

THE MANITOBA CLEAN ENVIRONMENT COMMISSION

IN THE MATTER OF:

THE KEYYASK GENERATION PROJECT (“KEYYASK”)

BETWEEN:

PEGUIS FIRST NATION (“PFN”),

Applicant,

- and -

KEYYASK HYDROPOWER LIMITED PARTNERSHIP,

Respondent.

For the Applicant: Lorraine Land

For the Respondent: Sheryl Rosenberg

REASONS FOR DECISION

The applicant’s motion was argued before the Keeyask Hearing Panel on October 17, 2013. The participants were advised by email on October 18, 2013 that the motion was dismissed with written reasons to be delivered later. Following are the panel’s reasons for dismissing the motion.

BACKGROUND

In November 2012, the Minister of Conservation issued a request that the Clean Environment Commission hold public hearings on the proposal by the Keeyask Hydropower Limited Partnership to construct the Keeyask Generation Project.

In March 2013, Peguis First Nation was granted funding under the Participant Assistance Program (PAP) and, thus, became a registered participant for these CEC proceedings.

ISSUE AND RELIEF SOUGHT

The Applicant has filed Notice of Motion pursuant to Section 2.08 of the Clean Environment Commission *Process Guidelines Respecting Public Hearings*, whereby it seeks an order adjourning the start – or in the alternative, the conclusion – of the Commission’s public hearings in regard to the Keeyask Generation Project.

The specific relief being sought is:

1. An order adjourning the start of the Commission's public hearings regarding the Keeyask Generation Project until completion of an independent and comprehensive regional cumulative effects assessment of the impacts of hydro development on the Nelson River and Churchill River Watersheds, and the result of this study are integrated into the Environmental Impact Statement; or
2. In the alternative, a scheduled adjournment of the final evidence and arguments before the CEC regarding the Project until completion of an independent and comprehensive RCEA of the impacts of hydro development on the Nelson River and Churchill River Watersheds, so that the results of this study can be integrated into the final evidence and arguments of all Parties.

APPLICANT'S GROUNDS FOR MOTION

For the purposes of these Reasons for Decision, the panel will quote extensively from the written submissions filed on behalf of the applicant:

1. The CEC has jurisdiction over its own procedures, including adjournment.
2. Adjournment should be allowed where necessary for procedural fairness.
 - The basic question governing whether adjournment is an appropriate remedy is: *Is an adjournment necessary in order to ensure procedural fairness?* In other words, is adjournment necessary so that the parties have a reasonable opportunity in all the circumstances to present proofs and arguments to the decision-maker, and to answer the opposing case?
 - A tribunal's choice of date for a hearing should prevail unless a party demonstrates that proceeding would result in a denial of procedural fairness.
 - A tribunal's failure to conduct proceedings in a way which allows parties to procure or produce relevant evidence can be found to be a breach of procedural fairness.
3. Peguis First Nation is affected by the CEC'S procedural decisions on Keeyask.
 - Peguis First Nation ("Peguis") is a Participant in the hearings on the Project based on Peguis's concerns about the Projects impacts on the First Nation's Aboriginal rights, treaty rights and Aboriginal title.
 - Peguis is situated upstream from the proposed Project as well as upstream and downstream from a number of existing and proposed hydro-electrical

and other projects, which together affect the water flows and levels of water bodies in Peguis' traditional territory including Peguis' current main Reserve.

- The CEC's procedural decisions about what evidence is examined regarding the overall effects of the Project, including its relationship with and dependency on a broader network of existing and proposed hydro-electrical development, will directly impact Peguis.

