Canadian Institute of Resources Law
Institut canadien du droit des ressources

Energy and Utility Regulation in Alberta: Like Oil and Water?

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Abstract

Since establishing the Alberta Board of Public Utility Commissioners (PUB) in 1915, Alberta's approach to energy resource and utility regulation has evolved in response to various pressures and perceived needs. For the most part, regulation of the energy resource and utility sectors has been carried out separately and independently by sector specific entities. Energy resource and utility regulation continued to be carried out independently one from the other even during the period of time when those functions were merged under the Alberta Energy and Utilities Board (AEUB).

At the end of 2007, the AEUB was dissolved and separate energy resource and utilities regulators — the Energy Resources Conservation Board (ERCB) and the Alberta Utilities Commission (AUC) — were reconstituted. This most recent evolutionary step in energy resource and utility regulation in Alberta raises many questions and while this paper does not provide conclusive answers, it is intended to provide a basis for better understanding the respective roles of energy and utility regulation in Alberta. To that end, this paper begins with a brief, high level discussion of the theory of regulation then provides the following: an overview of the history of energy resource and utility regulation in Alberta; a description of key phases in energy resource and utility regulation in Alberta; an assessment of the significant characteristics of the energy resource and utility regulators as they existed at the time of the 1995 merger; an examination of the policy and regulatory context for the 1995 merger of the PUB and the ERCB as well as for the 2008 split of the AEUB; and, finally, a discussion of some areas of potential strength and weakness in the current two-board model.

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Table of Abbreviations

AGS	Alberta Geological Survey
AUC	Alberta Utilities Commission
ERCB	Energy Resources Conservation Board
NAFTA	*North American Free Trade Agreement*
NEB	National Energy Board
NEP	National Energy Program
NGTL	NOVA Gas Transmission Ltd.
OGCB	Oil and Gas Conservation Board
PNGCB	Petroleum and Natural Gas Conservation Board
PUB	Alberta Board of Public Utility Commissioners
TVCGB	Turner Valley Gas Conservation Board

1.0. Introduction

Alberta has a history of public utility regulation dating back to 1915 when the Alberta Board of Public Utility Commissioners (PUB) was created. Energy resource regulation, specifically oil and natural gas conservation, dates back to 1932 when the Turner Valley Gas Conservation Board (TVCGB) was created. From the time the PUB was first established, Alberta's approach to energy and utility regulation has evolved in response to various pressures and perceived needs. Over time, the boards and their successors have taken on differing, and in the case of the PUB often wide ranging, responsibilities and different forms as provincial governments of the day saw fit.

After having regulated Alberta's utilities and the development of Alberta's energy resources separately and independently since their inception, all of the functions of the PUB and the Energy Resources Conservation Board (ERCB — whose roots go back to the TVCGB) were merged in 1995 under the Alberta Energy and Utilities Board (AEUB). In 2007 the Government of Alberta announced that, effective 1 January 2008, the AEUB would be split into energy and utility components to (re)form the new ERCB and the Alberta Utilities Commission (AUC).[1]

This most recent evolutionary step in energy resource and utility regulation in Alberta raises many questions, in particular: what was the driving factor in the re-creation of the new ERCB and the AUC, was it external forces or internal policy shift? Was it simply an admission that the 1995 merger was a mistake?[2] Was it some combination of the foregoing or was the recreation of the new ERCB and the AUC simply a political decision? When the AEUB was formed in 1995, the primary reason given for the merger was the government's desire to restructure the Energy Ministry to create a more streamlined regulatory process.[3] An additional reason given was that there were gaps and overlaps in energy resource regulation that were best addressed by merging the two existing regulators.[4] Did the merger fail to effectively address those concerns? Is the re-creation of the new ERCB and the AUC consistent with good regulatory theory and practice? Will the implementation of the split lead to gaps or areas of overlap and/or uncertainty in jurisdiction?

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[1]Throughout the balance of this paper, references to the PUB or the AUC should be read to mean the relevant utilities regulator or regulators and references to the ERCB or the "Conservation Boards" should be read to mean the ERCB and/or its predecessors as the context requires. The phrase "new ERCB" will be used to distinguish the re-created Conservation Board from its original incarnation.

[2]Deborah Yedlin, "Relief, cynicism greet energy board split-up" *Calgary Herald* (18 April 2007).

[3]Alberta, Legislative Assembly, *Hansard* (28 February 1994) at 290-291 (The Hon. Patricia Black).

[4]Alberta, Legislative Assembly, *Government Bills and Orders Second Reading Bill 15 (Hansard)* (25 April 1994) at 1408.

While this paper does not and cannot purport to provide conclusive answers to all of these questions, in reviewing the history of energy and utility regulation in Alberta and examining in more detail the context for the 1995 merger and the re-creation in 2008 of a separate utilities regulator and an energy resource development regulator, it is intended to provide a basis for better understanding the respective roles of energy and utility regulation in Alberta. Against the backdrop provided by this paper, a subsequent paper will examine the current roles of the new ERCB and the AUC and how those boards can be used to implement the province of Alberta's recently released energy strategy.[5]

The balance of this paper is devoted to the following: a brief, high level discussion of the theory of regulation; an overview of the history of energy resource and utility regulation in Alberta; a description of key phases in energy resource and utility regulation in Alberta; an assessment of the significant characteristics of the energy resource and utility regulators as they existed at the time of the 1995 merger; an examination of the policy and regulatory context for the 1995 merger of the PUB and the ERCB as well as for the 2008 split of the AEUB; and finally, a discussion of areas of potential strength and weakness in the current two-board model.

2.0. Theory of Regulation

Governments implement regulation for a variety of reasons. Those that are most relevant to utility and energy regulation in Alberta are: to control market power in a sector; to facilitate competition and/or stabilize markets during a transition to competition;[6] and to ensure that participants in a sector behave in a manner consistent with the government's interests.

Traditional utility regulation, such as that implemented by the PUB since its inception, is rooted in the first reason. Since the electric industry restructuring initiative commenced in 1995, the second reason has also been at the heart of AEUB and now

[5]Alberta Department of Energy, *Launching Alberta's Energy Future: Provincial Energy Strategy* (Edmonton: December 2008) online: <http://www.energy.alberta.ca/Org/pdfs/AB_ProvincialEnergyStrategy.pdf> [Strategy].

The Strategy is described as a comprehensive plan that supports the government's priority of ensuring that our energy resources are developed in an environmentally sustainable way. The Strategy identifies clean energy production, wise energy use and sustained economic prosperity as the desired outcomes of its implementation. Among the tools to be employed to achieve those outcomes, the Strategy identifies many actions to be taken and they include ensuring an integrated approach to development of energy resources (in the context of addressing the environmental footprint) and ensuring "alignment" by introducing changes to ensure policy, regulatory and institutional alignment with the energy strategy.

[6]Whether for the purpose of actively managing commodity supply or pricing, or during a transition to competition.

AUC regulation of the electric utility sector.[7] The primary responsibility of the PUB has always been setting and approving rates for services provided to the public. Public utility pricing refers to "the setting of prices for goods and services in order to maximize the benefit to the community" where such pricing could not be carried out in normal market conditions.[8] In addition to securing the opportunity to earn a fair return on its investment, the regulatory compact requires that the utility must also be able to attract capital. The regulator, in this case the PUB/AUC, bears the responsibility of balancing the competing interests of the regulated service provider and its ratepayers.

Regulation of the Alberta petroleum industry by the Conservation Boards has always been motivated by the second and third reasons: the rapacious behavior of oil and gas companies exploiting the Turner Valley field[9] being a prime example of how the behavior of participants in the new, unregulated oil and gas sector diverged from both the government's and the public interest. The Conservation Boards have always operated under a form of command and control model whereby the regulator administers as well as establishes rules and regulations governing the conduct of operations in its sector. The competing interests balanced by the Conservation Boards are those of operators, Albertans generally (in the appropriate development of the province's energy resources), landowners directly affected by oil and gas activity, and other affected stakeholders.

Under the energy resource regulatory regime in Alberta, the regulatory compact between a regulator, the regulated entity and its customers is not present. It is fair to say that energy resource developers are part of a broader social contract whereby they get the opportunity to explore for and develop energy resources in Alberta in return for benefits created by such economic activity as long as they comply with applicable regulation.[10] By contrast with the utilities, while the form and extent of regulation may affect operators' ability to attract capital, the entities subject to conservation board regulation have no assurance of earning a fair or any return on their capital investment as a result of regulation.

Finally, normative theories of regulation conclude that, among other things, regulation should be established in a manner that improves economic efficiency and

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[7]It should be noted that while electricity sector restructuring required and continues to require significant regulatory effort, deregulation of the natural gas sector was accomplished without a detailed regulatory framework.

[8]H. Hotelling, "The General Welfare in Relation to Problems of Taxation and of Railways and Utility Rates" (July 1938) 6:3 Econometrica at 242-269.

[9]For example, it has been estimated that approximately 6,000,000 m^3 per day of natural gas was flared at Turner Valley for a decade before successful regulatory intervention: see, AEUB, *2004 Year in Review* (Calgary: 2005) at 6.

[10]It is also fair to say that the social contract now requires that energy resource developers go above and beyond mere compliance.

results in processes that are independent, transparent, predictable, legitimate and credible.[11] As will be discussed later, it may be that concerns about the credibility, transparency and legitimacy of certain AEUB processes were a contributing factor to the decision to revert to the two board model, or at least to the timing of the implementation of that decision.

3.0. History of Energy Resource and Utility Regulation in Alberta

3.1. An Overview

The predecessors to the new ERCB and the AUC have a history dating back to 1915 with the creation of the original PUB. That board's primary responsibility was to regulate utility rates and service.[12] The short-lived TVGCB was established in 1932 with the mandate to implement conservation measures and impose order on the out-of-control exploitation of the Turner Valley field.[13]

In order to fully consider the creation of the new ERCB and the AUC in the context of energy and utilities regulation and policy in Alberta, a chronology of energy resource and utility regulation in Alberta, with highlights of relevant energy sector developments, is set out below.

Chronology[14]

1882 Oil sands along the Athabasca River examined for development potential.

[11]Public Utility Research Center, University of Florida, "The Body of Knowledge on Utility Regulation" at Chapter 1: Theories of Regulation, online: <http://www.regulationbodyofknowledge.org/print/1/narrative/6/>.

[12]AUC, "History — Items of Interest", online: <http://www.auc.ab.ca/about-the-auc/who-we-are/Pages/history.aspx> [AUC "History"].

[13]David H. Breen, *Alberta's Petroleum Industry and the Conservation Board* (Edmonton: University of Alberta Press, 1993) at 653.

[14]Sources: Breen, *ibid.* at 651-662; Keith F. Miller *et al.*, "Recent Legislative, Regulatory and Environmental Developments of Interest to Oil and Gas Lawyers" (1995-96) 34 Alta. L. Rev. **738** at 744-745; Michael J. Bruni, Q.C., "The New ERCB" (2008 CAPP Environmental Seminar, 21 January 2008), online: <http://membernet.capp.ca/raw.asp?x=1&dt=NTV&e=PDF&dn=131975>; AUC "History", *supra* note 12; Alberta Energy, "Energy's History in Alberta", online: <http://www.energy.alberta.ca/About_Us/1133.asp>; ERCB, *Conservation in Alberta – 1971* (Calgary: 1972); J. Owen Saunders & Jenette Poschwatta-Yearsley, eds., *Canadian Energy Law Service – Alberta* (Toronto: Carswell, 2007) at 30-3101 – 30-3103; ERCB, *Energy Alberta 1995* (Calgary: 1995).

