

## THE AEUB: A SHORT CHAPTER IN ALBERTA'S LONG HISTORY OF ENERGY & UTILITIES REGULATION

Article by Cecilia A. Low ♦

### Introduction

Public utility regulation in Alberta dates back to 1915 with the creation of the Alberta Board of Public Utility Commissioners (PUB). Energy resource regulation in the province dates back to 1932 with the establishment of the Turner Valley Gas Conservation Board (TVGCB). The Alberta Energy and Utilities Board (AEUB) was created in 1995 when the Government of Alberta merged the functions of the PUB and the Energy Resources Conservation Board (ERCB) under a single entity.<sup>1</sup> In 2007, the Government of Alberta announced that it would be eliminating the AEUB and re-establishing the Alberta Utilities Commission (AUC) and the new ERCB.<sup>2</sup>

During its 13-year tenure, the AEUB oversaw fundamental restructuring in the electricity sector, managed a significant increase in oil and gas related activity, and faced growing environmental activism and land-use conflict. Although the AEUB proved to be a relatively short chapter in the history of energy resource and utility regulation in Alberta, it is a chapter worth knowing. To that end, the balance of this article proceeds as follows: Part 2 outlines a brief history of public utility and energy resource regulation in Alberta; Part 3 provides an assessment of the context of the 1995 merger of the functions of the PUB and the ERCB under the AEUB; Part 4 is an overview of the AEUB's tenure; Part 5 describes the circumstances of the elimination of the AEUB; and Part 6 closes with some concluding remarks.

### A Brief History of Utility and Energy Resource Regulation in Alberta<sup>3</sup>

- 1915 - PUB created.
- 1932 - TVGCB established.
- 1933 - PUB given authority to regulate milk production and pricing.
- 1933/34 - TVGCB abandoned.
- 1936 - PUB given jurisdiction to regulate and licence fuel dealers.
- 1937 - PUB relieved of some non-utility responsibilities.
- 1938 - Petroleum and Natural Gas Conservation Board (PNGCB) established.
- 1942 - PUB's jurisdiction over milk price regulation increased.
- 1944 - Alberta Natural Gas Utilities Board created to address monopolistic behavior in the Turner Valley field and Calgary natural gas market.
- 1949 - Responsibility for approving provincial pipelines transferred from Department of Public Works to the PNGCB.
- 1950 - *Oil and Gas Resources Conservation Act* rewritten to "consolidate regulatory authority firmly in the embrace of the Conservation Board".<sup>4</sup>
- 1954 - PUB given jurisdiction to set natural gas transportation rates on a complaints basis.
- 1957 - PNGCB renamed the Oil and Gas Conservation Board.
- 1958 - Pipelines moved to jurisdiction of the Department of Mines and Minerals.
- 1960 - *Gas Utilities Act* introduced, to be administered by PUB.
- 1969 - PUB relieved of jurisdiction over milk except power to set minimum prices.
- 1970 - PUB relieved of jurisdiction over expropriations.
- 1971 - Oil and Gas Conservation Board renamed the ERCB's role expanded to include hydro and electric energy resources as well as coal.
- 1982 - *Electric Energy Marketing Act* required PUB to set price for sale of electricity to equalize electrical rates throughout the province.
- 1995 - ERCB and PUB functionally merge forming the AEUB.
- 1995 - *Electric Utilities Act* proclaimed to bring about restructuring of the electric energy industry in Alberta.





