

DECISION
of the
Manitoba Clean Environment Commission
On the Motion of the
Consumers' Association of Canada, Applicants
August 29, 2012

For the Applicant: Byron Williams
Intervenor: James Beddome
For the Respondent,
Manitoba Hydro: Doug Bedford

Decision

The Motion requesting an adjournment of the Hearings is dismissed.

Issue

The Applicant, by way of a motion made pursuant to Section 2.08 of the Clean Environment Commission *Process Guidelines Respecting Public Hearings*, requested an order adjourning the start of the Commission's public hearings for 120 days from the scheduled date of October 1, 2012.

Background

In December 2011, the Minister of Conservation issued a request that the Clean Environment Commission hold public hearings on Manitoba Hydro's proposal to construct the Bipole III transmission line project.

In May 2012, the Consumers' Association of Canada was granted funding under the Participant Assistance Program (PAP) and, thus, became a registered participant for the CEC proceedings.

Commission's Authority

Subsection 6(8) of *The Environment Act* allows the Commission to make rules governing its procedure.

Section 2.08 of the Clean Environment Commission *Process Guidelines Respecting Public Hearings* provides:

The Commission will accept motions respecting procedural matters from the Proponent and those designated as Participants.

.....

On hearing the motion, the Commission may allow, dismiss or adjourn the motion, in whole or in part, and with or without terms.

The Supreme Court of Canada reinforced this authority in a 1989 decision:

As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. Adjournment of their proceedings is very much in their discretion¹

Accordingly, the Commission does have the authority to decide whether or not to grant the requested adjournment.

The Manitoba Court of Queen's Bench, in *Candeias v. Manitoba (Residential Tenancies Commission)*, 2000 MBQB 216, considered the matter of a request for an adjournment of an administrative proceeding.

The judge quoted from a decision of the Supreme Court of Canada in identifying the principle to be followed by an administrative body in making such a decision:

"... there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual: ...

"The question, of course, is what the duty of procedural fairness may reasonably require of an authority in the way of specific procedural rights in a particular legislative and administrative context and what should be considered to be a breach of fairness in particular circumstances. ..."²

¹*Prasad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560

² *Cardinal et al. v. Director of Kent Institution* (1985), 16 Admin. L.R. 233 (S.C.C.)

Relief Sought

An order adjourning the start of the Commission's public hearings regarding the Bipole III Transmission Project for 120 days or to such further time as the information before the Clean Environment Commission is sufficient for participants to know the case they must meet and to fully and fairly prepare.

Applicant's Grounds

From Notice of Motion, filed August 8, 2012.

1. The record is materially deficient in that:
 - critical elements of the environmental assessment do not meet minimally acceptable standards;
 - key information is still under development and not available for review;
 - important environmental assessment activities have not yet been undertaken by Manitoba Hydro;
 - the responses to numerous important First Round information requests have not yet been provided;
 - First Round information requests central to the development of the CAC Manitoba case theory have not yet been forwarded to Manitoba Hydro.
2. There is no reasonable possibility that the record can be corrected in time for funded participants to provide expert evidence and written submissions at least fourteen days prior to the scheduled October 1st, 2012 start date.
3. It is unclear when the information before the Clean Environment Commission will be sufficient for participants to know the case they must meet and to fully and fairly prepare.
4. The ability of the Commission to fulfil the terms of reference from the Minister will be materially impaired by:
 - the material deficiencies in the record as it currently stands; and
 - the inability of funded participants to know the case they must meet and to fully and fairly prepare.
5. The magnitude of risk exposure highlighted by Manitoba Hydro in Chapter 2 of its BiPole III filing may be overstated when reviewed in light of the 2012 Load Forecast.
6. Independent assessment raises concerns regarding the reliability of Hydro's load forecasts on a going forward basis.

Proponent's Response

From Response of Manitoba Hydro, filed August 13, 2012.

1. CAC Manitoba asks for a postponement for four months of the commencement of the hearing which the CEC has scheduled. It does not state, explicitly, why the delay is required. It just asks for a postponement. It would appear from reading its Motion materials that CAC Manitoba has a long 'wish list' of items that it believes ought to be prepared and provided to it. However, these items have either been provided or, where they have not been provided and/or will not be provided, Manitoba Hydro has given its rationale in the answers to the specific Information Requests ("IRs"). Consequently, there is no need to delay the commencement of the hearing for four months.