1883 First discovery of natural gas in Alberta.

1902 First oil well drilled and produced in Alberta near Waterton Lakes.

1914 First oil discovery at Turner Valley sparks an oil boom.

1915 The PUB was created. As utility services in the province are relatively limited and demand is low, the Board is given broad ranging jurisdiction including supervision of debentures issued by municipalities, approval of tariffs for provincial railways and the regulation of the sale of shares and other securities in the province. The Board also regulates the rates of Alberta Government Telephones. Its earliest, primary responsibility is the regulation of the tram and street railway "in the public interest".[15]

1924 Royalite deep gas discovery at Turner Valley spurs renewed exploration efforts.

1926 Federal Minister of the Interior issues gas conservation regulation with no enforcement procedure.

1930 Prairie Provinces given jurisdiction over their natural resources, including oil and gas.

1931 City of Calgary applies to PUB for a reduction in natural gas rates bringing to a head the issue of waste of natural gas occurring at Turner Valley field.

1931 Alberta makes first regulations under new *Oil and Gas Wells Act, 1931*.

1932 Turner Valley Gas Conservation Board established to address the waste gas problem in the Turner Valley field; however, due largely to industry resistance, TVGCB proved wholly ineffective and was disbanded within two years of being established.[16]

1932 First TVGCB order issued and subsequently challenged by Spooner Oils.

1933 Supreme Court of Canada decides Spooner case finding that the province did not have the jurisdiction to enforce conservation measures on certain lands.

1933 Milk declared a public utility and PUB given authority to regulate milk production and pricing. In particular, PUB set the minimum wholesale price for milk.

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[15]Breen, *ibid.* at 124; and Bernard Taverne, *Petroleum Industry and Governments: A Study of the Involvement of Industry and Government in the Production and Use of Petroleum*, 2d ed. (The Netherlands: Kleuwer Law International, 2008) at 58-59, 86-87.

[16]Breen, *ibid.* at 79-95.

1933/1934 Alberta's request for federal action to enforce conservation measures rejected.

1936 PUB given jurisdiction to regulate and licence fuel dealers in the province. Combined weight of fuel oil licensing and milk regulation a significant burden on Board resources.

1937 PUB relieved of some of its non-utility responsibilities although an increase in exploration and development activity in Turner Valley increased burden of securities regulation, a non-utility responsibility it retained.

1938 Petroleum and Natural Gas Conservation Board (PNGCB) established to implement conservation measures for province's oil and gas resources (i.e. not just Turner Valley) and to ensure orderly development of those resources.

1938 PUB retains responsibility for oil pipeline regulation. Due to fact that only 5% of farms receive electric service and many towns and villages receive only part-time service, electric utility regulation remains only a small part of the Board's work.

1942 Wartime Prices and Trade Board increases PUB's jurisdiction over milk price regulation.

1944 Alberta Natural Gas Utilities Board created with responsibility to fix prices for the purchase of gas by the public utility created under the same legislation. The Board is created to address concerns over the monopolization of the local natural gas market and the waste of Turner Valley natural gas that is unable to access local markets as a result. The Board consists of the Chairmen of the PUB and the PNGCB. Natural Gas and Utilities Board is also given authority to regulate construction and operation of pipelines and other infrastructure required to gather, process and transport natural gas within Alberta.

1947 Leduc discovery marks transformation of oil and gas industry in Alberta to a "major national industry with international markets."[17]

Post-Leduc period sees rapid expansion of PNGCB field offices.

1949 Responsibility for approving provincial pipelines transferred from Department of Public Works to the PNGCB.

1950 *Oil and Gas Resources Conservation Act* regulations are updated to keep pace with unprecedented industry development since the discovery of

[17] "Time of Transition" at 2.

Leduc. Act rewritten to "consolidate regulatory authority firmly in the embrace of the Conservation Board".[18] Board is given significant, general regulation-making authority.

1954 *Alberta Gas Trunk Line Company Act* passed giving the PUB jurisdiction to prescribe rates for natural gas transportation on a complaints basis. First complaint is not filed with the Board until 1971. The Act creates a single, privately owned, integrated, province-wide gas gathering system

1957 Provincial oil and gas conservation legislation refined and the PNGCB renamed the Oil and Gas Conservation Board (OGCB).

1958 *The Pipeline Act, 1958* places pipelines under jurisdiction of the Department of Mines and Minerals and establishes requirements for permits to construct and licences to operate pipelines in Alberta.

1959 Following the recommendation of the (federal) Borden Commission, the NEB is created and given regulatory authority over export and import of natural gas and electricity, as well as administrative responsibility for the federal *Pipe Line Act*.

1960 *Gas Utilities Act* is introduced, to be administered by PUB. The 1960's saw an increase of 66% in utility customers in the province.

1960 OGCB recommends approval of the Great Canadian Oil Sands project.

1969 Alberta Milk Control Board established, relieving the PUB's entire jurisdiction over milk except the power to set minimum prices — which it held until August 2008.

1970 Board of Arbitration (now the Surface Rights Board) formed, relieving the PUB of jurisdiction over expropriations.

1971 Upon completion of a review of the areas of government responsibility related to energy resource development, including petroleum, coal and hydro electricity, the *Energy Resources Conservation Act* is passed renaming the OGCB as the ERCB. Pursuant to that Act and the new *Hydro and Electric Energy Act*, the ERCB's role is expanded to include conservation and development of hydro and electric energy resources as well as coal. In the words of the ERCB, its responsibilities now "span the energy resources of Alberta and energy generation and transmission."[19]

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[18]Breen, *supra* note 13 at 306-307.

[19]ERCB, *Conservation in Alberta — 1971*, *supra* note 14 at 3-4. The initiative for the expanded role of the OGCB came from the suggestion by the cities of Edmonton and Calgary that Alberta's requirements for all forms of energy and energy resources ought to be reviewed as a whole and their development coordinated. At the instigation of the cities, a government review of the areas of provincial government

1971 Government of Alberta establishes a Department of the Environment for the first time.

1973 Global oil price shock triggers process of globalization of oil markets.

1975 Oil markets become open, freely accessible and global. Prices for Canadian oil still set by the NEB.

1980 ERCB and Department of the Environment meet to improve liaisons and to identify ways to avoid/minimize overlap in environmental review.

1980 National Energy Program (NEP) introduced implementing, among other things, new, blended pricing for western Canadian petroleum.

1982 Lodgepole blowout results in heightened public concern about sour gas development.

1982 *Electric Energy Marketing Act* requires PUB to set price at which electric utilities can sell electricity to the Electric Energy Marketing Agency with a view to equalizing electrical rates throughout the province.

1985 Western Accord results in deregulation of crude oil prices in Canada and an end to the NEP.

1986 Natural gas pricing is deregulated pursuant to federal-provincial agreement.

1989 *North American Free Trade Agreement* (NAFTA), in force, opening continental energy markets.

1992 ERCB facing ever increasing workload due to suspended, aging and expanding energy facilities and identifies pressure from interest groups and long-term budget constraints as challenges.[20]

1992 *Energy Resources Conservation Amendment Act, 1992* amends existing legislation to give the ERCB more comprehensive powers to cooperate with governmental or other regulatory agencies. Specifically, Board is given power to "conduct a hearing, inquiry or investigation … jointly or in conjunction with another board or commission or other body constituted in Alberta."[21]

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responsibility for energy resources was undertaken and certain gaps were identified with respect to some energy resources. In particular, an increased role was identified as being necessary in energy resource management and in the control of the environmental impact of energy developments. A need for coordination of appraisals and development programs was also identified.

[20]ERCB, *Into the Next Century* (Calgary: 1992) at 1.

[21]Donald MacDiarmid, Patrick Maguire & Shawn Denstedt, "Recent Legislative and Regulatory Developments of Interest to Oil and Gas Lawyers" (1994) 32 Alta. L. Rev. 380.

1992 Provincial government discussion paper assesses regulatory framework for the electric power industry, including whether steps are needed to address areas of overlap/gaps in PUB and ERCB jurisdiction over electric industry.[22]

1992 UN Conference on Environment and Development — more than 160 nations, including Canada, adopt sustainable development philosophy under the UN Framework Convention on Climate Change and agree to begin limiting greenhouse gas emissions.

1993 Government (of Alberta) wide review of regulation commences with a view to streamlining regulation in light of long term budget constraints.

1993 Alberta *Environmental Protection and Enhancement Act* proclaimed establishing formal environmental impact assessment process applicable to many energy sector projects/activities.

1994 Alberta establishes Department of Environmental Protection.

1994 Provincial Energy Minister announces a ministry-wide restructuring including amalgamation of the ERCB and the PUB.[23] Responsible government authorities indicate that the move is driven by need for long-term fiscal restraint and is intended to create a more streamlined and efficient ("one-window") regulatory process.

1994 "Fundamental changes" in energy regulation announced in light of dual challenge of significant increase in activity and streamlining to meet budget targets.[24] Changes placed onus on the oil and gas industry to take more responsibility, independent of the regulator, to know and comply with the myriad of regulatory requirements and to self-police. In the words of the Board, "Since the inception of the Conservation Board in 1938, Alberta's regulatory regime for energy development has involved close interaction between industry and the Board."[25] Now it would involve less.

1995 ERCB and PUB are functionally merged forming the AEUB. AEUB assumes jurisdiction of each of the PUB and the ERCB under their respective enabling statutes. ERCB and the PUB continue to exist as separate legal entities. The legislation they administer remains intact.

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[22]Janet Keeping, *A Citizen's Guide to the Regulation of Alberta's Energy Utilities* (Calgary: Canadian Institute of Resources Law, 1993) at 67.

[23]ERCB, *Energy Alberta 1994* (Calgary: 1995) at 5.

[24]*Ibid.* at 6.

[25]*Ibid.*

1995 *Electric Utilities Act* proclaimed to bring about restructuring of the electric energy industry in Alberta. Purposes of the new legislation include the establishment of a framework for a competitive electricity market that minimizes the cost of regulation and provided incentives for efficiency. The Act also introduces a negotiated settlement process permitting stakeholders to seek agreement on matters within the Board's jurisdiction and present negotiated settlements to the AEUB for approval. Finally, the Act requires unbundling of electric energy services by function: specifically, generation, transmission and distribution.

1995/1996 Alberta Ministry of Energy begins initiative to implement integrated resource decision making.

1996/1997 *Gas Utilities Act* amended to allow for approval of incentive based tolls.

1996/1997 AEUB implements organizational and structural changes in response to ongoing budget pressures and customer feedback.[26]

1997 Kyoto Protocol established.

1998 Three independent bodies, the Power Pool, Transmission Administrator and Market Surveillance Administrator, established to ensure "open and competitive access" to the electricity market in Alberta.

1998 Landowner concerns regarding oil and gas industry activity a leading concern. Both industrial sabotage and the shooting of an oil industry executive take place during the year.[27] Restructuring and streamlining of the AEUB ongoing.[28]

1998 AEUB introduces negotiated settlement process guidelines for tolls, tariffs and conditions of service.[29]

1998/1999 AEUB implements guidelines for negotiated settlement processes for utility rate applications.

