

**DECISION**  
**of the**  
**Manitoba Clean Environment Commission**  
**On the Motion of the**  
**Bipole III Coalition, Applicants**  
**August 29, 2012**

For the Applicant: Brian Meronek, Q.C.  
Ivan Holloway  
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 directing the proponent to answer specific Information Requests, as well as an adjournment of the start of the Commission's public hearings to an unspecified date from the scheduled date of October 1, 2012.

**Background**

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

In May 2012, the Bipole III Coalition 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 discretion<sup>1</sup>

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. ..."<sup>2</sup>

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<sup>1</sup>*Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560

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

## **Relief Sought**

1. An Order or Direction of the CEC to Manitoba Hydro to respond to those Information Requests submitted to the CEC by the Coalition on July 19 and 20, 2012, as listed in attachment A to this Motion;
2. An adjournment of the Hearing scheduled to commence on October 1, 2012 to a date sufficient to enable the Information Requests to be answered; a second round of Information Requests to be submitted by the participants and answered by Manitoba Hydro; and, expert reports to be prepared in time before the commencement of the hearing; in accordance with the schedule, in attachment B to this Motion.

## **Applicant's Grounds**

*From Notice of Motion, filed August 8, 2012.*

The Applicant's arguments focus on the fact that a number of its Information Requests were not submitted to the proponent for response. It argued that:

1. The Information Requests are relevant.
2. A review of the EIS demonstrates that the Information Requests are necessary in order to determine:
  - a. The need at this time for Bipole III at all regardless of location;
  - b. The reliability concerns alleged by Manitoba Hydro to be the motivating consideration behind Bipole III;
  - c. Whether there are alternatives to the construction at this time of Bipole III in terms of environmental impact, cost and sustainable development specifically by relocating Bipole II to the La Verendrye S.S. (or perhaps the Riel S.S.).
3. All Information Requests are within the scope of the Terms of Reference to the CEC established by the Minister of Conservation on or about December 5, 2011.
4. All Information Requests directly relate to matters and issues specifically advanced by Manitoba Hydro in the EIS.
5. Natural justice requires that Information Requests which are clearly inside the Terms of Reference be allowed to be asked of the proponent without first having to be vetted and pre-approved by the CEC or its staff.

6. Natural justice requires that a tribunal not pre-judge the requirement for evidence without the proponent first putting the relevancy and admissibility of such evidence into question before the tribunal.
7. Environmental law recognizes that there be a meaningful need for and alternative to (NFAAT) assessment of a project in order for the tribunal to discharge its obligations in making recommendations to the Minister.
8. The proponent has put into question NFAAT in its EIS.
9. The timing of the receipt of IR responses; the need for a second round of IRs and responses thereto; and the ability of the Coalition's experts to adequately review the responses and prepare their report all militate in favour of an adjournment of approximately two months.
10. The state of the Record is inadequate to permit the hearing to commence on October 1, 2012 as scheduled.
11. There is nothing on the record submitted by Manitoba Hydro which would require the hearing to be held on October 1, 2012.

### **Proponent's Response**

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

According to the Brief filed by the Bipole III Coalition, it no longer seeks answers to a number of the IRs it submitted and has answers to others it submitted because they were duplicative of questions asked by other participants which were sent to Manitoba Hydro and which have been answered by Manitoba Hydro. With respect to the residual questions, to date, unanswered because they were found to be out of scope, Manitoba Hydro responds as follows.

1. The Terms of Reference given to the CEC by the Minister of Conservation do not direct the CEC to determine if there is a less costly way for Manitoba Hydro to meet, through existing facilities, its need to improve reliability. Questions seeking data or reports or alternative spreadsheet modeling intended to assist in determining the foregoing are out of scope for this hearing.
2. The Terms of Reference do not ask the CEC to determine whether Bipole III has to be built "at this time". Accordingly, questions that seek data or reports or alternative spreadsheet modeling intended to assist in proving that the Bipole III Project is not needed "at this time" are out of scope for this hearing.