4. There is an identified need for a Cumulative Effects Assessment.

- The CEC has previously recommended the need for RCEA as part of proper assessment for new hydro development.
- In its June 2013 Report on the Bipole III Transmission Project, the CEC recommended to the Minister that a RCEA of all projects and associated infrastructure in the Nelson River sub-watershed should be "undertaken prior to the licensing of any additional projects the Nelson River subwatershed after the Bipole III Project".
- The CEC rightly noted in the Bipole III Report that the assessment process was wholly inadequate due to a lack of an overall plan for environmental assessment, and the failure to take into account the cumulative effects of hydro-electric developments that "have had a profound impact on communities in the area of these projects, as well as on the environment upstream and downstream."
- This was not the first time that the CEC identified the need for a more comprehensive review of the cumulative effect of hydro in order to enable proper assessment of impacts for a new project. For example, the CEC recommended the following in its Report on the Wuskwatim Generation and Transmission Projects:

The application for the approval of final licences for Churchill River Diversion, Augmented Flow Program and Lake Winnipeg Regulation should include a review of the terms and conditions, an operations review and any required environmental impact assessments. Clear guidelines should be developed with respect to what constitutes conformance to and/or violation of the terms of licences.

The Projects and other future developments provide an opportunity to address the effects of past projects and provide for sustainable hydroelectric developments along the Churchill, Burntwood and Nelson rivers that benefit First Nations, other Aboriginal communities and northern Manitoba residents.

- To date, a RCEA of hydro projects has not been completed nor initiated. The result of failing to implement the CEC's previous recommendations to

ensure that they form part of the basis for evidence in these hearings is that the same deficiencies of material evidence and information – highlighted by the CEC in the Bipole III Report – would recur when the CEC attempts to evaluate the current Project.

5. Manitoba has committed to doing a Cumulative Effects Assessment.

- The Province of Manitoba has acknowledged the need for more comprehensive planning and better assessment for new hydro-electrical projects.
- Manitoba adopted the Report on the Consultation on Sustainable Development Implementation (the “COSDI Report”) in 2000. The COSDI Report highlighted the need to improve review of developments, including in its finding that the assessment process should look at cumulative effects. The COSDI Report recommended that proper assessment of projects should occur in the context of comprehensive planning of large areas, such as watersheds, to ensure proper implementation of sustainable development policies.
- As recently as August 14, 2013, Minister Gord Mackintosh again confirmed the province’s commitment to a more comprehensive approach when issuing the Environment Act Licence No. 3055 for the Bipole III Transmission Project.
- In order to properly implement the CEC’s Bipole III Report recommendation for RCEA, procedural steps should be taken to ensure that the relevant evidence of RCEA is allowed into the study for this Project.

6. A Cumulative Effects Assessment is grounded in the CEC’S Terms of Reference for the Keeyask Generation Project.

- The CEC’s Terms of Reference from the Minister explicitly require the CEC to integrate, into these hearings, principles related to RCEA.
- The Terms of Reference require the CEC to consider the Strategy, Principles and Guidelines for Sustainable Development, established pursuant to section 7(1) of the *Sustainable Development Act*.
- The Strategy, the Principles and the Guidelines emphasize the need to implement sustainable development through comprehensive planning, integrated decision-making and adequate access to information.
- An adjournment of the commencement or completion of the hearings, until an RCEA is complete and adequate information is available, is key for the CEC’s to meet its Terms of Reference and its Mandate.