1999 Alberta Department of Energy is reorganized and renamed Department of Resource Development with responsibility for oil, gas, electricity, forestry and rural utilities.

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[26]Alberta Ministry of Energy, *1996/1997 Annual Report*.

[27]Alberta Ministry of Energy, *1998/1999 Annual Report*, at 2.

[28]Alberta Ministry of Energy, *1997/1998 Annual Report*.

[29]*Ibid.*

2001 Alberta Department of Resource Development becomes Department of Energy.

2001 AEUB no longer regulates wholesale electricity prices and consumers can choose own electricity retailer.

2003/2004 In recognition of the larger role played by oil sands in Alberta's energy future, the AEUB opens a regional office in Fort McMurray.[30]

2003/2004 In spite of "record levels of activity", the average turn-around time for routine facility applications is down.[31]

2004 AEUB commences regulating distribution and default electricity rates for EPCOR and ENMAX.

2006 Ministry of Energy introduces vision for integrated development of Alberta's energy resources. The vision for integration is "… about maximizing value from Alberta's vast resources and world-class expertise, positioning Alberta as a globally recognized energy supplier, using an environmentally responsible approach to energy development and meeting the expectations of Albertans as owners of their energy resources."[32] "Integration means that energy projects and commodities are not treated on a standalone basis, but as part of a larger energy scenario."[33]

2007 With no fanfare, no department-wide reviews, no hint in either the relevant Ministry of Energy three year business plans or the annual plans of either of the affected regulators, the Minister of Energy announces the split of the AEUB into a new ERCB and an AUC. The split is to be implemented through the new *Alberta Utilities Commission Act*. In the government press release the Minister of Energy says: "This bill will help ensure our regulatory system can effectively manage growth pressures and provide all Albertans with access to a robust regulatory authority as we develop our resource and utilities system."[34]

[30]Alberta Ministry of Energy, *2003/2004 Annual Report*, at 42.

[31]*Ibid.* at 50.

[32]Alberta Ministry of Energy, *2006/2007 Annual Report*, at 5.

[33]*Ibid.* at 14.

[34]Government of Alberta, News Release, "Managing Growth Pressures" (14 June 2007).

2008 The AEUB is dissolved and its powers reallocated to the new ERCB and the AUC. The new ERCB will "focus exclusively on the responsible development of Alberta's energy resources."[35] The AUC will oversee electricity and natural gas distribution and sale to consumers in Alberta and will make decisions regarding new electricity transmission facilities.

2008 Market Surveillance Administrator's investigative powers strengthened, findings to be taken to the AUC for final determination.

2008 Office of the Utilities Consumer Advocate is relocated to the AUC and given an expanded mandate to include: representation of small electric and natural gas consumers at regulatory proceedings and canvassing of views of Albertans on utility matters.

2008 The AUC retains some of the PUB's powers over diverse matters including determination of compensation to be paid to ambulance service providers[36] and compensation paid to owners of businesses affected by a loss of access due to city approved work.[37]

A cursory review of the chronology reveals that Alberta has employed economic regulation since the early 20th Century to protect the interests of producers and consumers of goods that are considered public necessities (e.g. milk, public transportation, heating fuel, electric energy). The chronology also reveals that after a rocky start, successive Alberta governments have consistently delegated oversight and management of the development of Alberta's oil and gas resources to the Conservation Boards, all within the context of ever-changing and evolving economic, political and technological environments.

For the purposes of this paper, the difference between how Alberta has approached utility regulation and energy resource (specifically oil and gas) regulation is important. The former has followed a more traditional public utility regulation model from its initial implementation with an arm's length, adjudicator — party relationship between the regulator and the utilities it regulates. The regulatory philosophy underpinning the PUB's jurisdiction has been the need for government to ensure that prices were set for public goods and services in a manner that protects consumers from the effects of unfair, or no competition while fulfilling the regulatory compact with the providers of those goods or services.[38]

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[35] *Ibid.*, "Backgrounder".

[36] *Ambulance Services Act*, R.S.A. 2000, c. A-39, s. 38.

[37] *City Transportation Act*, R.S.A. 2000, c. C-14, s. 57.

[38] In the case of milk, the PUB's role included providing price assurance for producers.

The regulatory philosophy that initially drove the creation of the TVGCB was that the interests of the Alberta government and oil and gas operators were not aligned.[39] Successive Conservation Boards followed a model of regulation that had the Board in the roles of manager of petroleum resource development; command-and-control director for day to day operations; policy maker through its broad regulation making powers and information gathering responsibilities; and, finally, independent adjudicator of disputes. What is most striking about the consecutive Conservation Boards from their initial incarnation as the TVGCB, has been their collaborative,[40] hands-on approach to the regulation of the development of oil and gas resources in Alberta.

Finally, one of the things that stands out from the chronology is that the regulation of utilities and of energy resources have largely progressed independently one from the other. Indeed, as will be discussed later in this paper, even after the merger of the ERCB and the PUB in 1995, the myriad of legislation administered by the AEUB maintained a clear and distinct separation between energy resource management and utility regulation.

3.2. Key Phases of Energy Resource and Utility Regulation

The chronology also reveals some relatively distinct phases of energy resource and utility regulation in Alberta.

Broadly speaking, energy resource regulation in Alberta has always been subject to and sometimes shaped by external pressures: whether as a result of federal/provincial jurisdictional issues; the evolution of Canadian, continental and world markets for energy commodities; or increasing concerns about the environmental impact of energy resource development. Utilities regulation, on the other hand, has been largely focused on the specific task of price/rate setting within Alberta until relatively recently.

The first phase of energy resource regulation in Alberta was one of neglect. Until 1930, when the Prairie Provinces were given control over their natural resources, the federal government had the exclusive jurisdiction to regulate energy resources in Alberta but did not take any steps to do so.[41] The effects of the federal government's failure to regulate the exploitation of energy resources in Alberta during that early period were

[39]Specifically, operators, left to their own devices, showed that their primary, if not sole, concern was maximizing short-term profits whereas the government was concerned about ensuring that provincial petroleum resources were developed to their fullest potential over the longer term.

[40]Alastair R. Lucas, "Alberta's Voluntary Approach to Climate Change" in G. Bruce Doern, ed., *Canadian Energy Policy and the Struggle for Sustainable Development* (Toronto: University of Toronto Press, 2005) at 301-302 and 305.

[41]Keith Brownsey, "The New Oil Order: The Post Staples Paradigm and the Canadian Upstream Oil and Gas Industry" (June 2007) 1:1 Canadian Political Science Review 91 at 94-95.

manifest in the precipitous depletion of reserves in the Turner Valley field. As soon as it was able to do so, and in an attempt to bring order and conservation measures to bear on the early oil and gas industry in Alberta, the Alberta government established the TVGCB. That board attempted, unsuccessfully, through concerted efforts in the field and the offices of those it was to regulate, to convince all of the players involved of the value in conservation measures and to accept the TVGCB's enforcement of conservation orders.[42]

After the TVGCB was disbanded and prior to the discovery of Leduc, the principal focus of regulation of the energy resource sector in Alberta was the introduction of oil and gas conservation measures. Throughout the earliest efforts to implement conservation through regulation, due to the need to get buy-in to the concept of conservation from all of the players[43] and due to a policy of minimizing direct intervention,[44] the Conservation Boards took a very cooperative and consensual approach to their mandate spending significant time and effort working directly with industry and developing a collaborative approach to regulation that continues to this day.

The next phase of regulation of the petroleum sector in Alberta was the post-Leduc phase, which was notable for technical advances at all stages of the petroleum industry, from upstream to downstream, and for the significant increase in exploration activity throughout the province. During this phase, the Conservation Board focused on making new rules and regulations that better reflected the state of the industry, such as the development of a maximum permissible rate of production for oil wells.[45] As with most Conservation Board rules, these rules were made after consultation with stakeholders, although over time, the scope of those persons considered to be "stakeholders" has broadened considerably.[46]

During this phase of maturation of the petroleum industry, the Conservation Board continued the practice of maintaining a collaborative approach to regulation, with significant interaction and consultation with the players both in the field and in the office.[47] Throughout this period, the overarching policy objective remained orderly development of Alberta's oil and gas resources to ensure their fullest possible utilization for the benefit of the province. Of particular importance during this phase was the transfer from the provincial cabinet to the Board of the power to make regulations

[42]*Ibid.*

[43]There was reportedly significant conflict between Imperial Oil and the smaller local players in the nascent oil patch in Alberta. *Ibid.*

[44]Breen, *supra* note 13 at 543.

[45]Breen, *ibid.* at 294-296.

[46]From those subject to regulation to those subject to board regulation as well as those who may be affected by regulated activity undertaken by those subject to board regulation.

[47]Lucas, *supra* note 40.

governing the drilling, completion and abandonment of wells. In addition, the Conservation Board was given the authority to "make such just and reasonable orders and regulations … to effect the intent, purpose and object of the Act."[48]

This brings us to the 1970s which were characterized by the energy price shocks that triggered events leading to the globalization of oil markets and, in Canada, to the NEP. In Alberta, the 1970s saw the first formal recognition of the environment and environmental issues as a subject requiring explicit government attention by way of the creation of a Ministry of the Environment.

From the time of its creation in 1915 until the 1970s, it appears as though the PUB was treated as a catch-all for any form of utility regulation or price setting in the province. During that period of time, the biggest impacts on the PUB seem to correspond to increases in its energy utility work resulting from urbanization and growth in utility service throughout the province. In the 1970s, the PUB became focused on traditional economic regulation of energy utilities as some of the other responsibilities it had held for milk and expropriations were reallocated to other entities. It is interesting to note that its original powers in respect of energy utilities remained "virtually the same"[49] as in 1915.

The 1980s brought a collapse in world oil prices, the signing of the Western Accord and an end to the NEP. The 1980s also saw the ratification of NAFTA. As a result of NAFTA, Canadian energy markets now had guaranteed access to, and became integrated with, the larger continental energy markets.[50] As crude oil prices were deregulated, the ERCB no longer prorationed oil. A provincial government policy was adopted that directed that electric utility customers should pay the same price for electricity no matter where they were located in the province. Consequently, during this phase, the PUB was called upon to implement equalization of electricity rates throughout the province.

Finally, in the 1990s and early 2000s, while each sector in the energy industry faced its own issues, there were significant, potentially transformative issues that came to bear on the energy industry as a whole. Those issues were: an increasing emphasis on and demands for environmental protection; the introduction and implementation of sustainable development policy; increased public activism and participation in regulatory processes; increasing landowner — resource developer conflicts; uncertainty about the impact of the implementation of the Kyoto Protocol; declining conventional reserves; increasing efforts to locate and develop unconventional sources such as coal bed

[48]Breen, *supra* note 13 at 307.

[49]*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, LEXUM 2006 SCC 4 at para. 57 [*ATCO Gas & Pipelines Ltd.*].

[50]*Ibid.* at 100.

methane; and heightened concern on the part of significant energy consuming nations about security of supply.[51] Those concerns remain driving forces today.

