations of the Anti-Manipulation Rule based on UTC trading.[89] Earlier in 2014, in an unprecedented move, Powhatan launched a website publicly responding to a non-public Preliminary Notice of Violation[90] alleging the same violations set forth in the Notice of Alleged Violation. The website contained a summary of communications between FERC and Powhatan's legal representatives, position papers and videos from experts, and other materials related to Powhatan's defense. The website claimed that FERC's investigation violates due process because there were no pre-existing FERC rules stating that the trades were unlawful. Powhatan also claimed that the Fund entered into the subject transaction in an open, transparent manner without concealment or misrepresentation, and that such actions to take advantage of market flaws are not manipulative.[91]

3. City Power Marketing, LLC

On August 25, 2014, FERC issued a Notice of Alleged Violation against City Power Marketing, LLC ("City Power") and its principal owner for alleged manipulation relating to UTC trading in the PJM regional market from 2010 to 2014.[92] In the Notice, FERC also alleged that City Power made false statements and omitted material information during the investigation.[93] The investigation is ongoing.

VII. Demand Response

On May 23, 2014, the D.C. Circuit vacated FERC Order No. 745 in its entirety by a vote of 2 to 1.[94] Order No. 745 had directed Regional Transmission Organizations and Independent System Operators to pay suppliers of cost-effective demand response resources in their day ahead and real-time wholesale power markets the full locational marginal price (LMP) used to compensate generation suppliers to these markets.

The court vacated Order No. 745 on two separate grounds. First, the court held that the order directly regulates retail markets which are outside of FERC's jurisdiction. The court rejected FERC's argument that it had statutory authority to set rates for demand response in wholesale markets because the *Federal Power Act* authorizes FERC to ensure all rules and regulations "affecting…rates" in connection with the wholesale sale of electric energy are "just and reasonable." The court ruled that demand response involves retail customers and their decisions whether to purchase electricity at retail and the resulting level of retail electricity consumption are within the exclusive ambit of state regulation.

Second, the court ruled that even if FERC had jurisdiction to adopt Order No. 745, the Order No. 745 was "arbitrary and capricious" in violation of the *Administrative Procedure Act*. FERC failed to respond directly to the dissenting opinion of FERC Commissioner Moeller to Order No. 745, which posited that the LMP payment mechanism mandated in Order No. 745 over-compensated demand response resources, because in addition to being paid the full LMP demand response providers may retain the savings associated with the provider's avoided retail generation cost.

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88 *Ibid* at paras 1, 3.

89 FERC, *Staff Notice of Alleged Violations* (5 August 2014), online: FERC <http://ferc.gov/enforcement/alleged-violation/notices/2014/houlian-08-05-2014.pdf> (Enforcement alleges that the principal trader made "millions of megawatt hours of offsetting trades" between the same two trading points, with the same volumes and for the same hours, to cancel out the financial consequences from any spread between the points and capture marginal loss of surplus payments from PJM.").

90 See FERC Office of Enforcement, *Preliminary Findings of Enforcement Staff's Investigation of Powhatan Energy Fund, LLC* (9 August 2013), online: FERC <http://ferclitigation.com/wp-content/uploads/0005-FERC-Preliminary-Findings-August-9-2013-2002899_1.pdf>.

91 See Powhatan Energy Fund, LLC, *FERC vs. Powhatan Energy Fund, LLC* (last visited 30 January 2015), online: <http://ferclitigation.com>.

92 FERC, *Staff Notice of Alleged Violations* (25 August 2014), online: FERC <http://www.ferc.gov/enforcement/alleged-violation/notices/2014/tsingas-08-25-2014.pdf>.

93 *Ibid*.

94 *Elecectric Power Supply Association v FERC*, 753 F (3d) 216 (DC Cir 2014).

In dissent, Senior Circuit Judge Edwards criticized the majority decision for not deferring to FERC's reading of the *Federal Power Act*. According to Judge Edwards, the *Federal Power Act* is ambiguous as to whether demand response falls within FERC's jurisdiction over wholesale sales of electric energy. Amid such ambiguity, Judge Edwards concluded that the court must defer to FERC's permissible construction of the *Federal Power Act*. Judge Edwards also deferred to FERC with respect to its mandate that demand response resources be paid the full LMP, finding FERC's defense of the LMP payment mechanism adequate.

The Solicitor General of the United States, representing FERC before the Supreme Court, filed a petition with the U.S. Supreme Court for a writ of certiorari to review the decision and stated that the rules in Order No. 745 for participation by demand-response resources in wholesale electric-power markets are an "integral feature" of the markets "that is of substantial importance to the proper functioning of those markets and to assuring just and reasonable rates for wholesale power in those markets."[95]

VIII. Crude Oil by Rail

National and state agencies took numerous steps in 2014 to regulate crude oil shipments by rail. The number of such shipments has increased significantly as producers extract more oil from the Bakken Shale region. In the wake of several high-profile rail accidents involving Bakken crude, the Pipeline and Hazardous Materials Safety Administration (PHMSA) and U.S. Department of Transportation (DOT) issued two important emergency orders and released a Notice of Proposed Rulemaking (NPRM) in an effort to increase safety. In addition, the North Dakota Industrial Commission issued an order to establish conditioning standards for crude oil prior to shipment.