7. Procedural Fairness requires complete information.

- Procedural fairness demands that all relevant evidence is available for scrutiny and assessment. Without the completion of a RCEA in advance of the completion of the CEC's hearings into the Project, the information filed by the proponent through Manitoba Hydro is incomplete because the current assessment process is insufficient. Participants, including Peguis, are deprived of the opportunity to consider and respond to relevant information.
- The CEC noted with concern in the Bipole III Report that Manitoba Hydro's evidence was lacking in that proceeding. The CEC noted that deficiencies in the information provided was not likely due to a lack of data: Returning to a more practical level, the Commission finds it simply inconceivable – given the 50-plus-year history of Manitoba Hydro development in northern Manitoba and given that at least 35 Manitoba Hydro projects in the north in that time – that there are few, if any, cumulative effects identified in the EIS.
- Relevant information regarding the full scope of impacts of the Project, including in association with existing hydro infrastructure, can and should be compelled, and is needed to ensure that a full record of relevant evidence is before the CEC and subject to scrutiny of the participants as part of the Project hearings.
- A RCEA done in advance would provide that relevant information, including determination of whether the environment and identified sensitive areas could handle the collective impacts of existing and proposed activities. This would inform management decisions and project approvals. That should also include a thorough assessment of the needs for the Project. A proper determination of whether or not there is a need would also benefit and enable the CEC to better evaluate the Project.
- Time is needed for a thorough and independent RCEA prior to the CEC's full and final review of yet another project proposed by Manitoba Hydro.
- An adjournment is required in order to allow the CEC to ensure that it considers the full, relevant evidence regarding the impacts of the Project, including the RCEA, and to allow the Participants in the hearing the opportunity to properly review and respond to the evidence as required by the principles of procedural fairness.

RESPONDENT'S GROUNDS FOR DISMISSAL OF THE MOTION

As above, the position of the respondent is detailed by quoting extensively from the material filed on its behalf:

1. The CEC controls its own process, including adjournment of proceedings if required. However, in accordance with sections 6(5) and 6(5.1) of *The Environment Act* (the "Act"), the CEC must carry out hearings in relation to proposals for specific developments in accordance with the terms of reference stated by the Minister. Any decision with respect to process should flow from the substantive mandate for the hearing.
2. The CEC does not make regulatory decisions with respect to proposals for specific developments. Rather, the CEC provides recommendations to the Minister which are considered along with other inputs, including the advice of the Technical Advisory Committee, the results of Crown consultation with Aboriginal peoples and Government policy and views concerning the best interest of the people of Manitoba.
3. When it is asked to hold a public hearing and make recommendations, the CEC fulfills a specialized function in the environmental assessment and review process, which is to gather and consider relevant stakeholder and public input before ultimately providing recommendations to the Minister.
4. The public hearing process is one important means of implementing the intent and purpose stated in section 1(1)(d) of the Act, that is to provide for *public consultation* in environmental decision making while "*recognizing the responsibility of elected government ... as decision makers.*"
5. The CEC hearing process fulfills an important role in participatory democracy. Through the public hearing process, citizens are given the opportunity to be heard by an impartial body on matters of environmental public importance and to have their views considered in advice to the licensing body, which in this case the Minister.
6. However, in accordance with the duties assigned to it in section 6 of the Act, and with the Minister's Terms of Reference for the Project proposal:
 - a) The CEC does not have the power to adjudicate or consider allegations of loss or damage caused by past or existing projects carried out by any person, including Manitoba Hydro, which is not in fact the proponent of the Project. No participant in the CEC Project hearings has a procedural or any right to be heard on an issue of that nature.
 - b) The CEC does not have the power to adjudicate or consider Manitoba's compliance with its Constitutional duties with respect to Aboriginal

interests and the honour of the Crown. Nor does it have the mandate or power to hear evidence concerning a First Nation's Aboriginal rights, treaty rights or title or the impact of any proposed project thereon. If there were any doubt concerning the jurisdiction of the CEC in that regard, the Minister's Terms of Reference specifically exclude such powers. No Aboriginal group has either a procedural or substantive right to be heard by the CEC with respect to these matters. Further, in its Hearing Directive, the CEC has made clear that it "does not play a role in, or have any responsibility for, these consultations."

