

THE MANITOBA CLEAN ENVIRONMENT COMMISSION

IN THE MATTER OF:

THE KEYASK GENERATION PROJECT (“KEYASK”)

BETWEEN:

PIMICIKAMAK,

Applicant,

- and -

KEYASK HYDROPOWER LIMITED PARTNERSHIP,

Respondent.

For the Applicant: Kate Kempton

**For the Respondent: Cheryl Rosenberg
Robert Adkins**

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 June 2013, Pimicikamak was granted funding under the Participant Assistance Program (PAP) and, thus, became a registered participant for these CEC proceedings.

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 by the Commission adjourning the commencement of the Commission’s public hearings in connection with Keeyask until after:
 - a) the completion of a Regional Cumulative Effects Assessment (“RCEA”) for the entire Churchill River Diversion, Lake Winnipeg Regulation, Nelson River works and related facilities hydro project (“MH Project”) (or in the alternative, for those aspects of the MH Project in the Nelson River sub-watershed); and
 - b) the completion of a land use and occupancy study and an impacts study (“Studies”) to determine Pimicikamak’s connections to, values in and use and occupancy of its traditional territory and to help assess the impacts of Keeyask including those cumulative with impacts from the existing MH Project, on Pimicikamak.
2. In the alternative, an order by the Commission to adjourn the Commission’s public hearings in connection with Keeyask following the completion of this first round of hearings scheduled to end on November 28, 2013, to allow time for the completion of:
 - a) a RCEA for the entire MH Project (or in the alternative, for those aspects of the MH Project in the Nelson River sub-watershed); and
 - b) the Studies following the completion of which, the Commission will reconvene the public hearings to allow Participants and the public the opportunity to make submissions to the Commission on the results of the RCEA and the Studies as they relate to the assessment the Commission is tasked to make under its Terms of Reference for Keeyask (the “Terms of Reference”).

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 Commission has been mandated to conduct an environmental review for Keeyask. In order to do so, it must ensure that necessary and highly relevant evidence is before the Commission and the parties to the Keeyask proceedings in order for an informed report and recommendations to be completed, and in order for the Minister to make an informed decision. Such necessary and relevant information includes the information that would or should result from the RCEA and the Studies.
2. For the Commission to proceed without the results and evidence from the RCEA and the Studies would amount to a violation of the Commission's mandate for Keeyask. This would be an error of jurisdiction or law.
3. Pimicikamak is a party to the Commission's proceedings on Keeyask, and stands to be significantly impacted by Keeyask including cumulatively with existing impacts from the MH Project. It has been severely impacted by the cumulative effects of the MH Project to date – environmentally, socially, economically, psychologically and spiritually. Identifying and understanding all actual ongoing impacts generally, and in respect of Pimicikamak in particular, is critical to assessing Keeyask and whether it should be allowed to proceed.
4. A failure to allow this evidence to be gathered and submitted would amount to a denial of procedural fairness and, therefore, an error of law.
5. For the Commission to undertake a review of Keeyask (or at least, for the Commission to render its report on Keeyask) before the RCEA and Studies are complete, would call into question the entire environmental assessment regime in Manitoba.
6. Public bodies, including the Commission and the Manitoba Government, are subject to the Rule of Law, and if this is not upheld then the administration of justice will be brought into disrepute. The Commission and the Minister have recognized this and thus the Commission recommended an RCEA be conducted before any licences are issued for additional hydro development, and the Minister accepted this recommendation.
7. The Commission recommended in its June 2013 Report on the Bipole III Transmission Project (the "Bipole III Report") the following:

13.2 Manitoba Hydro, in cooperation with the Manitoba Government, conduct a Regional Cumulative Effects Assessment for all Manitoba Hydro projects and associated infrastructure in the Nelson River sub-watershed;

and that this be undertaken prior to the licensing of any additional projects in the Nelson River sub-watershed after the Bipole III Project.