3. While acknowledging that the EIS does have a chapter explaining the need for the Project and alternatives to it, the proponent is of the view that the Minister of Conservation, in his request that the EIS be “reviewed”, did not intend that the CEC investigate whether Bipole III is needed “at this time” or whether there are cheaper, better alternatives.
4. Courts and tribunals are entitled to set aside, in summary fashion, documents filed with them that do not follow prescribed procedures or which are, on their face, out of scope. Not every decision made by every decision maker must necessarily be accompanied by ‘notice’ and ‘an opportunity to be heard’. In any event, to be practical, the Bipole III Coalition is going to be heard on the issues raised in its Motion, notwithstanding that it is in effect “appealing” a decision to the CEC that it has already made.

### **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.

The applicant asked for two different remedies in this motion:

- an order directing the proponent to respond to specific Information Requests submitted by the applicant; and
- an adjournment of the commencement of the hearing to a date sufficient to enable the Information Requests to be answered; a second round of Information Requests to be submitted and answered; and, expert reports to be prepared in time before the commencement of the hearing.

In addressing the first remedy, counsel for the applicant argued that all of the information requests in question are relevant, that they relate directly to matters in regard to the “needs for and alternatives to” the project (NFAAT). Counsel argued that the Terms of Reference issued to the Clean Environment Commission are very clear that NFAAT issues are to be reviewed in the public hearings.

The applicant dismissed suggestions by the proponent’s counsel that the Commission seek a clarification of the Terms of Reference from the Minister. The applicant argued that there is no ambiguity in the terms of reference and, thus, no need for clarification.

In his response, counsel for Manitoba Hydro argued that the Minister did not specifically ask the Commission to investigate matters relating to NFAAT. He argued further that, if

the panel were to engage in considering NFAAT matters, it would be at the expense of environmental issues, which he stated is our area of expertise.

The conflicting positions presented on this matter made it clear to the panel that a clear and wide divide exists among parties on the matter of reviewing NFAAT matters during the hearings.

While an NFAAT consideration is a requirement of environmental reviews conducted under the federal *Canadian Environmental Assessment Act*, it is not required by provincial statute and has not been a part of provincial reviews.

The one exception to this was the review process for the two Wuskwatim projects – the generating station and the transmission line. Rather than subject the projects to two separate and potentially lengthy reviews, it was decided to have a joint Clean Environment Commission-Public Utilities Board review, with members of both bodies sitting on the review panel. The Terms of Reference issued by the Minister specifically stipulated reviews of both NFAAT and environmental matters.

Wuskwatim was a distinct, one-time process. The Clean Environment Commission, in stand-alone hearings, has not undertaken NFAAT reviews.

In order to resolve this divide among the parties, the panel elected to write to the Minister seeking clarification as to his intent in regard to the Commission's review of NFAAT, as it relates to Bipole III.

The Minister has responded that it was not his intention that we engage in an NFAAT review.

Accordingly, the first remedy sought is not granted.

The second remedy sought by this applicant asked for an adjournment of sufficient time to allow for the completion, receipt and analysis of certain information. Co-counsel for the applicant, in arguing this matter, spoke of the large scale of the project, the large amount of information filed and the tight timeframes for the participants to prepare prior to the commencement of the hearings.

This argument shares some elements of that put forward by the Consumers' Association of Canada.

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.

During the course of the hearings, the applicant, along with all of the other 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 there remain unanswered, relevant questions, 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 in regard to the second remedy is to dismiss the application and to confirm that the hearings will commence on October 1, 2012.

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 expressed by the applicant 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 or Direction of the CEC to Manitoba Hydro to respond to those Information Requests submitted to the CEC by the Coalition on July 19 and 20, 2012, as listed in attachment A to this Motion, the decision is to dismiss; and

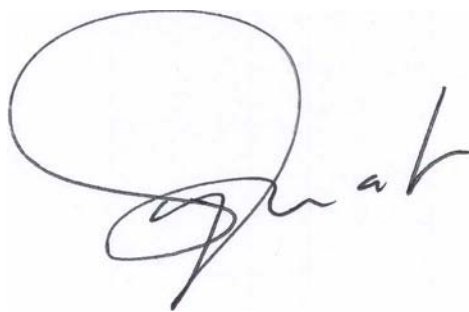
On the application for an adjournment of the Hearing scheduled to commence on October 1, 2012 to a date sufficient to enable the Information Requests to be answered; a second round of Information Requests to be submitted by the participants and answered by Manitoba Hydro; and, expert reports to be prepared in time before the commencement of the hearing; in accordance with the schedule, in attachment B to this Motion, 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 29<sup>th</sup> day of August, 2012.