## RÉSUMÉ

En Alberta, la réglementation des ressources énergétiques et des services publics remonte à 1915, date de la création de l'Alberta Board of Public Utility Commissioners (Commission albertaine des commissaires chargés des services publics), et à 1932, date de la création de la Turner Valley Gas Conservation Board (Commission chargée de l'économie du gaz de la vallée Turner). L'Alberta Energy and Utilities Board (AEUB) (Commission albertaine chargée de l'énergie et des services publics) a été établie en 1995, lorsque le gouvernement de l'Alberta a fusionné les mandats des successeurs de ces commissions. Bien que l'existence de l'AEUB ait été de courte durée, elle a été mouvementée. Cet article présente un bref historique de la réglementation de l'énergie et des services publics en Alberta et évalue le contexte de la création de l'AEUB et son existence. L'auteur conclut que ce que la commission a légué à la province, à savoir les processus de négociation d'ententes et l'adoption d'une approche plus collaborative à la réglementation du secteur de l'électricité, ne peut que bénéficier le gouvernement provincial lors de la mise en oeuvre de sa Stratégie en matière d'énergie.

- 1998 - Power Pool, Transmission Administrator and Market Surveillance Administrator established.
- 1999 - Alberta Department of Energy reorganized and renamed Department of Resource Development, with responsibility for oil, gas, electricity, forestry and rural utilities.
- 2001 - Alberta Department of Resource Development becomes Department of Energy.
- 2001 - AEUB no longer regulates wholesale electricity prices; consumers can choose own electricity retailer.
- 2004 - AEUB commences regulating distribution and default electricity rates for EPCOR and ENMAX.
- 2008 - AEUB dissolved and its powers reallocated to the new ERCB and the AUC.<sup>5</sup>

Broadly speaking, energy resource regulation in Alberta has always been subject to, and sometimes shaped by, external pressures – whether as a result of the participation of foreign corporations in the oil patch; the evolution of Canadian, continental and world markets for energy commodities; or increasing concerns about the environmental impact of the exploration for and development of energy resources. Utilities regulation, on the other hand, has largely been focused on the specific task of price/rate setting. Indeed, the PUB's role as traditional utility rate maker remained virtually unchanged from 1915 to 1995 when Alberta began restructuring its electricity industry. It has only been relatively recently, as Alberta and other North American jurisdictions have begun to restructure their electricity industries and as demand for electricity has grown significantly, that utility regulation has been subject to similar kinds of external pressures as energy resource regulation.

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. It was the Alberta government's policy objective of aggressive cost cutting and administrative streamlining adopted in the 1990s that led to the merger of the functions of the ERCB and the PUB in 1995.

### Creation of the AEUB

When the AEUB was formed in 1995, 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 specific details of their respective jurisdictions were very different. At that time, the ERCB's stated mission was 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."<sup>6</sup> In 1994 the core function of the PUB was to regulate Alberta's investor-owned utilities and certain municipally owned electric utilities to ensure that customers received safe and reliable service at just and reasonable rates.

At the time of their merger, the main similarities between the ERCB and the PUB 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.

At the time of their merger, both regulators oversaw the operations of those entities subject to their jurisdiction; however, in regulating the oil and gas industry, the ERCB employed a very much



hands-on, collaborative approach to applications, enforcement and the development of policy and operational regulations,<sup>7</sup> while the PUB's oversight was arm's-length and largely for the purpose of ratemaking.<sup>8</sup>

A fundamental difference between the AEUB and the PUB lay in their mandates and particular areas of expertise. The PUB was established to implement economic regulation in a wide range of settings rather than in one specific industry or business sector. That board's mandate at the time of the merger is best 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 public utilities."<sup>9</sup> By contrast, the ERCB's predecessor was created as a specialized board with expertise in energy resource regulation, specifically conservation of oil and gas resources. The overarching policy objective for the ERCB has always been the orderly development – with the emphasis on development – of the province's petroleum resources.<sup>10</sup>

Another fundamental difference between the two regulators in 1995 lay in the scope and nature of their public interest considerations. Generally speaking, the public interest considerations of the PUB have been found to be narrower than those of the ERCB, and focused on the interests of those on both sides of the rate paying equation.<sup>11</sup> The public interest considerations of the ERCB included those that would be directly affected by any given energy development project but also included the broader Alberta public that was interested in the economic, orderly and efficient development of energy resources in the province.<sup>12</sup> Other notable characteristics distinguishing the ERCB from the PUB in 1995 included the ERCB's technical expertise and presence in the field as well as its extensive regulation-making powers and policy development role.<sup>13</sup>

The motivation for the merger of the responsibilities of the PUB and the ERCB under the AEUB was the desire to achieve cost savings through the consolidation of processes and sharing of administrative costs.<sup>14</sup> There was no indication at the time that the implications of the electric industry restructuring, which was to be undertaken at the same time and to be implemented by the AEUB, was taken into account in the merger plans.