A. Emergency Orders Requiring Proper Testing, Safer Treatment, and Advance Notification of Crude Oil Shipments

On February 25, 2014, DOT issued an Emergency Order requiring proper testing of crude oil prior to shipment and mandating safer treatment of the less-hazardous "packing group III" crude oil.[96] Specifically, the Order requires that companies offering crude oil for shipment: (1) ensure that the crude oil is tested with sufficient frequency and quality; and (2) treat crude oil shipments as packing group I or packing group II hazardous materials even if the oil has been classified as less-hazardous packing-group III.

The Order was preceded by a Safety Advisory on November 20, 2013, which warned that Bakken crude oil may be more flammable than traditional heavy crude and emphasized the importance of proper characterization, classification and selection of a packing group for flammable liquids such as crude oil. Consistent with the Safety Advisory, the Order explained that misclassification can lead to the "use of unauthorized containers that lack the required safety enhancements necessary to safely transport PG I and PG II materials."[97] PHMSA had issued $93,000 in proposed civil penalties earlier in the month, after investigations of Bakken crude oil for the agency's "Operation Classification" revealed that companies had classified shipments improperly.[98]

DOT issued another Emergency Order on May 7, 2014, requiring railroad carriers that transport one million gallons or more of Bakken crude oil in a single train to inform first responders in towns and communities through which the train passes.[99] The Order requires that such railroad carriers notify the State Emergency Response Commission (SERC) in each state in which it operates and provide information regarding the expected volume, frequency and transportation route of those shipments. The Order also requires that carriers include emergency response information and a point of contact in their

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95 Application of the Solicitor General for an Extension of Time Within Which to File a Petition for a Writ of Certiorari at 4, *FERC v Electric Power Supply Association*, No 14A596 (US 5 December 2014); see Petition for Writ of Certiorari at 29-35, *FERC v Electric Power Supply Association*, No 14-840 (US 15 January 2015).

96 DOT amended its order on March 6, 2014, to provide further clarity regarding specific tests required and to prohibit alternate classification that involves less stringent packaging. See U.S. Dep't of Transp., *Amended and Restated Emergency Restriction/Prohibition Order*, Docket No DOT-OST-2014-0025 (6 March 2014), online: DOT <http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_D03C7A1E859361738D791378144472BF368F0200/filename/Amended_Emergency_Order_030614.pdf>.

97 *Ibid* at 12.

98 Pipeline & Hazardous Materials Safety Admin., Press Release, *PHMSA Ongoing Bakken Investigation Shows Crude Oil Lacking Proper Testing, Classification* (4 February 2014), online: DOT <http://www.phmsa.dot.gov/portal/site/PHMSA/m.6f23687cf7b00b0f22e4c6962d9c8789/?vgnextoid=9257b74180ad3410VgnVCM100000d2c97898RCRD&vgnextchannel=d248724dd7d6c010VgnVCM10000080e8a8c0RCRD&vgnextfmt=print>.

99 U.S. Department of Transportation, *Emergency Restriction/Prohibition Order*, Docket No DOT-OST-2014-0067 (7 May 2014), online: DOT <http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_D9E224C13963CAF0AE4F15A8B3C4465BAEAF0100/filename/Final_EO_on_Transport_of_Bakken_Crude_Oi_05_07_2014.pdf>.

notifications, as well as alert the SERC to any material changes in volume or frequency of shipments by rail.

B. Notice of Proposed Rulemaking for "High-Hazard Flammable Trains"

On July 23, 2014, PHMSA issued a comprehensive NPRM aimed at establishing new safety requirements for "high-hazard flammable trains" (HHFTs).[100] The NPRM defines an HHFT as any train comprised of 20 or more carloads of Class 3 flammable liquid, and thus would primarily impact materials shipped in high-volume, such as crude oil and ethanol. The NPRM proposes enhanced tank car standards, a new classification and testing program, and operational requirements such as restrictions on speed and improved braking controls. It also proposed to codify the May 7, 2014 Emergency Order requiring trains containing one million gallons of Bakken crude to notify SERCs of their expected volume, frequency and transportation routes.

Importantly, the NPRM would set new standards for future tank cars and proposes the phase out of older DOT 111 tank cars used in HHFTs, unless the tank cars are retrofitted to improve safety. The NPRM was accompanied by a report showing that Bakken crude oil tends to be more volatile and flammable, and therefore more likely to be classified as a packing group I flammable liquid.