MANITOBA CLEAN ENVIRONMENT COMMISSION

A handwritten signature in black ink, appearing to read "Terry Sargeant", is written over a light blue rectangular background.

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Terry Sargeant, Chair

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



August 20, 2012

Honourable Gord Mackintosh  
Minister of Conservation  
Room 330 Legislative Building  
Winnipeg, MB R3C 0V8

Dear Minister:

I am writing to seek clarification with respect to the Terms of Reference for the Manitoba Hydro Bipole III Transmission Line Project, specifically in regard to the review of the “need for and alternatives to” the project (NFAAT).

On August 16, 2012, the Commission considered motions presented by registered-Participant groups in advance of the hearings. During the presentation of positions, it became apparent that a clear and wide divide exists among Parties as to how deeply the Clean Environment Commission should go in reviewing NFAAT matters during the hearings.

On the one side, the Proponent, Manitoba Hydro, is of the view that, since the Terms of Reference issued to the Commission in December 2011 do not specifically identify a review of NFAAT, the Commission has no authority to enter into such considerations.

On the other side, at least two Participants are of the view that the NFAAT review should be a full PUB-style deliberation, considering whether or not the project is necessary.

Both sides may be looking to the Wuskwatim review in 2004 as an example.

The Wuskwatim project involved two separate, but obviously connected, proposals: the generating station and a transmission line. In an effort to streamline the regulatory process, it was decided that, rather than subject the projects to separate and potentially lengthy reviews by both the Public Utilities Board and the Clean Environment

Commission, the two would be combined into one proceeding. To that end, two members of the PUB were cross-appointed to the CEC. Terms of Reference were issued by the Minister of Conservation, which specifically addressed both sides of the review.

The Participants may be of the view that the Wuskwatim precedent is the “new normal”, calling for a full-NFAAT review; while Hydro takes the view that, in the absence of specific directions on NFAAT as in Wuskwatim, there should be no such review at all.

While an NFAAT consideration is a requirement of environmental reviews conducted under the federal *Canadian Environmental Assessment Act*, it has not been a part of provincial reviews. Except for the Wuskwatim example, the Commission, in past proceedings, has not undertaken NFAAT reviews.

The Panel is caught in a dilemma on this issue. In order to resolve this, we ask that you clarify your intent in regard to the Commission’s review of NFAAT, as it relates to Bipole III.

Minister, time is of the essence. Without resolution of this matter in short order, there could be significant impacts on the scheduled hearing and its timely completion. It will be necessary to issue decisions on the August 16 motions by the end of this week.

Sincerely,

*Original signed by*

Terry Sargeant  
Chair

cc: Bipole Panel



AUG 23 2012

MINISTER OF  
CONSERVATION AND WATER STEWARDSHIP

Legislative Building  
Winnipeg, Manitoba, CANADA  
R3C 0V8

August 23, 2012

Mr. Terry Sargeant  
Chair  
Clean Environment Commission  
305-155 Carlton St.  
Winnipeg MB R3C 3H8

Dear Mr. Sargeant:

Thank you for your August 21, 2012 letter requesting clarification of the Terms of Reference for the CEC's review of Manitoba Hydro's Bipole III Transmission Line Project. In response to your specific question about a Needs For And Alternatives To (NFAAT) review, the Terms of Reference, which were issued in December 2011, do not include instruction for the CEC to conduct an NFAAT.

I trust this clarifies this matter.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Gord Mackintosh".

Gord Mackintosh  
Minister

CC. Fred Meier  
Dan McInnis  
Tracey Braun