8. The Minister of Conservation and Water Stewardship, in a letter to Manitoba Hydro dated August 14, 2013 issuing the BiPole III licence, agreed with this recommendation and stated his intention to see it implemented.
9. Keeyask is an “additional project in the Nelson River sub-watershed” for which Hydro is seeking a licence.
10. As a result, in accordance with the Commission’s recommendation, and the Minister’s acceptance of it, a RCEA must be completed before a licence is issued for Keeyask.
11. The Commission has recognized and the Minister has accepted that the results of a RCEA are necessary and relevant to any proceeding about further hydro development that is to be part of the MH Project (at least, in the Nelson River sub-watershed). This then forms either part of the mandate of the Commission for the Keeyask proceedings, or is otherwise required due to the rules of procedural fairness. This accords with the Rule of Law, which must be followed.
12. The results of the RCEA will constitute evidence that is required for the fair adjudication of the Commission’s hearings on Keeyask.
13. The Commission has been tasked under its Terms of Reference to conduct a public and consultative review of all elements of the Environmental Impact Statement for Keeyask (the “EIS”), which must include cumulative effects.
14. Pimicikamak submits that the Commission cannot legally complete its review of Keeyask and issue its recommendations in accordance with its Terms of Reference until the RCEA is complete. This is because:
 - a) The initial Terms of Reference explicitly or implicitly require consideration of the results of the RCEA; and/or
 - b) The Minister’s acceptance of the Commission’s recommendation from BiPole III that called for the RCEA before any further hydro development licences were to be issued confirmed that this requirement was now effectively part of the Terms of Reference for Keeyask.
15. An adequate assessment of the existing and ongoing impacts of the MH Project (which Keeyask would become a part of, if licenced) must be done in order to then assess the impacts of Keeyask in the context of those existing impacts.

16. Pimicikamak submits that it would be a denial of procedural fairness to Pimicikamak, the other Participants, and the public for the Commission to hold hearings on Keeyask (or at the very least, to render a report on Keeyask) before the RCEA is complete.
17. While adjournment is a discretionary procedural remedy, it must be granted if it is necessary to ensure procedural fairness.
18. The conduct of proceedings that fail to allow parties to procure or access relevant evidence can be found to be a breach of procedural fairness.
19. The Participants and the public need the opportunity to obtain and assess evidence on regional cumulative effects in order to know the case to meet at the Commission's hearings and to fairly participate in those hearings. Without that full information, the Participants and public, including Pimicikamak, will be denied the opportunity to comment in the hearings on the true cumulative impacts of Keeyask. This is particularly unfair to Pimicikamak, who has been profoundly affected by the existing hydro development in Manitoba and is seriously concerned about how Keeyask will add to those existing impacts.
20. The Commission has been mandated to incorporate the principles and guidelines of Sustainable Development into its review of Keeyask. The *Principles and Guidelines of Sustainable Development* require that all Manitobans have access to adequate environmental information.
21. Pimicikamak submits that in the interests of fairness and in order to comply with the *Principles and Guidelines of Sustainable Development*, the Commission must adjourn the hearings until the RCEA is completed so that the Commission, Participants, and the public have essential information on existing effects with which they can properly assess Keeyask.
22. Pimicikamak submits that the Commission cannot assess Keeyask in accordance with its Terms of Reference until Pimicikamak completes the Studies to ascertain Pimicikamak's connections to, values in, uses and occupancy of the land and how Keeyask, including cumulatively with existing impacts from the MH Project, may affect Pimicikamak.
23. Pursuant to ss. 9.1.3 and 9.4 of the *Environmental Impact Statement Guidelines for the Keeyask Generation Project* (the "EIS Guidelines"), in its EIS, Manitoba Hydro was required to identify and assess the significance of, among other things:
 - a) The potential social and economic effects to Pimicikamak that may arise as a result of Keeyask;
 - b) The effects Keeyask may have on current use of lands and resources for traditional purposes by Pimicikamak and its citizens;
 - c) Related effects on lifestyle, culture and quality of life;

- d) Measures to avoid, mitigate, compensate, or accommodate effects on those traditional uses;
 - e) Effects on Pimicikamak and its citizens in terms of access onto the Keeyask area;
 - f) Effects of Keeyask on heritage and archeological resources that are important or of concern to Pimicikamak; and
 - g) A discussion of any factors that may inhibit or foster the flow of economic and other benefits to Pimicikamak.
24. Manitoba Hydro has wholly failed to identify or assess any of the above for Pimicikamak in the EIS.
25. Without these Studies, neither Pimicikamak nor the Commission can know the potential direct and cumulative environmental impacts of Keeyask.
26. Pimicikamak submits that the evidence that would be gathered by the Studies is integral to and necessary for the Commission to render its decision on Keeyask. This is because:
- a) Such information forms a part of the evidence that the Commission is mandated to receive directly, or
 - b) The failure to require its admission would amount to a denial of procedural fairness.
27. Therefore, Pimicikamak submits that the Commission needs the results of the Study to fulfill its mandate and determine if:
- a) The environment will be protected and maintained to sustain a high quality of life, including social and economic development, recreation and leisure for this and future generations if a licence is issued; and
 - b) Any licence conditions required to ensure appropriate and optimal environmental management practices.

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, 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, ie. by 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 Hydro's compliance with the Northern Flood Agreement, which is subject to its own arbitration process.
 - c) 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."