From the beginning, changes in the utility and energy regulators and in utility and energy regulation in Alberta have been both process driven, as with the creation of the Milk Control Board to remove the regulation of milk from the purview of the PUB, and policy driven, as with the establishment of the Electric Energy Marketing Agency to manage province-wide electricity prices. Many of the changes, particularly in the regulation of petroleum resources, appear to have been reactive rather than proactive in nature. For example, the province created the TVGCB in response to wasteful[52] exploitation of the Turner Valley field. Later, the province created the Alberta Natural Gas Utilities Board because existing legislation and regulation had failed to manage continued exploitation of the Turner Valley field in a manner that was fair and equitable to all producers. Similarly, the deregulation of natural gas pricing in the 1980s was largely a response to the failure of regulation.[53]

Because of their degree of involvement with industry and their mandate to ensure the orderly development of provincial energy resources, the evolution of the Conservation Boards was shaped in large part by developments in oil and gas markets, technical advances in oil and gas exploration and production, and political factors.[54] In contrast, because electricity markets have only recently incorporated elements of competition and opened to outside influence, the PUB's role as traditional utility rate maker remained virtually unchanged from 1915 to 1995 when Alberta began restructuring its electric industry.

Aside from the decision to restructure Alberta's electricity sector, the most notable example of a specific government policy objective implemented through changes in the energy regulatory framework was that of cost cutting and streamlining in the 1990s which led to the restructuring of the Ministry of Energy and the merger of the functions

[51]See: Brownsey, *supra* note 41 at 91; G. Bruce Doern, "Canadian Energy Policy and the Struggle for Sustainable Development: Political — Economic Context" in Doern, *supra* note 40 at 7-26 and 33-35; Michael J. Bruni & Keith F. Miller, "Practice and Procedure Before the Energy Resources Conservation Board" (1982) 20 Alta. L. Rev. 79 at 79; Madam Constance D. Hunt, "Toward the Twenty-First Century: A Canadian Legal Perspective on Resource and Environmental Law" (1993) 31 Osgoode Hall L.J. 297 at 314; and Alastair R. Lucas, "The North American Agreement on Environmental Cooperation: International Environmental Jurisdiction Over the Energy Sector" (1998) 16 J. Energy, Nat'l Res. & Envtl. L. 84 at 84.

[52]In both the physical and economic sense of "waste".

[53]W.D. Walls, *Natural Gas and Electricity Markets*, IAPR Technical Paper Series Technical Paper No. TP-08003 (Calgary: Institute for Advanced Policy Research, 2008).

[54]See for example: *Energy Alberta 1994*, *supra* note 23 at 6 where the Board says: "Since the inception of the Conservation Board in 1938, Alberta's regulatory regime for energy development has involved close interaction between industry and the Board"; and Breen, *supra* note 13 at 535.

of the AEUB and the PUB in 1995. As will become clear below, it is remarkable that both policies were implemented at the same time.

4.0. Characteristics of Energy Resource and Utility Regulators in Alberta in 1995

At the time of the merger, the ERCB and the PUB were similar in many ways and different in some very important aspects. Broadly speaking both had jurisdiction to deal with energy matters in the province of Alberta, although the outlines and contours of their specific jurisdictions were different. In 1994, the core functions of the ERCB were to:

- provide for the appraisal of reserves and productive capacity;
- provide for the appraisal of energy resource requirements;
- effect the conservation of, and prevent the waste of, Alberta's energy resources;
- control pollution and ensure environmental conservation;
- secure the observance of safe and efficient practices;
- provide for the recording as well as the timely and useful dissemination of information; and
- provide agencies from which the Government of Alberta may receive information with advice and recommendations.[55]

At the time, the ERCB described its mission and vision as being: "To ensure that development of Alberta's energy resources takes place in a responsible manner in the interests of Albertans" and to "provide a regulatory process for ensuring that development of Alberta's energy resources occurs in a safe, efficient, and environmentally sound manner that balances the broad interests of Albertans."[56] In effect, the ERCB was the steward of Alberta's energy resources.

In 1994 the core function of the PUB was to regulate Alberta's investor-owned electric, gas, water utilities and certain municipally owned electric utilities to ensure that customers received safe and reliable service at just and reasonable rates. The PUB also had the oversight of the tolls, tariffs and service regulations of natural gas pipelines and

[55]ERCB, *Energy Alberta 1994*, *supra* note 23 at back cover.

[56]*Ibid.*

electric transmission lines. The PUB's primary function was to establish rates for utility service.

At the time of their merger, both regulators had responsibility for oversight of the operations of those subject to their regulation, although, as described elsewhere in this paper, the ERCB's involvement in the day to day operations of the oil and gas industry was and is extensive, and geared to managing the impacts of the activities of the oil and gas industry. The Conservation Boards have always been active participants in the evolving oil and gas industry particularly through their presence in the field and through ongoing collaboration with industry. By contrast, the PUB's oversight power was for the purpose of ratemaking.[57] Given its principal function, the PUB was established as, and has remained until relatively recently, a passive, arms-length regulator: that is, a regulator that primarily receives and acts on applications and complaints.

Both regulators had adjudicative functions. In their adjudicative roles, both the ERCB and the PUB were recognized by the courts as specialized tribunals with acknowledged expertise in their respective areas.[58] In practice, the PUB's adjudicative function was its key role. In terms of a per-application measure, the ERCB was called upon less frequently to exercise its adjudicative role to resolve disputes.

Throughout their tenure, both the ERCB and the PUB were impacted by external forces; however, because of their differing mandates, external forces impacted the ERCB and the PUB differently. Activities within the ERCB's jurisdiction had direct environmental impacts (e.g. drilling wells, developing oil sands deposits) and so were increasingly subject to environmental regulation at both the provincial and federal levels. Because of concerns about the environmental effects of developing and burning fossil fuels, the ERCB was also subject to increasing pressures from interests groups that were not directly affected by its decisions or oil industry activity but which might reasonably claim to be impacted by externalities or simply to be interested in the broader implication of energy development activities. As a result, the ERCB was subject to growing pressures to consider broader impacts in its decision-making processes.

Activities falling within the jurisdiction of the PUB, specifically the charging of rates for utility service, only indirectly affect the environment and are not as obviously the cause of externalities as are oil and gas exploration and development. As a result, the PUB was not subject to the same pressures to take environmental effects or broader externalities of its decisions into account. Having said that, as externalities came to be viewed as a matter to be taken into account in utility ratemaking, the PUB was certainly exposed to similar pressures.

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[57] *ATCO Gas & Pipelines Ltd., supra* note 49 at para. 60.

[58] See, for example, *TransAlta Utilities Corp. v. Alberta Public Utilities Board* (1986), 68 A.R. 171 (C.A.); and *ATCO Gas & Pipelines Ltd., ibid.*

At the time of their merger, the main similarities between the two regulators lay in the areas of process and broad functionality. Both relied on teams of technical specialists, economists, information managers and administrative support. Both had well established application review processes, the same powers on inquiry and broadly similar rules of practice and procedure for matters requiring a hearing. Perhaps that is why the Government of Alberta felt it could achieve sufficient cost savings from merging the two to offset the resulting disruption and the ongoing differences in the mandates established by the legislation administered by the two Boards.

In addition to the similarities between the Boards discussed above, in some instances both the ERCB and the PUB exercised their powers independently in respect of the same energy development. For example, under the *Oil and Gas Conservation Act*[59] the ERCB had the power, with the approval of the Lieutenant Governor in Council, to declare a pipeline to be a common carrier pipeline (whether oil, gas or synthetic crude).[60] Under that same Act, the PUB was given the power to determine the tariff the proprietor of a common carrier pipeline could charge to shippers in the event they were unable to reach agreement.[61] The ERCB's power to grant common carrier status was deemed necessary for its role in ensuring that oil and gas resources in Alberta are efficiently and effectively developed because the ability of a private pipeline owner to control producers' access to that pipeline could effectively preclude access to market. Giving the PUB the power to determine the rates for transportation on common carrier pipelines was consistent with its role as rate setter for monopoly service providers. In addition, giving the PUB the jurisdiction to set rates for service on a common carrier pipeline where the parties are unable to agree made sense on the basis that the parties who have been forced together into a commercial relationship by virtue of an order obtained from the ERCB by one of them, might have greater confidence in the impartiality of a tribunal that had not heard and decided the presumably contentious common carrier declaration application.

Throughout their tenures, a fundamental difference between the two Boards lay in their mandates and specific areas of expertise. At its inception, the PUB was established with very broad responsibilities and wide ranging areas of authority. Not only was it responsible for regulating to protect consumers of essential services such as electricity but it was responsible for ensuring the protection of producers of consumer goods, specifically milk. Initially, the PUB was a board that implemented general economic regulation in a wide range of settings with no specific focus on a sector. As many of its non-energy utility powers were reallocated, the PUB came to be recognized as principally having a rate-setting function, with incidental powers to supervise the operations and finances of those companies subject to its jurisdiction.[62] The Board's mandate has been

[59]R.S.A. 1980, c. O-5.

[60]*Ibid.*, s. 37.

[61]*Ibid.*, s. 44.

[62]*ATCO Gas & Pipelines Ltd., supra* note 49 at para. 60.

described as being one "of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities."[63]

By contrast, from its inception, the ERCB's predecessor was created as a specialized Board with expertise in energy resource regulation: specifically, conservation of petroleum resources. The ERCB's expertise and ability to adapt to and adopt emerging technologies and to deal effectively with emerging technical issues has been identified as a reason for confirming that the Board is in the best position to make regulations affecting energy resources in the province.[64]

The overarching policy objective for the Conservation Boards has always been and continues to be the orderly development of the province's petroleum resources. Indeed, Ernest Manning best summarized the Province's approach when he said in a 1987 interview:

> "To our minds, conservation and development decisions had to be made on engineering factors only, not on political factors.
>
> The ground rules for the new Board were: first, get the maximum production possible and encourage investment and development; second, get a fair return for the public, as owners of the resource; and third, eliminate waste …. Those ground rules are as appropriate today as they were in 1938."[65]

The different mandates for the ERCB and the PUB created the potential for conflict where the two boards were required by the relevant legislation to exercise their powers independently in respect of the same energy development. For example, no one could construct or commission a thermal electric power generating plant without the prior approval of the ERCB in accordance with the provisions of the *Hydro and Electric Energy Act*.[66] If the owner of such a plant was a utility, they also had to apply to the PUB pursuant to the *Public Utilities Board Act*[67] and the *Electric Energy Marketing Act*[68] for

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[63]*ATCO Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557 at 576.

[64]See *Giant Grosmont Petroleums Ltd. v. Gulf Canada Resources Ltd.*, 2001 ABCA 174 at para. 30 [*Giant Grosmont*], for example where the majority said:

> "The Energy Statutes provide the Board with the ability to address these issues promptly as they arise. That ability, coupled with the knowledge imperative to understanding the technical details of energy resource development, makes the Board the best body to deal with these matters. It would be inappropriate and inefficient to require the Board to seek legislative change every time science indicated a change was necessary."

[65]Excerpt of interview with Ernest Manning who was Alberta Minister of Trade and Industry in 1938. As reproduced in ERCB, *Energy Alberta 1992* (Calgary: 1993).

[66]R.S.A. 1980, c. H-13.

[67]R.S.A. 1980, c. P-37.