C. North Dakota Order to Establish Conditioning Standards

The North Dakota Industrial Commission issued an order on December 9, 2014, requiring North Dakota operators to properly separate production fluids into gas and liquid prior to shipment.[101] The order sets temperature and pressure standards for conditioning equipment to ensure that light hydrocarbons are removed properly. If production facilities use conditioning equipment that does not meet those standards, the order requires companies to ensure that the crude oil has a Reid Vapor Pressure of no more than 13.7 pounds per square inch. Finally, the order prohibits the blending of light hydrocarbons back into oil supplies prior to shipment.

IX. Electric Generating Capacity Markets Ligitation

As previously reported,[102] two federal district court decisions, one in New Jersey and one in Maryland, struck down state programs that encouraged the construction of new gas-fired capacity in the PJM region where generating capacity was deemed insufficient by state authorities.[103] Both cases were upheld on appeal to the Third and Fourth Circuits, respectively, and may be considered by the U.S. Supreme Court as petitions for certiorari have been filed.

On September 12, 2014, the Third Circuit ruled that New Jersey's subsidy program for new power plant construction usurped FERC's jurisdiction over electricity markets, affirming the district court's decision.[104] The court reasoned that the *Federal Power Act* gives FERC authority to regulate interstate sales of electric capacity, and that the incentives impermissibly constituted regulation of capacity rates, because they essentially set capacity prices. The court noted the concern of *amici* for appellants that a ruling against the program would "hamstring state-led efforts to develop renewable and reliable electric energy resources," but noted that states are free to use other means.[105]

The ruling came just three months after the Fourth Circuit similarly concluded that Maryland's program subsidizing new gas-fired power development encroached on FERC territory.[106] Relaying on a "wealth of case law" confirming the exclusive power of FERC to regulate wholesale sales of energy in interstate commerce, the Fourth Circuit concluded that the Maryland order was field preempted because it essentially "supplants the rate generated by the auction with an alternative rate preferred by the state."[107] The court rejected the argument that the Maryland program does not actually set a rate, and found that, while states retain the ability to regulate generating facilities, they may not exercise that authority in such a manner as to impinge on FERC's exclusive jurisdiction over

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100 *Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains*, 79 Fed Reg 45016 (2014).
101 North Dakota Industrial Commission, *Industrial Commission Adopts New Standards to Improve Oil Transportation Safety* (9 December 2014), online: <http://www.nd.gov/ndic/ic-press/dmr-order25417.pdf>.
102 *The Washington Report*, *supra* note 10.
103 The New Jersey decision is *PPL EnergyPlus LLC v Hanna*, No 11-745, 2013 WL 5603896 (DNJ) (11 October 2013). The Maryland decision is *PPL EnergyPlus LLC v Nazarian*, No MJG-12-1286, 2013 WL 5432346 (D Md) (30 September 2013).
104 *PPL EnergyPlus LLC v Solomon*, 766 F (3d) 241 (3d Cir 2014)[Solomon].
105 *Ibid* at 254.
106 *PPL EnergyPlus LLC v Nazarian*, 753 F (3d) 467 (4th Cir 2014) [Nazarian].
107 *Ibid* at 475-476.

wholesale rates.

The rulings do not mean that the door is shut on state incentives. The Third Circuit said that New Jersey could offer other incentives to developers, such as tax breaks or favorable lease terms. The state could even "directly subsidize generators so long as the subsidies do not essentially set wholesale prices."[108] Similarly, in the Fourth Circuit, the court expressly noted that its holding was limited to the Maryland program, and that it was not offering an opinion on other state efforts to incentivize new generation. The court concluded that "[o]bviously, not every state regulation that incidentally affects federal markets is preempted."[109]

X. Renewables and Distributed Generation

State public utility commissions across the United States grappled in 2014 with how to incorporate distributed generation and "net metering" into rate design. Utilities argued that giving consumers credit for energy produced with distributed generation (such as residential solar panels that connected with the grid) unfairly reduced utility revenues. Because many utilities' costs were recovered with variable, per-KWh charges, utilities argued that distributed generation users were not paying their fair share of the fixed costs needed to provide the electricity they used. Advocates of distributed generation countered that high fixed prices (coupled with lower variable prices) encouraged energy use and would allow the utilities to avoid competition from distributed generation. Fixed rate and other proposals have been introduced in many states, and Minnesota is developing an innovative solution to the issue.

Statehouses and utility commissions also debated other efforts to promote renewable energy and energy efficiency. Some states, such as Washington and Nevada, initiated or implemented measures that would reduce the environmental impact of energy production. Ohio, on the other hand, passed legislation to limit wind energy and roll back renewables targets.