### AEUB's Tenure

The AEUB was created through the *Alberta Energy and Utilities Board Act*.<sup>15</sup> That Act contained no purposes provisions: it was purely utilitarian in scope and content. Pursuant to section 13 of that Act, the AEUB was given exclusive jurisdiction over "all

matters that may be dealt with by the ERCB or the PUB" and, pursuant to section 15, the AEUB was given all of the powers, rights and privileges held by the ERCB and the PUB. The existing statutes setting out the respective powers of the ERCB and the PUB remained intact and unchanged in their essential elements. As a result, fundamental differences in energy resource and utility regulation inherent in the legislative framework remained unchanged under the AEUB.

The early years of the AEUB's tenure were characterized by the struggle to come to terms with the tensions created by the need to amalgamate two strong, independent organizations with different administrative styles and fundamentally different regulatory purposes, while at the same time implementing cost-cutting measures and managing a growing workload that was also increasingly complex.<sup>16</sup> Within two years of its creation, the AEUB had two different chairpersons 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.

Overseeing the restructuring of the Alberta electricity industry required significant resources. The process consumed significant Board resources in hearing time and administrative effort.<sup>17</sup> At the same time, the petroleum side of the AEUB's business only increased.<sup>18</sup>

As part of its efforts to implement the government's regulatory streamlining and cost-cutting policies, the AEUB implemented numerous regulatory initiatives in the electricity sector aimed at creating more streamlined and efficient processes.<sup>19</sup> The AEUB also adopted a less interactive approach to regulating the oil and gas sector;<sup>20</sup> however, it reallocated resources to the field in 1998 in response to complaints about lack of enforcement, and acute landowner concerns that, in some instances, were manifested in acts of vandalism and violence.<sup>21</sup> In the interests of streamlining and efficiency, the AEUB also undertook the development of negotiated settlement process guidelines and a streamlined review process for applications for large, integrated oil sands projects.<sup>22</sup> In implementing these initiatives, the AEUB adopted the ERCB's collaborative approach.

The AEUB's priorities changed over its tenure. 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."<sup>23</sup> It described its core functions as: adjudication and regulation; applications; surveillance and enforcement; and information and knowledge. In 2003/2004, the AEUB





description of its mission was unchanged but it identified only two core businesses: adjudication and regulation, and information and knowledge.<sup>24</sup> Applications, surveillance and enforcement were no longer deemed to be stand-alone, core functions. This, in spite of the fact that the volume of applications dealt with by the AEUB increased dramatically over the course of its tenure. In 1996/1997 it received 19,551 applications.<sup>25</sup> By contrast, in 2006, the Board received over 60,000 applications in categories ranging from well licences, through pipelines, *in situ* oil sands development, sour gas flare permits, coal mining operational permits, to electricity facility and tariff applications.<sup>26</sup> Hearing effort also increased substantially: in 1996/1997 the AEUB held 72 hearings,<sup>27</sup> in 2006 the AEUB held a total of 131 hearings.<sup>28</sup>

The AEUB was subject to, and/or administered, some 42 pieces of legislation. During the tenure of the AEUB it was a policy taker, in particular in so far as it oversaw the restructuring of the electricity sector.<sup>29</sup> At the same time it was a policy maker in the petroleum sector.<sup>30</sup> 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.