By way of example:

- a. Manitoba Hydro will not be filing the draft access management plans before the hearing. These still must be reviewed with representatives of communities in the immediate vicinity of the Project and the MMF, prior to more public distribution, and may be revised after receipt of information from the hearing itself. In due course, they are also vetted by the Department of Manitoba Conservation and Water Stewardship.
- b. Manitoba Hydro is not going to carry out a "community health assessment". Manitoba Hydro is not a Provincial health agency. In the absence of a rational connection, or a direct pathway, between the known effects of a project and a human health indicator, proponents of projects do not conduct such assessments.
- c. It is anticipated that all 'first round' IRs will have been answered as of August 16, 2012 (over 600 questions).
- d. Load forecasts are not central to a review of the EIS. The CEC is not mandated by the Minister of Conservation to advise him on whether or not Bipole III is needed "at this time" or whether there is a cheaper way for Manitoba Hydro to meet its need to improve the reliability of its transmission system. Manitoba Hydro is not going to engage in a debate on the fine points of load forecasting.
- e. Additional information on caribou has been filed. Manitoba Hydro has filed additional material in its caribou report regarding wolves.
- f. Manitoba Hydro has provided additional information on trapping in its recent answers to IRs.

g. Manitoba Hydro will be providing additional information on air quality in answers to IRs.

h. Manitoba Hydro is not going to:

- file a final vegetation management plan for this hearing. That plan will be finalized after the hearing and will be informed by the recommendations of the CEC and license conditions.
- advance its Conawapa planning for the sole purpose of providing more information on that development for this hearing.
- conduct environmental audits of Bipoles I and II prior to this hearing.
- conduct studies of bird strikes for Bipoles I and II prior to this hearing, particularly as prior studies have already been conducted on other lines.
- do further habitat studies this autumn for the Project.
- develop a model for socio-economic impacts on regions.
- to do more field studies this autumn regarding rare plants and the Project.

2. The responsibility in Manitoba for determining whether an EIS filed by the proponent of a project, including Manitoba Hydro, meets “minimally acceptable standards” lies with the Department of Conservation and Water Stewardship and, ultimately, with the Minister of Conservation as set out in *The Environment Act* and guidelines developed by the Province. Presumably, that determination has been made as the EIS was referred to the CEC for review and Manitoba Hydro has, at no time, been informed by the Minister or his Department that it has not met minimally acceptable standards.

The fact that CAC Manitoba, and others, have a different opinion is not grounds for delaying a review of the EIS which the Minister has asked be reviewed in the context of a public hearing. The opportunity afforded CAC Manitoba and all other Manitobans to give their opinions to the Minister of Conservation on whether or not the EIS meets “minimally acceptable standards” elapsed five months ago when the deadline for public commentary on the EIS as filed expired.

The Minister is not asking that the hearing be delayed for four months so that he can reconsider whether the EIS meets “minimally acceptable standards” nor is the Minister asking Manitoba Hydro, as he has the power to do, to perform more studies or to gather more evidence or to re-write the EIS to the satisfaction of CAC Manitoba. He has asked the CEC to review the EIS that was filed and to conduct a public hearing.

Other Participants

Mr. Beddome of the Green Party of Manitoba spoke in support of the motion.

CEC Findings

The members of the Commission have carefully reviewed the written briefs filed by the applicant and by the proponent in response. We have also considered the oral arguments presented.

There are two parts to the remedy sought, first, to adjourn due to an insufficient amount of information in the proponent’s filing and, second, to allow participants sufficient time to prepare for the hearings.

In his presentation before the Commission, counsel for the applicant argued that commencing the hearings on the scheduled date would, among other things, be unfair to funded-participants in that they would have insufficient time to prepare their cases and that the Commission would not have all the necessary information upon which to make its report to the Minister.

The applicant argued that the record, provided by the proponent is deficient in that critical elements of the environmental assessment are poorly done, that the methodology used in its preparation was inappropriate, and that the proponent has not, or will not, do what is necessary to correct this.