[68]S.A. 1981, c. E-4.1

approval to include the costs of the plant in its rate base. The rate base of a utility forms the basis for calculating the tariffs that may be charged by a utility to its customers. In several such cases, the PUB denied owners' applications to include new generating plant in their rate bases for a specific tariff year, even though the ERCB had approved and established commissioning dates for the plants which would bring them into service in the relevant tariff year.[69]

This particular point of conflict and its interpretation by the courts highlights another fundamental difference between the two boards: the scope and nature of their public interest considerations. In the *Alberta Power* case the Alberta Court of Appeal drew a clear distinction between the public interest considerations arising from the proposed development of Alberta's energy resources and the public interest in the determination of just and reasonable rates for electric utility service using those resources.[70]

The *Alberta Power* case was before the courts because utilities that had received ERCB approval and direction to commission new thermal generating plants had been denied the ability to include the costs of those plants in their rate bases by the PUB. The utilities appealed. In upholding the PUB decisions, the Alberta Court of Appeal found that the ERCB and the PUB had separate and distinct but complimentary mandates in relation to thermal energy project development. Specifically, the court noted that the ERCB had jurisdiction over the orderly development of electric energy resources in the public interest and that the PUB had jurisdiction over if, when and how a utility could recover from ratepayers the costs of investing in such resource development. The ERCB's determination was to be made in consideration of "fostering the 'economic, orderly and efficient development and operation in the public interest' of generation facilities".[71] The Court found that those public interest and other considerations encompassed forecast long-term electric energy requirements in the province balanced by environmental concerns, construction cost efficiencies, effects of development on the labour force and affected communities, and the impact of certain commissioning dates.[72]

The Court went on to find that in determining whether to include the new facility in the utility's rate base, the PUB's public interest considerations were different from those

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[69]See for example, Edmonton Power's Genesee 2 project which was approved with a commissioning date of 1 October 1989 by way of ERCB Order HE8505 but the PUB found that the facility was not "used or required to be used" for public utility service in the tariff year which was the subject of the application and so denied Edmonton Power's application to include the costs in its rate base for that year: PUB Decision E89004.

[70]*Alberta Power Ltd. v. Alberta (Public Utilities Board)*, 72 Alta. L.R. (2d) 129, 1990CarswellAlta 15 at para. 32. Leave to appeal to the Supreme Court of Canada refused 13 September 1990, 72 D.L.R. (4th) vii [*Alberta Power Ltd.*].

[71]*Ibid.* at para. 32.

[72]*Ibid.*

of the ERCB and were limited by virtue of the wording of the applicable legislative provisions.[73] The PUB was found to have a much narrower public interest focus that was limited to the relationship between the utility and its ratepayers and specifically, whether the facilities in question were used or required for service in the relevant time period.

More generally, and in keeping with the narrow scope for "public interest" set out in the *Alberta Power* decision, "public interest" in the context of utility rate setting by the PUB in Alberta has been found to mean "consideration of both sides of the rate-paying equation: the payors, that is the customers receiving the utility service, and their right to fair and reasonable rates; and the payee, that is the utility providing the service, and its right to recover its prudent costs and expenses associated therewith."[74]

This difference in scope for public interest considerations is consistent with the most significant distinguishing characteristic between the two Boards at a regulatory theory level: which is that, in regulating the electricity sector and setting rates for service, the PUB regulated the use of private property that, by virtue of the nature of the service it was used to provide, had been affected with a public interest;[75] by contrast, the ERCB regulated the exploitation of public resources[76] for profit by private (i.e. not government) interests. The PUB provided a substitute for market competition — traditional utility regulation — while ensuring the regulatory compact between utilities and their customers. The ERCB implemented regulation where competition resulted in outcomes that were adverse to the broader public interest and, more recently to the interests of directly affected individuals.

So, under the PUB, the public had an interest in ensuring that the rates they were charged were no higher than necessary and no higher than they would be if there was competition in the provision of the particular service. In the terms of the legislation, the rate paying public was interested in receiving reliable, safe service at just and reasonable rates. The service provider had an interest in earning a fair return on its investment and in being able to raise capital when necessary at competitive rates. The regulator's role was to balance those directly competing interests: the PUB mediated between the utility and the specific members of the public that were utility customers.

Under the ERCB model, the government, on behalf of Albertans, determined that maximizing production and encouraging investment in energy resource exploration and development were in the public interest. Through the relevant legislation, policy direction to the Board remained broad in scope so the ERCB had to interpret what the interests of

[73] *Alberta Power Ltd.*, *supra* note 70 at paras. 31-31 and 42.

[74] *ATCO Electric Limited v. Alberta (Energy and Utilities Board)*, 2004 ABCA 215 at para. 132.

[75] *ATCO Gas & Pipelines Ltd.*, *supra* note 49 at para. 69.

[76] For the most part, recognizing that approximately 19% of lands in Alberta are freehold in which the owner of the surface also owns the mineral rights. Source: <http://www.energy.alberta.ca/>.

Albertans were on an *ad hoc* basis. The relationships between the public, the regulated entities and the regulator were multifaceted and over time they evolved. ERCB regulation involved the oil and gas industry players and/or other energy developers such as thermal power generators, landowners and the broader "public". In any given decision-making or regulation-making process, one, some or all of those stakeholders were involved with the Board and as the interests of those stakeholders in Alberta's energy resource development evolved, so did the ERCB's "public interest" considerations.[77]

Another way of characterizing the difference in the public interest considerations of the two boards is that the primary public interest of concern to the ERCB was not a direct pecuniary interest, like that of the PUB — rather it was an intangible and evolving interest in ensuring the "economic, orderly and efficient development" of energy resources. So, early in the life of the Board's predecessors, the public interest lay in ensuring that the province's oil and gas resources were not wasted. As landowners affected by oil and gas development began to assert their interests and landowners and others began to assert the need to balance the broader benefits of oil and gas development with its impacts, the Board had to adjust its "public interest" considerations accordingly.

Other notable characteristics distinguished the PUB from the ERCB at the time of their merger in 1995. For example, the ERCB was remarkable as a regulator for its technical expertise and presence in the field which enabled it to develop both an effective working relationship with those subject to its regulation and a robust, well respected regulatory framework based on informed consensus among stakeholders.[78] Indeed, at a law and policy level, the characteristic that most distinguished the ERCB from the PUB was the comprehensive policy/regulation making role given to the Conservation Boards starting in 1950. The ERCB was given a broad mandate for making regulations that extended well beyond the traditional operational or procedural regulations of the type made by the PUB.[79] The ERCB's extensive framework of regulations and its response to significant energy resource development applications created a significant body of Board made energy resource development policy.[80]

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[77]For example, the broader public interest in protecting the integrity of certain ecological regions in Alberta had a significant effect on the ERCB's approach to regulating activity in certain areas of the province such as the Whaleback region in southwestern Alberta.

[78]Breen, *supra* note 13 at 531.

[79]Such as regulations dealing with practice and procedure before the Board or regulations that deal with information reporting by industry.

[80]For example, groundwater protection during drilling, completion, production and abandonment operations was (and is) regulated through no less than five Board made Guides and Directives as well as the *Oil and Gas Conservation Regulations*.

In *Giant Grosmont Petroleums Ltd. v. Gulf Canada Resources Ltd.*[81] the Alberta Court of Appeal confirmed the Board's regulation making powers when it affirmed that the ERCB did have the authority to enact regulations dealing with the production of gas occurring within or immediately adjoining oil sands deposits. The *Giant Grosmont* case clearly illustrates the policy making role of the ERCB. In that case the appellants sought a declaration that several regulations made by the ERCB dealing with oil sands conservation were *ultra vires* the Board. The regulations in question dealt with the production of gas from wells completed within certain geological intervals in oil sands regions as defined in Board orders. The effect of the regulations was to give the Board the authority to prohibit gas production from certain wells unless the Board either approved the wells or exempted them from the operation of the regulations.

One might think that the policy decision of determining the appropriate balance between natural gas production and the conservation of natural gas in order to encourage production of bitumen resources is one that would be left to government. However, notwithstanding the fact that the legislative provisions explicitly giving the Board the same powers it exercised to make the impugned regulations had been repealed and replaced with provisions giving the Board much more general powers to make regulations regarding oil sands conservation,[82] the Alberta Court of Appeal found that the Board had the ability to determine the appropriate balance between resource development and resource preservation.[83] In discussing the question of the Board's regulation-making powers, the Court said:

> "The Energy Statutes have a pervasive and uniting theme of conserving Alberta's energy resources. Under the regime as a whole, the conservation of, *inter alia*, oil, gas and crude bitumen is to be ensured …. The Board's powers are, necessarily, very broad; it has been given extensive powers to make orders necessary to protect all energy resources.[84] …
>
> In keeping with the Board's comprehensive mandate to ensure the economic, orderly and efficient development of energy resources in the public interest, the Board has also been granted extensive powers to pass regulations to give effect to these purposes."[85]

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[81] *Supra*, note 64.

[82] For example, s. 21(1) of the *Oil Sands Conservation Act* provides: "The Board may make regulations … (g) respecting methods of operation to be observed for the prevention of waste; … (u) generally to conserve oil sands and crude bitumen and to prevent the waste or improvident disposition of oil sands, crude bitumen, derivatives of crude bitumen, declared oil sands or oil sands products." Section 10(1) of the *Oil and Gas Conservation Act* provides: "The Board may make regulations … (y) generally to conserve oil and gas, and to prevent waste or improvident disposition of oil or gas, and to do any other matter reasonably incidental to the development and drilling of any oil or gas wells, the operation of them and the production from them."

[83] *Giant Grosmont*, *supra* note 64 at para. 30.

[84] *Ibid.* at para. 29.

[85] *Ibid.* at para. 33.

The Court's finding has not been repudiated by government action.[86]

In relative terms, the ERCB has always been a policy maker while the PUB was predominantly a policy taker. While policy making by regulatory agencies is not inherently wrong if the legislative process is the initiator,[87] the ERCB was given such a broad legislative mandate with such significant discretion (i.e. little specific legislative direction) that it has been criticized for an *ad hoc* approach to policy development.[88] The ERCB's extensive power to create and affect policy clearly set it apart from the PUB.

The degree to which the ERCB and its predecessors were empowered to manage the development of energy — really petroleum — resources in Alberta set it apart from a traditional economic regulator such as the PUB. This allocation of policy making power to the ERCB has been identified by some as being consistent with the Government of Alberta choosing to maintain its role as resource owner.[89]

Given the substantial and important differences in the characteristics of the PUB and the ERCB, why did the Alberta government see fit to merge their functions in 1995?

5.0. 1995 Creation of the AEUB

The motivating factor for the merger of the responsibilities of the PUB and the ERCB under the AEUB in 1995 was the desire to consolidate processes and save money.[90] After conducting an assessment of the Ministry of Energy structure, the Government of Alberta determined that the Ministry ought to be "smaller, more integrated and more business-like".[91] In order to "streamline regulatory processes and reduce overlap and duplication"

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[86]For example, in the form of revised legislative provisions.

[87]C. Lloyd Brown-John, *Canadian Regulatory Agencies* (Toronto: Butterworths, 1981).