Unfortunately, the last year of the AEUB's tenure was marred by controversy surrounding the hiring of private investigators and their subsequent actions in the course of an unusually contentious hearing into proposed transmission infrastructure.<sup>31</sup>

### Elimination of the AEUB

By contrast with the creation of the AEUB, its elimination was carried out abruptly, with little fanfare or policy justification. In the press release in which the initial announcement was made, efficiency, ability to manage growth pressures, the need for robust regulatory authorities and timely decision-making were cited as rationales for the decision.<sup>32</sup> In subsequent communications the ability to focus resources and transparency in the regulatory framework were also cited as reasons for the return to a two-board model for energy resource and utility regulation in Alberta.<sup>33</sup>

*The Alberta Utilities Commission Act*<sup>34</sup> 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 which will be regulated by the AUC. The AUC's mandate is much broader than was that of the

PUB at the time of the 1995 merger because of its expanded mandate, which now includes oversight of the competitive market in electricity generation and of market conduct.

### Conclusion

While the timing and rather abrupt announcement of the re-establishment of the new ERCB and the AUC raises questions, the two-board model is, nonetheless, an accurate reflection of the approach to public utility and energy resource regulation in operation in Alberta since the early 20th Century.<sup>35</sup> The elimination of the AEUB, along with the re-establishment of the new ERCB and the AUC, mark the beginning of a new chapter in energy and utility regulation in Alberta. What the new chapter will tell remains to be seen; however, the legacy of the AEUB, including the introduction and implementation of negotiated settlement processes and the adoption of a more collaborative approach between the regulator and those subject to its regulation on the electricity side can only prove beneficial going forward as the government implements its Energy Strategy.

- ◆ Cecilia A. Low has a B.Sc. in Applied Science (geophysics) and an LL.B. She is a sole practitioner based in Calgary and a student in the LL.M. program at the University of Calgary. Her practice and areas of interest include: energy (regulatory) law; environmental law; aboriginal law and international development law. This article is based on a longer paper published by the Canadian Institute of Resources Law. Cecilia A. Low, *Energy and Utility Regulation in Alberta: Like Oil and Water?*, Occasional Paper #25 (Calgary: Canadian Institute of Resources Law, 2009).

### Notes

1. The ERCB was a successor to the TVGCB.
2. The Chairman of the ERCB has used the phrase "new ERCB" to distinguish the current incarnation of Alberta's energy resource regulator from its predecessors with the same name. The phrase "new ERCB" will be used in this article when referring to the new entity.
3. Sources: David H. Breen, *Alberta's Petroleum Industry and the Conservation Board* (Edmonton: University of Alberta Press, 1993) at 651-662; Keith F. Miller *et al.*, *Recent Legislative, Regulatory and Environmental Developments of Interest to Oil and Gas Lawyers (1995-1996)* 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 – Items of Interest", online: <http://www.auc.ab.ca/about-the-auc/who-we-are/Pages/history.aspx>; Alberta