In response, counsel for Manitoba Hydro argued that it is not within the authority of the Commission to determine the sufficiency of the Environmental Impact Statement at this point. Prior to the commencement of the hearings, it is responsibility of the Department of Conservation and Water Stewardship to determine if the record is sufficiently complete to proceed to the hearings.

This applicant’s argument regarding preparation time for the participants shares some elements of that put forward by the Bipole III Coalition.

The panel recognizes that the Bipole project is not insignificant in its size and in the amount and scope of the materials provided. The panel also recognizes that there is much work involved in preparing for the hearings.

However, the amount of time for the Bipole proceedings is not out of line when compared with other recent CEC hearings. For the Wuskwatim hearings, the period from the filing of the EIS by the proponent to the start of the hearings was eleven months; for the Floodway Expansion, it was six months. For Bipole III, the proposed start date for the hearings is ten months after the filing of the EIS.

By bringing the first part of this motion – that the EIS record is incomplete – the applicant is asking the Commission to decide, without hearing any evidence, that the proponent’s Environmental Impact Statement is deficient. The Commission is not prepared to make any such finding at this time.

The proponent has consistently taken the position that its EIS is thorough and the methodology that it used was suitable under the circumstances. The Commission does not have authority, nor is it inclined, to dictate to the proponent, without hearing any evidence, the manner in which it must perform its environmental assessment.

During the course of the hearings, the applicant, along with all of the other participants, has the right to challenge the methodology used in the preparation of the EIS, as well as the conclusions reached. As well, participants will be given every reasonable opportunity to pose questions to the proponent. It will be incumbent on the proponent to respond adequately to all such relevant questions. There is no fixed end-date to the hearings.

Further, it is open to participants to argue against the issuance of an environmental license or to argue that any license should be subject to conditions.

If the Commission concludes, after hearing all of the evidence from the proponent and the various participants, that the EIS is deficient, or that the methodology used in its preparation was inappropriate, the Commission can emphasize such conclusions in its final report.

In such a case, the Commission would have the authority and the mandate to consider a number of alternatives available in making recommendations to the Minister.

The decision of the Commission is to dismiss the application for an adjournment of the hearings and, with regard to this motion, to confirm that the hearings will commence on October 1, 2012.

In dismissing this motion, the Commission is, by no means, finding that the EIS is adequate or that the methodology used in its preparation was suitable. Nor, is the Commission prejudging the issues presented by the applicant in its arguments. Those are issues that should – and will - be dealt with during the course of the hearing itself.

The Commission has set out a process that will allow testing by participants of the EIS filed by the proponent and is confident that the concerns regarding the alleged lack of information put forth in this motion can be addressed through the hearing process.

The Commission remains of the view that the process, upon which we have embarked, balances the needs of all of the parties to have an efficient, fair and transparent process, and allows sufficient opportunity to test the relevant information.

Disposition

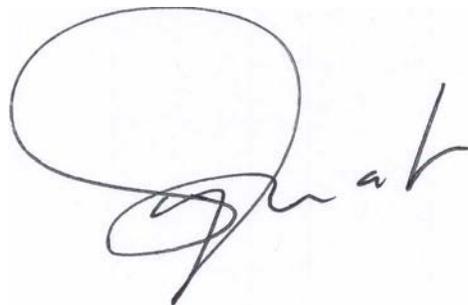
On the application for an order adjourning the start of the Commission's public hearings regarding the Bipole III Transmission Project for 120 days or to such further time as the information before the Clean Environment Commission is sufficient for participants to know the case they must meet and to fully and fairly prepare, the decision is to dismiss.

Conclusion

Given the decision on this application, the Commission confirms that the hearings will commence on October 1, 2012.

DATED this 29th day of August, 2012.

MANITOBA CLEAN ENVIRONMENT COMMISSION

A handwritten signature in black ink, appearing to read 'Terry Sargeant', is written over a light grey circular stamp. The signature is fluid and cursive.

Terry Sargeant, Chair

On behalf of the Panel: Ken Gibbons, Brian Kaplan, Patricia MacKay, Wayne Motheral