[88]Michael M. Wenig & Jenette Poschwatta, *Developing a 'Comprehensive Energy Strategy' with a Capital 'C'*, Occasional Paper No. 22 (Calgary: Canadian Institute of Resources Law, 2008) at 5.

[89]Lucas, *supra* note 40.

[90]For example, the "Feature Article" of the *Review of Alberta Energy Resources in 1993* (Calgary: ERCB, 1993) at 2 opened with the following line:

> "In step with the province's promise to dramatically reduce public sector spending and balance the budget by 1997, the ERCB placed greater emphasis on a program of regulatory streamlining and improved efficiency begun in 1991. The goal is clear: eliminate lower-priority activities, reduce the regulatory burden on industry and ensure no increased risk to public safety or the environment."

Also see: Keith Brownsey, "Alberta's Oil and Gas Industry in the Era of the Kyoto Protocol" in Doern, *supra* note 40 at 213.

[91]*Supra* notes 3.

within the Ministry, it was determined that the number of agencies reporting to the Minister ought to be reduced and, to that end, the PUB and the ERCB amalgamated into a single reporting agency.[92]

Notwithstanding the fact that the Ministry of Energy had just completed a review of the electric energy sector in Alberta[93] and had clearly decided to implement a significant restructuring initiative, the restructuring was not cited as a reason for the merger of the Boards. Indeed, there was no mention made in any of the available material to indicate that the implications of that restructuring, for example in terms of workload or increased complexity of work, were taken in to account in the merger plans.

The AEUB was created through the *Alberta Energy and Utilities Board Act*.[94] That Act contained no purposes provisions whatsoever. It simply gave the AEUB exclusive jurisdiction over "all matters that may be dealt with by the ERCB or the PUB" as well as giving it all of the powers, rights and privileges held by the ERCB and the PUB.[95]

The existing statutes setting out the respective powers of the ERCB and the PUB remained intact and unchanged in their essential elements. So, for example, the *Hydro and Electric Energy Act*[96] continued to provide that ERCB approval was required for the construction and operation of power generating plants and for the construction of transmission lines.[97] The *Energy Resource Conservation Act*[98] and the *Oil and Gas Conservation Act*,[99] legislation establishing the ERCB and one of the most significant pieces of legislation administered by the ERCB respectively, were not amended at all in 1995 to reflect the merger or otherwise.

Consistent with the provincial government's overriding policy of fiscal restraint, the AEUB's government funding was cut and a new funding formula required industry to contribute 70% of the AEUB's annual budget.[100]

Prior to the creation of the AEUB there had been some suggestion that the merger of the functions of the two Boards would address concerns raised when the PUB refused to

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[92]*Ibid.*

[93]Keeping, *supra* note 22.

[94]*Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 [repealed].

[95]*Ibid.*, ss. 13 and 15 respectively.

[96]*Supra* note 66.

[97]*Ibid.*, ss. 9(1) and 12(1).

[98]R.S.A. 1980, c. E-11.

[99]*Supra* note 59.

[100]Brownsey, *supra* note 90 at 213.

allow several electric utilities to include the costs of new generating facilities in their rate bases, even though the facilities had previously been approved for construction and commissioning by the ERCB.[101] However, those concerns were effectively superceded by the Alberta government's decision to restructure the Alberta electric industry and, in particular, the decision to unbundle generation, transmission and distribution services so as to allow new investment in generation to be driven by market forces and not by regulatory decision making.

In keeping with its goal of sharing administrative costs while maintaining the separate jurisdiction of the PUB and the ERCB,[102] the provincial government went about the merger of its two energy regulatory bodies by simply creating a third, new energy regulatory body and, through the *Alberta Energy and Utilities Board Act*, gave it the powers of each of the ERCB and the PUB. The original statutes remained in place, as did the original legal entities, so, while the AEUB did undertake internal organizational changes intended to implement the efficiencies motivating its creation, the fundamental differences in respect of utility regulation and energy resource development discussed earlier remained the same.

As a result of the foregoing, when dealing with applications by ATCO Gas in respect of the recovery and allocation of costs in respect of a number of functions, the carbon natural gas storage facilities in particular, the AEUB said:

> "The Board recognizes that there may be something of a 'grey area' in considering whether to include in, or to exclude a particular asset from, rate base. On occasion, the public interest could be served by either result, provided questions of fairness and potential harm to both the utility and ratepayers are addressed …. Where this 'grey area' is concerned, the decision as to whether an asset is used or required to be used to provide service to the public and therefore whether it should remain in rate base must ultimately be based on the legislation and the authority of the Board as defined therein."[103]

When dealing with the question of whether a particular asset should be brought within rate base, the AEUB's view was that regardless of the broader public interest, its decision had to turn on the narrow consideration of whether the facilities were actually used and required to be used. Even though the carbon natural gas storage facilities played a role in energy resource development in Alberta, the broader public interest considerations for energy resource development could not ultimately, tip the balance in the decision-making process.

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[101]Keeping, *supra* note 22 at 65-66; and *Alberta Power*, *supra* note 70.

[102]*Supra* note 3 at 295.

[103]AEUB, *Carbon Facilities Part 1 Module — Jurisdiction*, Decision 2007-005 (5 February 2007) at 15.

The AEUB was created to deal with the widest possible range of energy resource and utility issues without the benefit of any legislative direction on issues that a single energy regulator might address, such as integrated and sustainable resource development or common stakeholder issues such as the cumulative effects of multiple energy developments and industry/landowner conflict. In and of itself, the creation of the AEUB simply manifested the government's policy of fiscal restraint.

6.0. AEUB 1995 – 2008

The way in which the AEUB described and approached its mission and core businesses changed somewhat over its tenure. For example, in 1998, it described what it did as ensuring that "the discovery, development, and delivery of Alberta's resources takes place in a manner that is fair, responsible and in the public interest.[104] It described its core functions as: adjudication and regulation; applications; surveillance and enforcement; and, information and knowledge. In 2003/2004, the AEUB described its mission as being to "ensure that the discovery, development, and delivery of Alberta's resources and utilities services take place in a manner that is fair, responsible and in the public interest."[105] In that same time period the AEUB identified only two core businesses and they were adjudication and regulation, and information and knowledge.[106] This remained the case through 2007.

The ERCB and the PUB were said to have differing administrative styles that were difficult to reconcile.[107] Within two years of its creation, the AEUB had two different chair people and two significant reorganizations of its internal structure: the latter as part of ongoing efforts to meet budget constraints while being responsive to feedback received from the now very broad constituency served by the Board.

As mentioned earlier, at the same time the government created the AEUB, it also set about the hearing-intensive process of restructuring the Alberta electricity sector. The process was hearing intensive because within the first 12 months of the restructuring process, each of the integrated electric utilities was required to bring forward applications for the approval of new tariffs for each of generation, transmission and distribution service in order to implement the government's decisions to unbundle electricity services, open generation development to the market and deregulate the price of electricity in the province of Alberta.[108] To deal with the matter of the restructured electricity tariffs alone,

[104]AEUB, *Regulatory Highlights for 1998* (Calgary: 1999) at 1.

[105]Alberta Ministry of Energy, *supra* note 30 at 40.

[106]*Ibid.*

[107]Brownsey, *supra* note 90 at 213.

[108]*Electric Utilities Act*, S.A. 1995, c. E-5.5, s. 75.

the AEUB conducted a comprehensive hearing to consider applications from all of the electric utilities under its jurisdiction. The hearing commenced 14 July 1996 and ran through 23 October 1996.

In addition to hearing time, the electricity sector restructuring process required significant AEUB attention and resources as it underwent substantive refinements in both 1998[109] and 2003[110] and more recently in 2008.[111] Each set of refinements impacted the AEUB as the regulator of the electricity sector since each required the AEUB to undertake new responsibilities both for existing entities and for newly unbundled sectors of the electric energy industry.[112] As part of its role in the restructuring of the electricity sector, the AEUB undertook numerous regulatory initiatives in the utility sector aimed at creating more streamlined and efficient processes.[113]

At the same time, the petroleum side of the AEUB's business did not ease off. The Board had to deal with the gas-over-bitumen issue, surging levels of exploration and development activity throughout the province, including significant activity in non-conventional petroleum resources, increasing landowner — industry conflict, increasing public pressure and heightened concern about externalities resulting from petroleum resource development activity.[114]

As part of its efforts to implement the government's cost cutting policy, the AEUB did move to adopt a less interactive approach to regulating the oil and gas sector, introducing a self-policing model for enforcement and encouraging self-reliance in the application and approval processes.[115] However, it moved to reallocate staff resources to the field in 1998 in response to public complaints about apparent lack of enforcement and acute landowner concern that, in some instances, was manifest in acts of vandalism and violence.[116]

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[109]*Electric Utilities Amendment Act*, S.A. 1998, c. 13.

[110]*Electric Utilities Act*, S.A. 2003, c. E-5.1.

[111]*Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2.

[112]So, for example, on 1 January 2004 the AEUB's jurisdiction expanded to include regulation of the EPCOR and ENMAX distribution and default electricity rates. Previously, each utility had been regulated by their respective administrators.

[113]Such as conducting a single hearing to establish a common approach to setting the return on equity for all electric and natural gas utilities under the AEUB's jurisdiction. See, *2004 Year in Review*, *supra* note 9 at 14.

[114]See, for example, AEUB, *Alberta Energy and Utilities Board Regulatory Highlights for 1998* (Calgary: 1999).

[115]Alberta Ministry of Energy, *1995/1996 Annual Report*, at 64-65.

[116]*Supra* note 114 at 5-7.

Not surprisingly, given the increasing workload on both the energy and utility side, the volume of applications dealt with by the AEUB continued to increase throughout its tenure. In 1996/97 it received 19,551 applications.[117] In 2004, the Board received over 44,000 applications in categories ranging from well licences, through pipelines, *in situ* oil sands development, sour gas flare permits, coal mining operational permits, to electric facility applications and tariff applications.[118]

In keeping with the government's policy of regulatory efficiency and cost effectiveness, the AEUB undertook initiatives including the development of negotiated settlement process guidelines and a comprehensive petroleum resource development application guide.[119] It was hoped the former would reduce some of the Board's hearing burden and the latter the time necessary to process applications. In implementing these initiatives, the AEUB adopted the ERCB's collaborative approach.

The AEUB was subject to and/or administered some 42 pieces of legislation. During the tenure of the AEUB it was both a policy taker, in particular in so far as it oversaw the restructuring of the electricity sector,[120] and a policy maker in the petroleum sector.[121] Because the creation of the AEUB was not accompanied by any rationalization of the previously existing regulatory roles and functions of the PUB and the ERCB, the single entity continued to regulate energy resource development and utilities independently one from the other.

The fact that there was no change in government energy policy consistent with or supportive of the merger of the roles and functions of the PUB with the ERCB, coupled with the significant resources needed for implementing the policy decision to restructure the electric industry, along with the rapid proliferation of external pressures on the oil and gas industry could only lead to frustration for the AEUB and its stakeholders.

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[117]Alberta Ministry of Energy, *supra* note 26 at 15.

[118]*Supra*, note 113 at *Operational Highlights*.

[119]See, for example, Alberta Ministry of Energy, *supra* note 115.