- c) Nor, for the reasons stated above does the CEC have the power or jurisdiction, in the course of hearings with respect to a specific proposed project, to hear evidence and argument concerning Government policy as it is or should be or to consider possible future legislative changes in Manitoba's environmental assessment and approval regime, though the CEC has the power and jurisdiction pursuant to section 6(3) of the Act to consider matters on its own motion in separately constituted hearings. The positions taken in this regard by Peguis are without foundation in law.
 - d) Neither is it the CEC's role to determine the scope of the environmental assessment of the Project or the terms of reference for the environmental impact statement assessment of the Project nor to carry out the detailed technical review of the proponent's EIS. These responsibilities have been carried out by the Provincial and Federal specialist agencies which comprise the Technical Advisory Committee. In accordance with the Minister's Terms of Reference, the documents that were produced during these processes are to be considered as input for the public hearing. Any expansion of the scope of assessment that may be proposed by a participant in a CEC hearing is beyond the power and jurisdiction of the CEC to order.
7. Specifically with respect to the regional cumulative effects assessment recommended in the CEC's report on the Bipole III hearings, the CEC identified such recommendation as "non-licensing" in recognition of the limits on the scope of its mandate with respect to the specific proposal before it for review.
 8. The scope of assessment for the Project includes project specific cumulative effects assessment, not regional cumulative effects assessment. To expand the scope of assessment as suggested by Peguis would be beyond the power and jurisdiction of the CEC.
 9. Further, the proponent's submissions with respect to the Project were complete and the CEC had set the date for the Keeyask hearing before it issued the Bipole III report. The

CEC's report indicates no intention to tie the recommendation for regional cumulative effects assessment to commencement of the Keeyask hearing, which was already before it. Nor did the CEC seek further direction from the Minister in that regard. The CEC may, at any time, request that the Minister review or clarify the Minister's Terms of Reference.

10. In fact, in accordance with the Minister's acceptance of the recommendation, Manitoba Hydro has already engaged with Manitoba to begin implementation of a regional cumulative effects assessment. It is important to note that the Minister's letter stated no intention and gave no instruction to delay the regulatory process for the Project. Nor has he provided any further direction to the CEC that such was his intention.
11. It is incorrect to suggest that it would be an error of jurisdiction or law, against the Rule of Law or a violation of the CEC's mandate to proceed without the results of a regional cumulative effects assessment.
12. What would be an error of jurisdiction and action exceeding the CEC's mandate would be to halt proceedings on the basis of the Applicant's view that a regional cumulative effects assessment is necessary to the CEC's responsibility to review the EIS, including the proponent's public consultation summary, to hold public hearings to consider stakeholder and public input and to prepare and file a report with the Minister of Conservation and Water Stewardship outlining the results of the CEC's review and providing recommendations for the Minister's consideration.

DECISION

The panel members have carefully reviewed the written briefs filed by the parties to the motion and have considered the oral arguments advanced at the Motions Hearing.

As indicated previously, the applicant seeks an order from the panel to adjourn the commencement of, or in the alternative to delay the conclusion of, the public hearings part of the review process, until after the completion of a regional cumulative effects assessment (commonly referred to in argument as an RCEA) and its incorporation into the existing EIS for the Keeyask Generation Project.

In this request, the applicant is, in effect, asking the panel to order the proponent to conduct a RCEA of the impacts of hydro development on the entire Nelson River and Churchill River Watersheds.

There is no dispute that such an assessment has not been completed by Manitoba Hydro (or anyone else) and therefore does not form part of the EIS material filed in connection with the Keeyask project.

The relief being sought arises, at least in part, from the recommendation made by the Clean Environment Commission itself in its report on the Bipole III Transmission Project. That report called for Manitoba Hydro and the Government of Manitoba to conduct a regional cumulative effects study before the issuance of licenses for any further projects in the Nelson River sub-watershed.

It perhaps should be noted that the recommendation was a “non-licensing” one, meaning that the completion of such a study was not to be a condition attached to the license issued in respect of Bipole III.

When granting the license, however, the covering letter from the Minister of Conservation and Water Stewardship did indicate that all of the non-licensing recommendations were being accepted by him, which would include the call for a regional cumulative effects study.