A. Rate Changes as a Response to Distributed Generation

In 2014, utilities proposed fixed rate increases in many states in response to increasing use of distributed generation. In Wisconsin, Madison Gas and Electric had proposed an increase in residential fixed rates from $10.50 per month in 2014 to $67 in 2017 while dropping variable rates by over 67 per cent.[110] After a dispute with Wisconsin's Citizen's Utility Board, the utility altered the plan to increase the fixed charge to $22 in 2015 and reduce per-KWh charges only fractionally.[111] Other Wisconsin utilities also enacted fixed charge increases of $7 to $15 per month.[112]

In Arizona, where the climate is ideally suited to distributed solar generation, the Arizona Corporation Commission approved by a 3-2 vote new charges for users of distributed generation to help recover utilities' fixed costs.[113] Users will be charged $0.70 per KW per month.[114] Arizona also ordered a new docket to study the costs and benefits of distributed generation. Dissenting commissioners argued that the new charge only accounted for a small portion of the fixed cost that is shifted to consumers who do not use distributed generation.[115]

In California, the Public Utility Commission implemented certain changes to its distributed generation program that were mandated by a 2013 law. The commission ruled that distributed generation would be entitled to the compensation structure in effect at the time of installation for 20 years to promote investment by providing revenue certainty.[116] In 2015, the commission will take up further rate design changes.[117] (These initiatives in California are discussed in more detail below.) In Hawaii, another state with

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108 *Solomon*, *supra* note 104 at 253 note 4.
109 *Nazarian*, *supra* note 106 at 479.
110 *Application of Madison Gas and Electric Company for Authority to Change Electric and Natural Gas Rates* (Ex. 1 to Testimony of Steven James at 3), Docket No 3270-UR-120 (Wis Pub Serv Comm'n, 2 June 2014).
111 *Application of Madison Gas and Electric Company for Authority to Change Electric and Natural Gas Rates*(Final Decision Matrix) at 27, Docket No 3270-UR-120 (Wis Pub Serv Comm'n 13 November 2014) at 27.
112 Joint *Application of Wisconsin Electric Power Company and Wisconsin Gas LLC, both d/b/a We Energies, for Authority to Adjust Electric, Natural Gas, and Steam Rates* (Final Decision Matrix), Docket No 5-UR-107 (Wis Pub Serv Comm'n, 5 November 2014).
113 Arizona *Public Service Company's Application for Approval of Net Metering Cost Shift Solution*,
Decision No 74202, Docket No E-01345A-13-0248 (Ariz Corp Comm'n, 3 December 2013) at 19-20 [*Arizona Application*].
114 *Ibid*.
115 *Arizona Application, supra* note 114, (Pierce, Comm'r, dissenting).
116 *Order Instituting Rulemaking Regarding Policies, Procedures and Rules for the California Solar Initiative, the Self-Generation Incentive Program and Other Distributed Generation Issues, Decision Establishing a Transition Period for Customers Enrolled in Net Energy Metering Tariffs* at 2, Decision No 14-03-041 (Cal Pub Utils Comm'n,27 March 2014).
117 *Ibid* at 8.

significant solar production, Hawaiian Electric Co. has proposed increasing fixed charges to $61 per month and adding a charge to connect distributed solar generation to the grid of $16.[118]

In Iowa, conflict over distributed generation reached the courts, as Interstate Power and Light Co. challenged the right of consumers to satisfy their own energy needs with distributed generation within the utility's exclusive territory.[119] In July 2014, the Iowa Supreme Court ruled that the on-site solar company at issue was not regulated as a utility and could therefore sell its electricity to the City of Dubuque.[120]

The New York Public Service Commission initiated a proceeding to look at transforming utility practices to improve efficiency, facilitate customer choices, and account for new generation and distribution technologies[121] (discussed further below) and the Colorado Public Utility Commission opened a proceeding to solicit input on the impact of net metering and other approaches to distributed generation.[122]

B. Minnesota Implements New Formula to Calculate the "Value of Solar"

In 2014, Minnesota pushed toward implementation of 2013 legislation requiring that utilities have the option to provide distributed generation users with a rebate based on the "value of solar" rather than the ordinary variable per-KWh charge. This value accounts separately for avoided fuel cost, avoided fixed and variable operations and maintenance, avoided capacity and distribution charges, and avoided environmental cost.[123] Minnesota's Department of Commerce laid out a detailed methodology for calculating each element of this cost.[124] However, the Public Utilities Commission has so far declined to use value of solar pricing, instead opting for further study.[125]

Under Minnesota's 2013 law, solar customers are to be billed for gross electricity consumption at the standard rate for electricity and then receive a credit for solar generation based on the value of solar.[126] The program is not intended to be an incentive to install distributed generation, but instead has the goal of evenhandedly valuing energy from distributed generators to ensure efficient market signals and eliminate cross-subsidization of distributed generation by conventional generation.[127]

C. Other State Renewable Energy and Energy Efficiency Proposals

States and localities took up other issues related to renewables and energy efficiency in 2014. Arizona approved a rate increase of $0.01/KWh to cover costs of renewable generation needed to meet a state mandate.[128] In Washington, an executive order convened a task force to recommend market mechanisms to reach carbon reduction thresholds set by the Pacific Coast Collaborative.[129] On the other hand, the Ohio legislature introduced bills to curtail environmental initiatives, requiring that wind turbines be set farther back from adjacent property[130] and reducing "advanced energy" and other renewable mandates.[131]

XI. New Electric Distribution Platforms

A. New York Public Service Commission's Reforming Energy Vision

In December 2013, the New York Public Service Commission (NYPSC) announced

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118 *Instituting a Proceeding to Review the Power Supply Improvement Plans for Hawaiian Electric Company, Inc., Hawaii Electric Light Company, Inc., and Maui Electric Co., Ltd., Hawaii Electric Light Power Supply Improvement Plan* at 6-4, Docket No 2014-0183 (Haw Pub Utils Comm'n,, 26 August 2014).