- d) 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. The positions taken in this regard by Pimicikamak are without foundation in law.
 - e) 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 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 Pimicikamak 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 announced 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. As acknowledged in paragraphs 17 and 18 of Dr. Luttermann's Statement of Facts, (which was filed by the proponent in support of its position) the regional cumulative effects assessment being undertaken by Manitoba and Manitoba Hydro may take many years to complete. Any adjournment granted in that regard would in effect constitute termination of the hearing process without hearing from members of the public who wish to participate, including those most directly affected by the proposed development.
12. Dr. Luttermann's views concerning sturgeon and other environmental matters are proper evidence in the hearing itself as scheduled, where they can be fully expressed and their validity tested against the evidence adduced by the proponent.
13. Similarly, the hearing itself is the proper forum for any submissions that participants wish to make concerning Principles of Sustainable Development and Guidelines for Sustainable Development as contained in the Sustainable Development Strategy for Manitoba. In that regard, however, the CEC will be limited to those aspects of sustainable development analysis which do not relate to economic or financial considerations or the need for and alternatives to the proposed development. In accordance with the Minister's Terms of Reference, these matters have been explicitly excluded from the mandate for this hearing.
14. With respect to the Studies, the responsibility for determining the scope of the assessment and carrying out a technical review of the Proponent's submission belongs to the Ministry and the TAC, not to the CEC. These responsibilities have been completed. The Studies were not contemplated in the scope of the assessment reported on in the EIS or in the Minister's Terms of Reference. A decision that additional studies are required before the hearing can be held would be an improper expansion of the scope of the assessment, contrary to the intention of the Act for the role of the CEC in licensing processes and to the Minister's Terms of Reference.
15. To the extent that the Studies relate to rights under the NFA or Aboriginal or Treaty rights, the results of the Studies, should they be performed, are outside the subject matter of the hearing, as determined by the Minister's Terms of Reference.
16. Further, any additional information that Pimicikamak wishes to have considered concerning potential impact on hunting, fishing or other activity can appropriately be put before the CEC, in accordance with the Minister's Terms of Reference, in the course of the public hearings which serve to provide an opportunity for Hearing Participants and/or stakeholders and other members of the public to bring forward any information or concerns with respect to the Project.

17. In the course of the Article 9 process and in response to discussions initiated by the Pimicikamak, Manitoba Hydro tabled a proposal to conduct resource use studies with respect to the Pimicikamak and the Project area; however this proposal was rejected by the Pimicikamak, whose representatives stated that they would only participate in resource use studies if the studies were led by Pimicikamak with experts ultimately selected by Pimicikamak.
18. The proposal submitted by the Pimicikamak, which encompasses the Studies referenced in the within Motion is far more expansive than the proposal tabled by Manitoba Hydro or even what was originally discussed between the parties.
19. As a result of the significant expansion of study parameters, Manitoba Hydro was not in a position to respond immediately to the study proposal received approximately one month ago and, as acknowledged in paragraph 24 of the Statement of Facts of Darwin Paupanakis, Manitoba Hydro has not yet made a decision on whether the Studies, in the form proposed by the Pimicikamak, will be funded.
20. The Pimicikamak's outstanding study proposal should not delay the commencement or completion of the CEC's review of the Project, or specifically the commencement or completion of the CEC's public hearings.
21. On December 28, 2012 the Partnership received a Request for Additional Information from the Canadian Environmental Assessment Agency ("CEAA") which requested the Proponent to:
 - a) Provide a description of current and proposed use of resources for non-Keeyask Cree Nation (KCN) Aboriginal groups based on available information from other sources, if not provided by the Aboriginal group;
 - b) Assess the effects (if any) on those uses; and
 - c) Identify residual effects (if any) and potential mitigation for non-KCN Aboriginal groups.
22. The Partnership prepared a draft response to the CEAA and, as it related to the Pimicikamak the response was reviewed by the Pimicikamak. The comments Pimicikamak provided to Manitoba Hydro in relation to its review of the response were considered and, where feasible, suggested edits were incorporated within the final submission of the response to the CEAA.
23. The Partnership reviewed extensive information available with respect to those issues that would be the subject of the Studies and that are relevant to the Project. The outcome of that review was that no effects on the traditional use of lands and resources

by the Pimicikamak are predicted in association with the Keeyask Project and no related mitigation is required.