It is perhaps appropriate to the determination of this motion to review the jurisdiction of the Clean Environment Commission in the present circumstances.

The general jurisdiction is found in Section 6(1) of The Environment Act which states:

“Clean Environment Commission

- 6(1) There shall be a Clean Environment Commission with a minimum of 10 members appointed by the Lieutenant Governor in Council for such terms and remuneration as may be specified by the Lieutenant Governor in Council, for the purposes of
- (a) providing advice and recommendations to the minister;
 - (b) developing and maintaining public participation in environmental matters.

...

And a more particularized role is set out in Section 6(5):

“Specific duties of Commission

- 6(5) When requested by the minister, the commission must do one or more of the following in accordance with any terms of reference specified by the minister:
- (a) provide advice and recommendations to the minister;
 - (b) conduct public meetings or hearings and provide advice and recommendations to the minister;
 - (c) conduct investigations into specific environmental concerns and report back to the minister;

- (d) act as a mediator between two or more parties to an environmental dispute and report back to the minister.”

The Minister wrote to the CEC on November 14, 2012 and requested the CEC to hold public hearings on the proposed Keeyask Generation Project. The letter contained specific terms of reference as follows:

Terms of Reference

Pursuant to Section 6(5.1) of the Act, the Minister has determined that the Terms of Reference the Commission is to follow are:

- to Review the EIS including the proponent’s public consultation summary. Note that a detailed technical review must be done by the provincial and federal specialist agencies who are members of the TAC. As such documents produced during this assessment should be considered by the Commission as input for the hearings;
- to hold public hearings for the Commission to consider stakeholder and public input; and
- to prepare and file a report with the Minister of Conservation and Water Stewardship outlining the results of the Commission’s review and providing recommendations for the Minister’s consideration. The report should be filed within ninety (90) days from the date of completion of hearings as per Section 7(3) of the Act.

Mandate of the Hearing

The Commission shall conduct the hearings in general according with its *Process Guidelines Respecting Public Hearings*.

It is the unanimous view of the panel that the motion being advanced by the applicant respecting a regional cumulative effects assessment is, in essence, asking for pre-judgment on the core of panel’s mandate, that is, whether the project should or should not be licensed.

In its written brief the applicant argued that “Procedural fairness demands that all relevant evidence is available for scrutiny and assessment”.

The Panel does not disagree with this argument. Where we differ with the applicant is that we hold the view that the determination as to whether all the necessary and relevant information is before us should not be made at a motions hearing prior to the hearings process.

The Commission has on a number of occasions ruled in motions decisions that it will not pre-determine the outcome of the hearings until we have heard the positions of all of

the parties to the proceedings.

The Commission has always taken the position that it will not conclude hearings until it is satisfied that all issues have been fully canvassed and that the record is sufficiently complete to allow the hearing panel to give to the minister sound advice and to make fully-informed recommendations.

It will remain open to the applicant, at the stage for final argument, to advance the position that the proponent's EIS is deficient, including the proponent's cumulative effects assessment. The applicant is welcome to state what they believe to be needed to fix any deficiencies and to ask the Commission to make recommendations in that regard.

The panel would further note that the Commission is not the "decision-maker" when it comes to issuing a license to the proponent. Under the Act, that role falls to the Minister. In considering his decision, the Minister is informed by a number of separate processes. These include: the advice provided by provincial and federal officials, the report of the Aboriginal consultations conducted by the province, the report of the Public Utilities Board into the "need for and alternative to" the project, as well as the report of the Clean Environment Commission.

For these reasons, we will not order the proponent to conduct a regional cumulative effects assessment prior to the conclusion of these hearings.

DISPOSITION

The motion of the applicant is dismissed.

DATED this 8th day of November, 2013.

MANITOBA CLEAN ENVIRONMENT COMMISSION

Terry Sargeant, Chair

On behalf of the Panel: Judy Bradley, Reg Nepinak, Jim Shaw, Edwin Yee