119 *SZ Enterprises LLC v Iowa Utilities Board*, No 13-0642, 2014 WL 3377074 (Iowa 2014)[Iowa].

120 *Ibid* at 6.

121 Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision, Order Instituting Proceeding at 5, Docket No 14-M-0101 (NY Pub Serv Comm'n 25 April 2014).

122 Commission Consideration of Retail Renewable Distributed Generation and Net Metering, Decision No C14-0615-I at ¶ 10, Docket No 14M-0235E (Colo Pub Utils Comm'n 28 May 2014).

123 Minnesota Department of Commerce, *Minnesota Value of Solar: Methodology* (2014) at 43, online: http://mn.gov/commerce/energy/images/MN-VOS-Methodology-FINAL.pdf [*Minnesota Solar].*

124 *Ibid*.

125 In the Matter of the Petition of Northern States Power Company, dba Xcel Energy, for Approval of Its Proposed Community Solar Garden Program, Order Approving Solar-Garden Plan with Modifications at 4, Docket No E-002/M-13-867 (Minn Pub Utils Comm'n 17 September 2014).

126 *Minnesota Solar*, *supra* note 123, at ii.

127 *Ibid* at 1.

128 In the Matter of Arizona Public Service Company - Request for Approval of Its 2014 Renewable Energy Standard Implementation Plan for Reset of Renewable Energy Adjustor, Decision No 74237 at 15, Docket No E-01345A-13-0140 (Ariz Corp Comm'n 7 January 2014).

129 State of Washington, Office of the Governor, *Washington Carbon Pollution Reduction and Clean Energy Action*, Exec. Order No. 14-04 (29 April 2014).

130 Am. Sub. H.B. 483, 130th Gen. Assemb., Reg. Sess. (Ohio 2014).

131 Sub. S.B. 310, 130th Gen. Assemb., Reg. Sess. (Ohio 2014).

a fundamental reconsideration of regulatory paradigms and markets of electric power systems, examining how its policy objectives are served by both clean energy programs and the regulation of distribution utilities.[132] Following the NYPSSC's Order, the New York State Energy Planning Board released a draft of the 2014 State Energy Plan, which called for the NYPSC to enable and facilitate new energy business models for utilities, energy service companies, and customers to be compensated for activities that contribute to grid efficiency.

Thereafter, the NYPSC initiated Case 14-M-0101, *Reforming the Energy Vision* (REV). In its order, the Commission described core policy objectives of customer knowledge, market animation, system-wide efficiency, fuel and resource diversity, system reliability and resiliency, and indicated that reduction in carbon emissions was also implied in its objectives.[133] In support of Case 14-M-0101, NYPSC Staff prepared a proposal articulating a preliminary framework for REV that recommended that utilities alter their operation to become Distributed System Platform Providers (DSPP).[134] As a DSPP, a utility would actively manage and coordinate distribution energy sources or generate power from many small resources and connect them to the system. The Staff proposal asserts such an approach would better achieve the NYPSC's policy objectives.

As a companion to the REV order, the NYPSC in May initiated a proceeding (Case 14-M-0094) to address the future of New York clean energy programs that are currently funded by a surcharge on the delivery portion of customers' utility bills. The proposed New "Clean Energy Fund" (CEF) is intended to ensure the delivery and continuity of clean energy programs, enhance program efficiency, and manage the transition of current programs, such as the System Benefit Charge, the Renewable Portfolio Standard and the Energy Efficiency Portfolio Standard, to better align with the market outcomes approach envisioned by the REV. According to the draft environmental statement prepared for the REV and CEF, the overreaching goal of the two proposed programs is to transform the ways in which New York State generates, distributes and manages energy, and, in so doing, reduce the State's dependence on fossil fuels, increase system reliability and resilience, reduce harmful environmental pollution and lower the overall costs of power across all sectors of the economy.[135]

The NYPSC adopted a two-phase schedule for Case 14-M-0101. Track 1 considers issues related to the concept and feasibility of a DSPP, as described in the NYPSC Staff preliminary framework. Track 2 focuses on regulatory changes and ratemaking issues. Task Forces and working groups have been formed and are working on both tracks.