- Energy, "Energy's History in Alberta", online: <[http://www.energy.alberta.ca/About\\_Us/1133.asp](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). For a more complete chronology, see: Cecilia A. Low, *Energy and Utility Regulation in Alberta: Like Oil and Water?*, CIRL Occasional Paper No. 25 (Calgary: Canadian Institute of Resources Law, 2009).
4. Breen, *ibid.* at 306-307.
  5. The AUC retains some of the PUB's powers over diverse matters including determination of compensation to be paid to ambulance service providers and compensation paid to owners of businesses affected by a loss of access due to city-approved work.
  6. ERCB, *Energy Alberta 1994: A Review of Alberta Energy Resources in 1994* (Calgary: 1995) at back cover.
  7. Alastair R. Lucas, "Alberta's Voluntary Approach to Climate Change" in G. Bruce Doern, *Canadian Energy Policy and the Struggle for Sustainable Development* (Toronto: University of Toronto Press, 2005) at 301-302 and 305.
  8. *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, LEXUM 2006 SCC 4.
  9. *ATCO Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557 at 576.
  10. Ernest Manning summarized the Province's approach to regulation of petroleum resources in a 1987 interview when he said:  
"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."  
Excerpt of interview with Ernest Manning as reproduced in ERCB, *Energy Alberta 1992* (Calgary: 1993).
  11. *ATCO Electric Limited v. Alberta (Energy and Utilities Board)*, 2004 ABCA 215, at para. 132.
  12. *Alberta Power Ltd. v. Alberta (Public Utilities Board)*, 72 Alta. L.R. (2d) 129, 1990 Carswell Alta 15 at para. 32. Leave to appeal to the Supreme Court of Canada refused 13 September 1990, 72 D.L.R. (4<sup>th</sup>) vii.
  13. Low, *supra* note 3 at 23-34.
  14. See: Alberta, Legislative Assembly, *Hansard* (28 February 1994) at 290-291 (The Hon. Patricia Black); and Alberta, Legislative Assembly, *Government Bills and Orders Second Reading Bill 15 (Hansard)* (25 April 1994) at 1408.
  15. R.S.A. 2000, c. A-17 [repealed].
  16. See Low, *supra* note 3 at 29.
  17. For example, 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. To deal with the matter of the restructured electricity tariffs alone, 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, the electricity sector underwent substantive refinement in both 1998 and in 2003. Each time the AEUB was impacted as it was required to undertake new responsibilities both for existing entities and for newly unbundled sectors of the electric energy industry.
  18. 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.
  19. 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, AEUB, *2004 Year in Review* (Calgary: 2005) at 14.
  20. Introducing a self-policing model for enforcement and encouraging self-reliance in the application and approval processes. See: Alberta Ministry of Energy, *1995/1996 Annual Report*, at 64-65.
  21. See, for example, AEUB, *Alberta Energy and Utilities Board Regulatory Highlights for 1998* (Calgary: 1999).
  22. See, for example, Alberta Ministry of Energy *1998/1999 Annual Report*, at 40-41.
  23. AEUB, *Regulatory Highlights for 1998* (Calgary: 1999) at 1.
  24. *Ibid.*
  25. Alberta Ministry of Energy, *1996/1997 Annual Report*, at 15.
  26. AEUB, *2006 Year in Review: Vision* (Calgary: 2007) at 9.
  27. *Supra*, note 25.
  28. *Supra*, note 26. Fifty-eight were energy related and 73 were utilities related.
  29. 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.
  30. 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 stakeholders.
  31. AltaLink's 2006 application for approval to construct a 500 kV transmission line between Edmonton and Calgary. Also see: Alice Woolley, "Enemies of the State? The Alberta Energy and Utilities Board, Landowners, Spies, a 500 kV Transmission Line and Why Procedure Matters" (2008) 26:2 *Journal of Energy and Natural Resources Law* 234.
  32. Alberta Ministry of Energy, Press Release (14 June 2007).
  33. Alberta Ministry of Energy, *2007/2008 Annual Report*, at 5 and Letters to the Chair of the ERCB and the AUC from the Office of the Minister of Energy of Alberta, mailed 20 December 2007.
  34. S.A. 2007, c. A37.2
  35. For a more detailed analysis and review see Low, *supra* note 3.



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At the end of 2007, the AEUB was dissolved and separate energy resource and utilities regulators – the Energy Resources Conservation Board and the Alberta Utilities Commission – 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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NUMBER 105 – 2009

*Resources* is the newsletter of the Canadian Institute of Resources Law. Published quarterly, the newsletter's purpose is to provide timely comments on current issues in resources law and policy. The opinions presented are those of the authors and do not necessarily reflect the views of the Institute. *Resources* is e-mailed free of charge to subscribers. (ISSN 0714-5918)

**Editors:** Nancy Money and Sue Parsons

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