[120]For example, under s. 91(1) of the *Public Utilities Act*, in fixing just and reasonable rates, tolls or charges to be imposed by a public utility, the Board was directed to consider the effect of the *Small Power Research and Development Act* on the revenues and costs of the owner with respect to the generation, transmission and distribution of electricity.

[121]For example, the AEUB issued Directive 060 (formerly Guide 060) in November 2006. The Directive established regulatory requirements for flaring, incinerating and venting in Alberta and was made to apply both to upstream petroleum industry facilities as well as gas transmission facilities. The Directive was developed with significant input from two multi-stakeholder teams.

7.0. 2008 Split of the AEUB into the New ERCB and the AUC

There was not the same degree of forewarning of the plan to re-establish an energy conservation board and a utilities commission as separate as there was prior to the 1995 merger of the ERCB and the PUB. Indeed, the *2005/2006 Annual Report* of the Alberta Ministry of Energy was completely silent on the issue of a possible split of the AEUB. In the Report the Minister noted that "Alberta's energy future will be based on an integrated approach to resource development ensuring that resource development in Alberta takes place in a coordinated, managed and environmentally sustainable manner":[122] that statement seems most compatible with a single energy regulatory board, albeit one with a comprehensive, rationalized mandate — unlike that of the AEUB.

In a document dealing with Alberta's electric policy framework published in June 2005, the government said:

> "The ISO, the MSA and Balancing Pool were established to implement government policy. The EUB has a long standing and respected reputation as the electrical sector regulatory authority in Alberta. …
>
> Implementing agencies must work with each other, stakeholders and the government to undertake their responsibilities. …
>
> Implementation of approved market refinements will include an assessment of the current roles, mandates, authorities and accountabilities of each implementing agency. The Department is aware of some expressed concerns about perceived over-lapping authorities and lack of clarity on how the implementing agencies will enforce compliance with their respective mandates. …
>
> The Department proposes to undertake the following in coming months and will consult with stakeholders to:
>
> - review the current role, mandate and authorities for the ISO, MSA, Balancing Pool and EUB with a view to identify areas for refinement."[123]

Clearly, the Department of Energy was concerned with clarifying the roles of the bodies involved in implementing government policy in the electricity sector — relative to each other. Although no reference is made to the review in announcements regarding the re-creation of the new ERCB and the AUC, perhaps the need to clarify roles, mandates and authority necessitated re-creating a regulatory entity with a more specific focus on and expertise in the electricity sector.

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[122]Alberta Ministry of Energy, *2005/2006 Annual Report*, at 5.

[123]Alberta Department of Energy, *Alberta's Electricity Policy Framework: Competitive – Reliable – Sustainable* (Edmonton: 2005) at 44.

In the AEUB's *2006 Year in Review* document, the Board reported on its ongoing re-examination of its regulatory framework. It had conducted stakeholder surveys, workshops and meetings in order to collect feedback for use in planning improvements to the EUB system. The AEUB reported that:

> "More than 100 companies and representatives from government and public associations gave their feedback, which revealed that most believe that fine tuning of the regulatory system is needed, *not wholesale changes* (emphasis added)."

The re-creation of two regulatory boards could be characterized as wholesale change.

On 13 December 2006, the Premier's office issued a News Release in which it said that a government priority was to "improve the transparency and accountability of government agencies and boards." There was no specific reference in the Release to any specific board and there were no accompanying legislative changes to the mandate of the AEUB reflecting the stated priority.

In the Ministry's *2006/2007 Annual Report* reference is again made to a long-term vision for the integrated development of the province's energy resources[124] and, in the portion of the report that provides an overview of Ministry operations, the regulation of energy development by the AEUB is identified as being one of four core businesses for the Ministry.[125] An integrated strategy for energy development was also identified as being a strategic priority where "Integration means that energy projects and commodities are not treated on a standalone basis, but as part of a larger energy scenario":[126] once again, a statement that seems, on its face, most consistent with a single energy regulator, or at least a comprehensive approach to regulation.

Then, abruptly, on 14 June 2007, Alberta Energy issued a Press Release in which it said:

> "The province has introduced legislation to promote efficiency in Alberta's energy regulatory system. …
>
> 'This bill will help ensure our regulatory system can effectively manage growth pressures and provide all Albertans with access to a robust regulatory authority as we develop our resources and utilities system … This new structure will create two distinct bodies of experts that can make timely decisions to capitalize on opportunities that are in the public interest.'"

In the *2007/2008 Annual Report*, the Minister said in his Message:[127]

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[124] Alberta Ministry of Energy, *supra* note 32 at 5.

[125] *Ibid.* at 12.

[126] *Ibid.* at 14.

[127] Alberta Ministry of Energy, *2007/2008 Annual Report*, at 5.

> "To better address increasing activity in Alberta's energy industry, we built on the strengths of our regulatory system. We separated the Alberta Energy and Utilities Board into the Energy Resources Conservation Board and the Alberta Utilities Commission, enabling regulators to better focus their resources to improve the efficiency and transparency of the regulatory framework for Albertans."

In a letter to each of the new Chairmen of the AUC and the ERCB, the Minister of Energy said:

> "The creation of two new regulatory bodies offers us a unique opportunity to refocus the way we approach applications for energy and utilities development in Alberta."[128]

The June 2007 announcement of the splitting of the AEUB came shortly after the public controversy surrounding the transmission line proceeding for which the AEUB felt compelled to hire private investigators to address security concerns that had arisen during the course of what turned out to be an unusually contentious hearing.[129] That fact, taken together with the information contained in the letters to the new chairmen of the AUC and the new ERCB, suggests that a motivating factor for the separation of the Boards may have been a desire to, in effect, wipe the slate clean and create regulators with a fresh mandate.[130]

This view is supported by the actions and comments of the AEUB in relation to an inquiry it initiated on 4 June 2007 (NGL Inquiry).[131] The NGL Inquiry was to examine matters relating to the extraction of natural gas liquids from the common natural gas

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[128]Letters to the Chair of the Energy Resources Conservation Board and the Alberta Utilities Commission from the Office of the Minister of Energy of Alberta, mailed 20 December 2007.

[129]Alta-Link 500 kV hearing, AEUB Decision 2007-75.

[130]See for example the Letter to the Chair of the Resources Conservation Board from the Office of the Minister of Alberta Energy, mailed 20 December 2007 in which the Minister says:

> "… you are aware that Alberta's regulatory structure is at a crossroads. Given the expanding caseload and complexity of applications in recent years, it was time for the former Energy Utilities Board to evolve to keep pace with the changing needs of Albertans and industry.
>
> The provincial government and all Albertans have high expectations that our renewed regulatory system is effective, responsive to concerns raised by directly affected landowners and interested third-parties, and promotes responsible development in the best interests of the public. …
>
> Over the course of the next year, I wish the board success in the challenges that lie ahead. These challenges will no doubt include:
>
> > Providing regulatory processes that ensure directly affected landowners are notified of proposed developments and that they understand the process through which they can express their view during regulatory proceedings."

[131]AEUB, *Inquiry into Natural Gas Liquids (NGL) Extraction Matters*, Decision 2009-009 (4 February 2009).

stream transported or processed in AEUB regulated facilities (which would include both utilities and non-utilities). The inquiry was a significant undertaking, both in terms of the scope of the process and in terms of energy policy development. In a ruling on a pre-hearing motion in the course of the NGL Inquiry, the AEUB said:

> "Although the division of the Board into two tribunals … had been proposed at the time that the inquiry commenced, the ultimate passage of the legislation, the form that legislation might take and the timing of enactment were uncertain. The creation of the ERCB and the AUC as of January 1, 2008 clearly demonstrates the intention of the legislature to phase out any ongoing role for the Board."[132]

Alternatively or in addition, it may be that the creation of the new ERCB and the AUC was specifically intended to acknowledge the very different roles and characteristics of energy resource and utility regulation in Alberta. The comments of the Minister of Energy in his *2007/2008 Annual Report* noted above make reference to this.

Finally, the AEUB's comments made in the pre-hearing motion in the NGL Inquiry suggest that the Board was not involved in the process of determining whether or how the AEUB might be able to work in a more focused and efficient manner. This suggests that the motivation for the split of the AEUB back into an energy resource and a utility regulator may have simply been political. Regardless of the actual motivation, there are, once again, two regulators in Alberta with responsibility for energy development and delivery: one with primary responsibility for energy resource development, and the other with primary responsibility for utility regulation and regulation of the construction and operation of facilities used for public utility service. Regardless of the actual motivation for the split, efficiency, transparency and focus (on a sector), all crucial elements of credible, effective regulation appear to feature prominently in the goals for the new two-board model.

8.0. The Two-Board Model — Issues to Consider

The *Alberta Utilities Commission Act*[133] dissolved the AEUB, created the AUC and re-created the new ERCB. The *Alberta Utilities Commission Act* assigns the responsibilities of the former PUB to the AUC and directs the new ERCB to regulate fossil fuel development and pipelines, except for gas utility pipelines. According to the Ministry of Energy *2007/2008 Annual Report*:

> "The ERCB ensures that the discovery, development and delivery of Alberta's resources take place in a manner that is fair, responsible and in the public interest. The ERCB regulates oil, natural gas, oil sands, coal and gathering systems. The ERCB also includes the Alberta Geological

[132] *Ibid.*

[133] *Supra* note 111.

> Survey (AGS), whose role is to provide geoscience information and expertise to government, industry, and the public in support of the sustainable development of Alberta's energy and mineral resources. The ERCB's operations are jointly funded by the Crown and a mandatory administrative fee applied to industry.
>
> The AUC is responsible for the approval and ongoing supervision of power plants, transmission lines and gas utility pipelines, as well as economic regulation and the establishment of rates for electricity, gas and water utilities. The AUC also began taking on new responsibilities under an expanded mandate, as it now approves changes to the rules of the Alberta Electric System Operator and acts as an adjudicator for cases dealing with market noncompliance brought forward by the Market Surveillance Administrator. The AUC's operations are 100 per cent funded by the industry it regulates."[134]

The re-creation of the new ERCB and the AUC may be said to restore "analytical primacy" to the idea that gas and electricity services to consumers are essential service industries in a modern economy[135] that merit a separate regulatory regime. Of course, that may be attributing more forethought and analysis to the planning of the split than is merited and, in any event, such primacy is most relevant in developing economies and during the early stages of developing an energy regulatory and utility framework. In a developed economy with a well established regulatory infrastructure, some would argue that analytical primacy demands a concerted approach to energy development, delivery and use that would be better managed by a single regulator — or at least under an integrated, comprehensive regulatory strategy and policy.[136]

Certainly the move back to a two-board model allows each regulator to re-establish itself as an expert focused on a specific sector with the corresponding advantages, such as being able to adapt quickly to innovations in technology and to effectively accommodate unconventional resource development within the regulatory framework. Re-establishing the two regulators as expert boards in specific sectors allows AUC staff to devote their attention to the ongoing developments in the electricity sector and to establish a rapport with stakeholders that can lead to an open, accountable, fair, efficient and effective regulatory framework in that sector. This will be crucial in the short to medium term as significant transmission infrastructure projects progress from proposal to reality.

Although all of the responsibilities of the former PUB have been assigned to the AUC, according to the Chairman of the AUC, the Commission's role is very different from that of the former PUB.[137] This is due in part to the AUC's expanded mandate as

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[134]At 7. Available online: <http://www.energy.alberta.ca/Org/Publications/AR2008.pdf>.