With regard to Track 1, the NYPSC Staff released a further straw proposal on August 22, 2014. Comments have been filed by the interested parties, and the NYPSC has indicated it expects to reach a generic policy determination in 2015. With regard to Track 2, the stakeholders have responded to a series of questions, and the NYPSC Staff is now working on a definitive straw proposal on regulatory and ratemaking issues.

The NYPSC made a Determination of Significance, noting that the REV and CEF actions could potentially have one or more significant adverse impacts on the environment, and called for the preparation of an Environmental Impact Statement. A draft EIS was issued on October 14, 2014.

B. California's Distributed Resources Rulemaking

For more than a decade, it has been California's policy to require each of its investor-owned electric utilities to consider nonutility-owned Distribution Energy Resources (DERs) as a possible alternative to investments in its distribution system in order to ensure reliable electric service at the lowest possible cost.[136] In 2013, the legislature enacted PU Code Section 769 requiring IOUs to submit Distribution Resource Plan Proposals (DRPs) to the California Public Utilities Commission (CPUC). Section 769 requires investor-owned utilities (IOUs) to submit DRPs that recognize the need for investment, to integrate cost-effective DERs and for activity identifying barriers to the deployment of DERs. The CPUC is authorized to modify and approve an IOU's DRP "as appropriate to minimize overall system costs and maximize ratepayer benefit from investments in distributed resources."[137]

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132 Proceeding on Motion of the Commission Regarding an Energy Efficiency Portfolio Standard, Order Approving EEPS Program Changes, Docket No 07-M-0548 (NY Pub Serv Comm'n 26 December 2013).
133 Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision, Order Instituting Proceeding, Docket No14-M-0101,(NY Pub Serv Comm'n 25 April 2014).
134 Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision, NYS Department of Public Service Staff Report and Proposal, Docket No 14-M-0101 (NY Pub Serv Comm'n 24 April 2014).
135 Draft Generic Environmental Impact Statement at ES-2, Docket Nos14-M-0101, 14-M-0094 (NY Pub Serv Comm'n 24 October 2014).
136 Cal Pub Util Code § 353.5.
137 Cal Pub Util Code § 769(c).

In August 2014, the CPUC opened Rulemaking 14-08-013 to establish policies, procedures, and rules to guide IOUs in developing their DRPs and to review, approve, or modify and approve the plans. The goal of the plans is to begin the process of moving the IOUs towards a more full integration of DERs into distribution system planning, operations, and investment. Section 769 requires that DRPs must provide a roadmap for integrating cost-effective DERs into the planning and operations of IOUS' electric distribution systems with the goal of yielding net benefits to ratepayers. In their DRPs, the IOUs are required to define the criteria for determining what constitutes an optimal location for the deployment of DERs, and then to identify specific locational values for DERs, augmented or new tariffs, and programs to support efficient DER deployment, and the removal of specific barriers to deployment of DERs.

The IOUs were required to respond (and other interested parties were invited to respond) to a number of specific questions related to implementing Section 769 and a draft paper for shaping the California's energy framework with regard to DERs. Comments were filed and a workshop was held in September. IOUs will file their DRPs in July 2015, and final CPUC approval of the DRPs is anticipated to occur toward the end of the first quarter of 2016.

XII. Energy Storage

A. Federal Developments

1. Department of Energy

In December 2013, the U.S. Department of Energy (DOE) issued a report entitled "Grid Energy Storage" in which it discussed the importance of energy storage systems in the modernization of the U.S. electric grid. The report discussed the need to modernize the electric grid to help the nation meet the challenge of climate change by relying on more energy from renewable sources while maintaining a robust and resilient electricity delivery system. Specifically, the report stated:

> Energy Storage Systems (ESS) will play a significant role in meeting these challenges by improving the operating capabilities of the grid as well as mitigating infrastructure investments. ESS can address issues with timing, transmission, and dispatch of electricity, while also regulating the quality and reliability of the power generated by traditional and variable sources of power. ESS can also contribute to emergency preparedness.[138]

It concluded that modernizing the grid will require substantial deployment of energy storage. Quoting from an Information Handling Services, Cambridge Energy Research Associates report, DOE stated that the energy storage business could grow from $200 million in 2012 to a $19 billion industry by 2017.[139]

Further, in December 2014, DOE published a report on energy storage safety and reliability—one of the key challenges identified in the Grid Energy Storage report relating to the widespread deployment of energy storage.[140] The report identified three components to safety: (1) system engineering and validation techniques; 2) incident response; and 3) standardization of safety determinations in the form of codes, standards and regulations. The report explored each component with a view toward current practices and best practices going forward, with the ultimate goal of developing a high-level roadmap to enable the safe deployment of energy storage.