24. There is no evidence to suggest that the Studies, if approved, will provide any information in relation to the Project that is not already before the CEC. There is no evidence to suggest that the preparation of the EIS in this regard was not both proper and complete.
25. Manitoba Hydro was prepared to undertake a resource use study despite its understanding that there would be little, if any, effect on the Pimicikamak in the Project Area and despite the fact that the Pimicikamak has not taken any steps to provide Manitoba Hydro with any information to the contrary.
26. The public hearings which the Pimicikamak seeks to adjourn provide the Pimicikamak with the appropriate forum to challenge such an assessment and provides the CEC with the opportunity to hear and consider public input and test the information before it.
27. If the CEC ultimately determines that, in its view, there is a shortfall of information with respect to Pimicikamak and the Project (of which the Proponent submits there is none), that shortfall can be addressed in the CEC's resultant recommendations to the Minister.
28. Manitoba Hydro submits that the CEC is in a position to make informed recommendations on the basis of the environmental assessments that have been done and the information that will be put before it in the course of the public hearing process.
29. Contrary to the Statement of Facts of Darwin Paupanakis, Manitoba Hydro notified Cross Lake First Nation of its intention to prepare plans for the future development of the Project in 2001.
30. The parties have been meeting semi-regularly since 2010 and throughout all of this time, Manitoba Hydro has continually expressed an interest and the need to hear directly from Pimicikamak its concerns and views with respect to the Project.
31. Manitoba Hydro has continued to seek an understanding of the Pimicikamak's views and any outstanding issues with respect to the Project.
32. Manitoba Hydro submits that the lack of concerns expressed to date by the Pimicikamak with respect to the Project area is consistent with the findings based on the review of existing literature and research that suggests that no effects on the traditional use of lands and resources by the Pimicikamak are predicted in association with the Keeyask Project.

33. Should the Pimicikamak have any evidence to the contrary, of which none has been provided to date, its representatives will have the opportunity to present such views at the public hearings.
34. 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 or the studies.
35. What would be an error of jurisdiction and action exceeding the CEC's mandate would be to halt proceedings on the basis of the Pimicikamak's view that a regional cumulative effects assessment and/or studies are 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 the public hearings part of the review process until after the completion of one or both of the following studies:

- (1) a regional cumulative effects assessment (commonly referred to in argument as an RCEA) and its incorporation into the existing ESI for the Keeyask Generation Project;
- (2) a land use and occupancy study and an imports study to determine the applicant's connections to, values in and use and occupancy of its traditional territory.

This decision will address these two requests separately.

With respect to the first request the applicant is, in effect, asking the panel to order the proponent to conduct a RCEA for the entire Churchill River Diversion, Lake Winnipeg Regulation, Nelson River works and related facilities hydro project, or alternatively a less far ranging RCEA limited to the Nelson River sub-watershed.

There is no dispute that such studies have not been completed by Manitoba Hydro (or anyone else) and therefore do 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, whether that be a full blown assessment of the watershed area or limited to the Nelson River sub-watershed, 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 as follows:

“We say it is well within the terms of reference and it is mandated by law that you ensure you have all necessary and relevant information before you to make informed findings and to enable the Minister to make an informed decision.”

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.

Applicant's counsel also stated that, in her view, "the Commission has the authority to attach conditions to a licence for Keeyask that the regional cumulative effects assessment must be done beforehand ..." she added that this would not be her choice, though. In fact, she would view this as a poor second choice. She noted that the Minister could ignore such a recommendation.

While the Commission's long-standing position is that it can make a wide range of recommendations relevant to the project under review, it is well aware that if recommendations are outside of the scope the Minister may reject them.

With respect to the second issue in this motion – the "studies", there is disagreement as to the genesis of the concept of these studies. The applicant has taken the position that the need for the studies arises from the Partnership's application for a license for the Keeyask project. The respondent, on the other hand, is of the view that this need falls under obligations in Article 9 of the Northern Flood Agreement (NFA).

If the latter is correct, then the matter is clearly not within the jurisdiction of the Clean Environment Commission and this part of the motion should summarily be dismissed.

However, counsel for the applicant asked the panel not to view this matter as one falling under the NFA. She argued that it does arise out of the Keeyask review and that the panel would be unable to make informed decisions if the results of the studies were not part of the record.

In simple terms, the goal of the studies is to determine the potential direct and cumulative environmental impacts of the project on Pimicikamak. In pursuing an independent, comprehensive review, the applicant is taking the position that the EIS filed by the proponent is insufficient in its assessment.

In its Notice of Motion, the applicant referenced ss. 9.1.3 of the CEEA Guidelines which required the proponent to identify and assess the significance on Aboriginal groups/peoples/communities of the project on a number of factors typical to environmental assessment, including, environmental, socio-economic, heritage, cultural and others.

As with the first issue in this motion, the panel is of the view that the applicant is asking for a pre-judgment.

Whether or not the proponent's EIS has sufficiently assessed the environmental impacts has yet to be determined. Whether or not the specific provisions of the CEEA Guidelines have been met has also yet to be determined. These are among the tasks before the Commission in these hearings.

As noted above, the Commission will not pre-determine the outcome of the process.

It remains open to the applicant, as a registered participant in these hearings to be heard on all matters before the panel and to place on the record its views respecting the environmental assessment under review. The panel, in its deliberations, will most certainly consider such input.

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 Hearing Panel: Judy Bradley, Reg Nepinak, Jim Shaw,
Edwin Yee