[135]G. Bruce Doern, *Power Switch: Energy Regulatory Governance in the Twenty-First Century* (Toronto: University of Toronto Press, 2003) at 69.

[136]Wenig & Poschwatta, *supra* note 88.

[137]See, for example: "Address to the Calgary Chamber of Commerce" (27 May 2008) and Speaking Notes for Willie Grieve, "The Role of the Alberta Utilities Commission & Electricity Regulation in a

overseer of the competitive market in electricity generation and as the ultimate overseer of market conduct[138] but, more importantly, it is due to the way in which the restructured electricity sector has changed since 1995. As a result of its expanded role and the changes in electricity markets in Alberta, the regulatory theory underpinning the AUC's role is no longer narrowly focused on traditional utility regulation. The AUC also regulates to ensure stability during the ongoing electricity market transitions and to ensure that participants in the competitive segments of the sector behave in a manner consistent with the government's interests. Since regulators can only be as effective as the individuals that carry out the regulator's mandate, as long as the electricity sector restructuring efforts are ongoing and utilities regulation in the province is evolving, it may be more appropriate and more efficient to have a regulator with the mandate and resources to focus exclusively on the sector.

The Government of Alberta took the opportunity presented by the creation of the AUC to consolidate approvals of energy projects for use in utility service and regulation of utilities under a single regulator. Now, in addition to its former jurisdiction over utilities, the AUC has the jurisdiction over applications to construct or operate hydro electric projects, power plants or transmission lines[139] in addition to gas utility pipelines.[140] Prior to the 1995 merger, that jurisdiction lay with the ERCB.

Whether nor not the inclusion of energy generation and transmission projects in the jurisdiction of the AUC was specifically directed at addressing the issue highlighted by the *Alberta Power* case discussed previously,[141] it seems that the AUC is clearly mindful of the concern. In a recent pre-hearing proceeding dealing with an application for approval for a gas utility pipeline and associated facilities, the Commission said that the rates for the pipeline would be determined in a separate, subsequent process and that:

> "In addition, the Commission is mindful that the proposed gas utility pipeline is within the ambit of the *Gas Utilities Act* and if approved has the potential to impact NGTL rates. Therefore, the Commission will consider whether the proposed gas utility pipeline is needed, represents the least

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Carbon Constrained Alberta" (Presentation at the CERI 2008 Electricity Conference, Calgary, 28 October 2008) [unpublished].

[138]The AUC has a significant enforcement role in the restructured electricity sector that was not relevant to the PUB's world. So, for example, the AUC administers significant administrative penalties (up to $1,000,000 per day of a contravention) in its market oversight role.

[139]*Hydro and Electric Energy Act*, R.S.A. 2000, c. H-16, ss. 9, 10, 14 and 15.

[140]*Gas Utilities Act*, R.S.A. 2000, c. G-5, s. 4.1.

[141]Where one regulator approves facilities and the other cost recovery through utility rates.

> cost alternative, is properly sized and will be adequately utilized, as these matters relate to the cost of the gas utility pipeline, which will ultimately be proposed as a rate base addition."[142]

However, as long as the relevant legislation requires that rate base is determined on the basis of whether a facility is used or required to be used to provide utility service, which it does,[143] the potential for a project to be approved for construction and operation but not for inclusion in rate base issue remains.

In exercising its new jurisdiction over hydro projects, power plants, transmission lines and gas utility pipelines, the Commission is to:

> "give consideration to whether construction or operation of the proposed hydro development, power plant, transmission line or gas utility pipeline is in the public interest, having regard to the social and economic effects of the development, plant, line or pipeline and the effects of the development, plant, line or pipeline on the environment."[144]

In the pre-hearing decision referred to above, the AUC responded to submissions suggesting that the Commission had to ensure the "economic, orderly and efficient development" of energy resources, saying that:

> "… these terms are used in the purpose sections of energy legislation administered by the Energy Resources Conservation Board. The Commission is not required by its legislation to pursue this objective in determining issues relevant to the Application. Nevertheless, the Commission may consider such an objective as part of its public interest analysis."[145]

To the extent that the AUC is required to consider the public interest having regard to the social and economic effects and the effects on the environment, and to the extent the Commission does consider the economic, orderly and efficient development of energy resources in the context of the broader public interest analysis in an application before it, will it take its lead on that front from the new ERCB? That is, will the Commission take into account the same or similar factors as the new ERCB or will its interpretation of the public interest in facilities and energy development be different from that of the ERCB? If it is different, will it be compatible with the public interest considerations of the new ERCB?

Absent clear policy direction from government on how the ERCB and the AUC energy development considerations should be harmonized, coordinated and/or prioritized, the two-board model gives rise to the risk that similar energy facilities will face differing

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[142] *Decision on Pre-hearing Meeting (Application No. 1551990)*, Decision 2008-035 at 5. Of course with respect to NOVA Gas Transmission Ltd. (NGTL), the issue is now moot as a result of the recent NEB Decision taking jurisdiction over all of its pipeline system.

[143] *Gas Utilities Act*, *supra* note 140, s. 37.

[144] Section 17 of the *Alberta Utilities Commission Act.*

[145] *Ibid.* at 4.

public interest tests. For example, with both the AUC and the ERCB having jurisdiction over pipeline projects (gas utility and others respectively) there is the potential for differing criteria and public interest considerations and hence policy to develop for utility pipelines and non-utility pipelines in Alberta.

A decision of the AEUB issued shortly before the split provides a further illustration of the kind of issue that may be exacerbated by the two-board model. In *Northwest Upgrading Inc.*[146] the AEUB considered an application to construct and operate an oil sands upgrader in Sturgeon County in the Edmonton region. Such a project involves both energy resource development and energy delivery, as the facility would require significant power resources to operate as well as feeder pipeline development. When faced with the issue of the need for a regional management plan to address infrastructure and public service impacts, the Board demurred and said:

> "The Board agrees with Edmonton that the region would benefit from a regional management plan …. However, the Board does not believe that it has the mandate to direct that a regional management plan be developed. It believes this responsibility rests with the appropriate government bodies."[147]

If the AEUB was unwilling and/or unable to address integrated resource development issues, it is hard to imagine that the new ERCB and AUC will do so absent legislative amendment giving them the mandate to do so. To the extent that the development of new electric power resources is now regulated by the AUC, while authority for approval of the upgrader would remain with the new ERCB, there is a risk of a conflict between decisions in respect of the same project. More importantly, there is a real risk that all of the public interest in respect of a project, both in the narrow sense of the interests of those who may be directly affected as well as the broader sense of those with an interest in how the province's energy resources are developed and deployed, will not be taken into account in a holistic, comprehensive fashion. This risk is not so much a result of the two-board model as it is a result of a regulatory framework that does not provide for a comprehensive approach to considering energy resource development.

An advantage of the move back to a two-board model is that the Conservation Boards, including the AEUB, have been criticized for having become captive to those they regulate.[148] The introduction of the new ERCB provides an opportunity for the Board to reinvent itself whether this will be the case remains to be seen.

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[146]AEUB, *North West Upgrading Inc. Application to Construct and Operate an Oil Sands Upgrader in Sturgeon County (Application 1444141)*, Decision 2007-058 (7 August 2008).

[147]*Ibid.* at 11-12.

[148]N. Vlavianos, *The Legislative and Regulatory Framework for Oil Sands Development in Alberta: A Detailed Review and Analysis*, Occasional Paper No. 21 (Calgary: Canadian Institute of Resources Law, 2008) at 38.

A further advantage of the two-board model with the revised funding provisions is that the risk of cross-subsidization of one sector's regulatory costs by the other is avoided. The two-board model enables government to implement regulatory cost recovery formulae that best reflect the parties to the regulatory compact and the social contracts underlying the responsibilities of the AUC and the new ERCB respectively.

Other issues raised by the division of the AEUB into two boards include:[149] will there be an effect on cumulative effects review, especially in context of large scale energy developments requiring natural gas feedstock and/or electric power systems/facility development; will a two-board model facilitate or frustrate inter-agency co-operation both intra and inter-provincially and at the provincial/federal level; will there be an effect on the integration of energy resource decision making with considerations of environmental effects/issues; and finally, how does the split advance the Province's recently released *Energy Strategy*?

While there are advantages and disadvantages to both a single and a two-board model, ultimately, the restoration of a two-board model is a tacit acknowledgement of the fact that a single entity, in the form of the AEUB, was carrying out what were, under the relevant legislative framework, two distinct roles and functions.

9.0. Conclusion

Energy resource and utility regulation in Alberta have progressed independently one from the other since their inception, even during the relatively brief existence of the AEUB. This is not surprising given that each was implemented to address fundamentally different issues: the former to address the divergence in government and oil and gas industry interests in the exploitation of public resources by private interests; the latter to control market power and set prices in a variety of sectors.

The separateness of energy and utility regulation in Alberta has consistently been reinforced through legislation establishing distinct mandates and public interest considerations for regulation of energy resource development and of utilities in Alberta: so perhaps it should not be surprising that after creating a single entity to discharge the functions and carry out the separate mandates of the PUB and the ERCB in 1995, the Government of Alberta decided to revert to a two-board model for energy and utility regulation.

Having said that, against the backdrop of the long history of energy and utility regulation in Alberta, the AEUB's 13-year tenure was short lived and its split back into an energy resources regulator and a utility regulator abrupt. There was no public clamor,

[149] At least some of the issues listed will be addressed in a subsequent paper.

or at least no clamor in the public domain, for a major overhaul of the AEUB. Indeed, those subject to its regulation were of the view that wholesale changes to the regulatory system were not required.

In addition, there was no prior debate in the legislature regarding the split similar to what there had been before the 1995 merger of the ERCB and the PUB. There was no new policy introduced by the Government of Alberta that was premised on a two-board model for energy and utility regulation in Alberta. In fact, government pronouncements regarding energy resource policy in 2005 through 2007 consistently referred to an "integrated" approach to resource development where energy projects and commodities were to be treated as part of the same scenario. While there is no reason that separate energy resource development and utilities regulators cannot effectively implement an integrated approach to regulation, they require the legislative direction and framework to do so. The *Alberta Utilities Commission Act* and related amendments do not establish an integrated approach to energy resource development that treats energy projects and energy delivery services as part of the same scenario.[150]

Finally, while the re-creation of the new ERCB and the AUC does raise questions and concerns, ultimately the issue is not whether there exists one regulator or two with jurisdiction in respect of energy resources and utilities in Alberta but whether overall, such regulation is carried out in a manner that is independent, transparent, predictable, legitimate and credible and supports and enhances economic efficiency.[151] The reasons given publicly for the reallocation of the responsibilities of the former AEUB to the new ERCB and the AUC emphasize a desire on the part of the Minister of Energy to encourage the regulators to (re)connect with all of their stakeholders and to reinforce fundamental elements of regulation in the process: specifically, transparency and efficiency. A single regulator with sufficient resources and legislative direction could certainly carry out that mandate but the process of re-creating the two boards certainly gives all involved a reason to approach their mandates and previously difficult relationships and/or issues from a fresh perspective.

[150]Although they do facilitate joint hearing processes where appropriate.

[151]In the broad sense of economic efficiency, including social costs and environmental impacts.

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