B. State Storage Proposals

1. California

California has taken the lead to include energy storage in its electric utilities and energy suppliers resource planning. In 2010, the California legislature enacted AB 2514[141]42[142]1directing the CPUC to determine appropriate targets, if any, for each load-serving entity to procure viable energy storage systems (ESS) and to set dates for any targets deemed appropriate to be achieved. Under AB 2514, an ESS is defined as commercially available technology that is capable of absorbing energy, storing it for a period of time, and thereafter dispatching the energy. To qualify as an ESS under AB 2514, the storage system also must have certain other delineated characteristics, including being

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138 U.S. Dep't of Energy, *Grid Energy Storage* at 7 (December 2013), online: DOE <http://energy.gov/sites/prod/files/2014/09/f18/Grid%20Energy%20Storage%20December%202013.pdf>.

139 *Ibid* at 9 (citing IMS Research, *The Role of Energy Storage in the PV Industry* (2013)).

140 U.S. Dep't of Energy, *Energy Storage Safety Strategic Plan* (December 2014), online: DOE < http://www.energy.gov/sites/prod/files/2014/12/f19/OE%20Safety%20Strategic%20Plan%20December%202014.pdf>.

141 Cal Pub Util Code § 2835 *et. seq.*

142 Cal Pub Util Code § 2835(a)(2)-(4). In its decisions implementing AB 2514, the CPUC also placed certain

cost-effective and either reducing emissions of greenhouse gases, reducing demand for peak electric generation, deferring or substituting for an investment in generation, transmission or distribution asset or improving the reliable operation of the electric transmission or distribution grid.[142]

In December 2010, the CPUC opened a rulemaking[143] to implement the provisions of AB 2514. Thereafter, in October 2013 (Decision (D.) 13-10-040), the CPUC established procurement targets for each of the IOUs and procurement requirements for other load-serving entities.[144] The CPUP ordered that by 2020, the three major IOUs should procure a total of 1.35 GW of storage (580 MW each for Southern California Edison Company (SCE) and Pacific Gas and Electric Company (PG&E); and 165 MW for San Diego Gas & Electric Company (SDG&E)). Individual targets were set for each utility for years 2014, 2016, 2018 and 2020, as well as for each point of interconnection (*i.e.*, transmission, distribution and customer (behind the meter)).

On February 28, 2014, the three IOUs submitted applications for approval of their respective storage procurement plans. In its filing,[145] SDG&E noted that based on existing projects, it is already in compliance with 2014 procurement targets for the transmission and customer domain and is in compliance with the distribution domain if it elects to transfer energy between domains or to defer procurement as allowed by D.13-10-040. Nevertheless for transmission and distribution domains, SDG&E said that it is still planning to conduct solicitations for the 2014 cycle in order to capture any cost-effective, viable storage. It stated that it is interested in procuring 10 MW of local and flexible capacity requirements (transmission connected), 2 MW of local and flexible capacity requirements (distribution connected) and 4 MW of distribution reliability/power quality, but may procure more or less based on the bids received. SDG&E included a proposed Energy Storage System Power Purchase Tolling Agreement as part of its application.

PG&E also submitted its application.[146] D.13-10-040 pre-approved certain transmission, distribution and customer-side energy storage projects for which PG&E had previously executed contracts or to which it had otherwise committed. PG&E indicated that it intends to count projects that are currently operational towards its 2014 targets. Including these projects will reduce PG&E's 2014 distribution storage by 8.5 MW, leaving a total 2014 procurement of 21.5 MW, and will also reduce its customer-related procurement target by 3.5 MW, resulting in a total customer-side target in 2014 of 6.5 MW. PG&E also stated that it has procured 150 MW of pre-approved transmission-level storage that it will apply to future energy storage procurement targets between 2016 and 2020. PG&E anticipates that 38 MW will be used to offset its transmission related energy storage targets in 2016, 49 MW in 2018 and 63 MW in 2020. PG&E stated that it intends to meet its remaining energy storage requirements through an RFO process, but reserved the right to use other means too.

SCE stated that it intends to meet its ESS target of 90 MW of energy storage procurement in 2014 and that it may procure additional storage.[147] SCE's application identified certain existing storage targets that are eligible to count towards SCE's procurement targets. SCE included a Pro Forma Energy Storage Agreement in its application and indicated that it did not intend to limit itself to procuring storage through a competitive solicitation, but planned to consider bi-lateral contract opportunities as well as utility owned storage. RFP's were issued in December 2014.

In September 2013, the California ISO (CAISO), CPUC, and the California Energy Commission announced that they were partnering to develop a joint energy storage roadmap to advance energy storage in California. The roadmap will propose action and venues to address identified barriers related to storage. Based on inputs received from

limitations on what qualifies as an ESS. The Commission excludes pumped storage greater than 50 MW from a qualifying ESS.

143 Order Instituting Rulemaking Pursuant to Assembly Bill 2514 to Consider the Adoption of Procurement Targets for Viable and Cost-Effective Energy Storage Systems, Docket No R10-12-007 (Cal Pub Utils Comm'n 16 December 2010).

144 Decision Adopting Energy Storage Procurement Framework and Design Program, Decision No 13-10-040, Docket No R10-12-007 (Cal Pub Utils Comm'n 17 October 2013).

145 Application of San Diego Gas & Electric Company for Approval of its Energy Storage Procurement Framework and Program as Required by Decision 13-10-040, Docket No A14-02-006 (Cal Pub Utils Comm'n 28 February 2014).

146 Application of Pacific Gas and Electric Company for Authorization to Procure Energy Storage Systems During the 2014 Biennial Procurement Period Pursuant to Decision 13-10-040, Docket No A14-02-007 (Cal Pub Utils Comm'n 28 February 2014).

147 Application of Southern California Edison Company for Approval of its 2014 Energy Storage Procurement Plan, Docket No A14-02-009 (Cal Pub Utils Comm'n 28 February 2014).

various stakeholders, a draft roadmap was made available in early October and a workshop was held on October 13 to discuss the draft and solicit feedback.[148] The final roadmap was completed by the end of 2014. [149]

The storage targets set forth in D.13-10-040 for SCE are only part of SCE's energy storage plans. ESS is also being considered as a part of the utility's long-term procurement planning process. In the same general time frame as the CPUC was conducting its rulemaking on energy storage (R.10-12-007), the CPUC also was considering its Long-Term Procurement Planning Process (LTPP) for the ten-year period 2012-2022.[150] The CPUC divided the 2012 LTPP into four tracks, two of which are relevant here. First, the CPUC indicated that it would consider whether there is a local resource need over the next several years. Track 1 examines the local requirement need for SCE's two local capacity areas—the Los Angeles Basin and Big Creek/Ventura. SCE's long-term local capacity requirements are expected to increase significantly due to the retirement of 4,900 MW of steam-generating plants in the Los Angeles Basin that utilize once-through cooling.[151]

In February 2013, the CPUC issued D.13-02-015 regarding SCE's Phase 1 procurement for local capacity requirements. The Commission authorized SCE to procure between 1,400 MW and 1,800 MW of electrical capacity in the West Los Angeles subarea and between 215 MW and 290 MW in the Moorpark subarea. Of the total 1,800 MW authorized, the Commission mandated that at least 50 MW be procured from energy storage resources and said that an additional 750 MW of new capacity could be satisfied by energy storage.

Second, the CPUC also established as part of the LTPP a Track 4 requirement to consider the impacts of the premature retirement of the San Onofre Nuclear Generating Station (SONGS) on local reliability needs. SCE has indicated that it intends to institute a pilot program targeted at transmission substations in areas highly affected by the retirement of SONGS to acquire up to 400 MW of competitively priced preferred resources or ESS to meet its reliability needs.

On November 5, 2014, SCE announced it had signed contracts for 2,221 MW of power in compliance with D.13-02-015. Of this total, SCE signed contracts with storage providers for 260 MW, involving 24 separate contracts. This is five times the amount mandated by the CPUC in D.13-02-015 for energy storage resources.

2. New York

Under its operating agreement[152] with the Long Island Power Authority (LIPA), PSEG-Long Island is required to submit a Utility 2.0 Plan to LIPA for approval. On July 1, 2014 PSEG-Long Island released its plan,[153] which it later updated in October. The plan includes 5 MW/25MWh of battery storage on the South Fork of Long Island, which would be owned and operated by PSEG-Long Island. Previously, in 2013 LIPA issued its own RFP[154] for approximately 150 MW of energy storage. No action has been taken to date. ■

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148 Cal. Indep. Sys. Operator, *Energy Storage Roadmap* (2014), online: CAISO <http://www.caiso.com/informed/Pages/CleanGrid/EnergyStorageRoadmap.aspx>.

149 California Independent System Operator, *Advancing and Maximizing the Value of Energy Storage Technology: A California Roadmap* (December 2014), online: CAISO < http://www.caiso.com/Documents/Advancing-MaximizingValueofEnergyStorageTechnology_CaliforniaRoadmap.pdf>.

150 Order Instituting Rulemaking to Investigate and Refine Procurement Policies and Consider Long-Term Procurement Plans, Docket No R12-03-014 (Cal Pub Utils Comm'n 22 March 2012).

151 The State Water Quality Control Board's regulations now consider heated water to be water pollution under the Federal Clean Water Act. As a result, steam generation plants that use once through cooling will have to be retrofitted or retired.

152 Long Island Power Authority, *Amended and Restated Operating Services Agreement* (31 December 2013), online: LIPA < http://www.lipower.org/papers/OSA.pdf>; see also NY Pub Auth Law § 1020-f(ee).

153 PSEG-Long Island, *Utility 2.0 Long Range Plan, Prepared for Long Island Power Authority* (1 July 2014), online: <https://www.psegliny.com/files.cfm/2014-07-01_PSEG_LI_Utility_2_0_LongRangePlan.pdf>.

154 Long Island Power Authority, *Request for Proposals for New Generation, Energy Storage and Demand Response Resources* (18 October 2013), online: LIPA <http://www.lipower.org/proposals/docs/GSDR-clean.pdf>.