Canadian Institute of Resources Law
Institut canadien du droit des ressources

The Provincial Energy Strategy — An Integrated Approach: The Challenges Raised by a Two-Board Model for Energy and Utility Regulation

Cecilia A. Low

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MFH 3353, University of Calgary, 2500 University Drive N.W., Calgary, Alberta, Canada T2N 1N4
Tel: (403) 220-3200 Fax: (403) 282-6182 E-mail: cirl@ucalgary.ca Web: www.cirl.ca

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All enquiries should be addressed to:

Information Resources Officer
Canadian Institute of Resources Law
Murray Fraser Hall, Room 3353 (MFH 3353)
University of Calgary
Calgary, Alberta, Canada T2N 1N4

Telephone: (403) 220-3200
Facsimile: (403) 282-6182
E-mail: cirl@ucalgary.ca
Website: www.cirl.ca

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Murray Fraser Hall, Room 3353 (MFH 3353)
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Calgary, Alberta, Canada T2N 1N4

Téléphone: (403) 220-3200
Facsimilé: (403) 282-6182
C. élec: cirl@ucalgary.ca
Website: www.cirl.ca

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Abstract

The government of Alberta introduced the Provincial Energy Strategy in 2008. A key element of the Strategy is integration in planning and decision-making across energy sectors and across energy, the environment and the economy. At the beginning of 2008, the government of Alberta moved away from the single board approach to energy and utility regulation back to a two-board model when it re-created the Energy Resources Conservation Board (ERCB) and created the Alberta Utilities Commission (AUC). The two-board model for energy and utility regulation as established by current legislation will present challenges to the implementation of the Provincial Energy Strategy.

In this paper, the author provides an assessment of the respective roles of the ERCB and the AUC as defined by current legislation as well as an assessment of the roles of the boards in the context of the Provincial Energy Strategy. In particular, the author identifies areas where challenges may arise as well as suggestions for how the two-board model for energy regulation in Alberta can be utilized to implement the Energy Strategy.

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Table of Abbreviations

AEUB	Alberta Energy and Utilities Board
ALSA	*Alberta Land Stewardship Act*
AUC	Alberta Utilities Commission
AUCA	*Alberta Utilities Commission Act*
ERCA	*Energy Resources Conservation Act*
ERCB	Energy Resources Conservation Board
ISO	Independent System Operator
NEB	National Energy Board

1.0. Introduction

After merging the functions of the province's energy resource and utility regulators under a single entity in 1995, the government of Alberta returned to a two-board model for energy and utility regulation at the beginning of 2008 when it (re)created the Energy Resources Conservation Board (ERCB) and the Alberta Utilities Commission (AUC). With the recent introduction of the Provincial Energy Strategy (Energy Strategy) and its renewed focus on integrated management of the environment, energy and the economy, the Alberta government has set the stage for a new approach to energy resource and utility regulation in Alberta.[1]

According to a report sponsored jointly by the United Nations Development Program, the United Nations Department of Social and Economic Affairs and the World Energy Agency (World Energy Assessment), a new approach to energy system development is required world-wide to support sustainable development.[2] Like the Energy Strategy, the World Energy Assessment emphasizes the linkages between energy, the environment and the economy, as well as social and health issues.[3] More to the point, it stresses the need to ensure that institutions, rules and regulations actually work in support of energy or sustainable development.[4] Whether or not a new approach will be adopted in Alberta remains to be seen, but the current two-board model for energy and utility regulation will present some challenges to taking an integrated approach generally and to implementing the Energy Strategy in particular.

Clean energy production, wise energy use and sustained economic prosperity are identified as the strategic outcomes to be achieved through the implementation of the Energy Strategy.[5] Energy production and energy use fall directly, in the case of the former, or indirectly, in the case of the latter, within the purview of the ERCB and the AUC. The Energy Strategy states that:

> "… many government departments will be directly involved in executing this strategy. It will also encompass the activities of a number of energy agencies, including the Alberta Utilities

[1] Alberta Energy, *Launching Alberta's Energy Future — Provincial Energy Strategy* (Edmonton: Alberta Energy, 2008) (Energy Strategy), online: <http://www.energy.gov.ab.ca/Org/pdfs/AB_ProvincialEnergyStrategy.pdf>.

[2] Thomas B. Johansson & José Goldemberg, eds., *World Energy Assessment Overview: 2004 Update* (New York: UNDP, Un-DESA and the World Energy Council, 2005) at 12.

[3] *Ibid.* at 11-13.

[4] *Ibid.*

[5] Energy Strategy, *supra* note 1 at 2.

> Commission (AUC), the Alberta Energy Research Institute (AERI), the Energy Resources Conservation Board (ERCB), and the Alberta Electric System Operator (AESO)."[6]

However, beyond a reference to reviewing and streamlining regulatory processes for electric energy transmission siting,[7] the Energy Strategy provides no detail about the specific roles of those agencies in executing the Energy Strategy.

This paper picks up from where an earlier paper left off.[8] It provides an assessment of the respective roles of the ERCB and the AUC as defined by current legislation, an assessment of the roles of the ERCB and the AUC in the context of the Energy Strategy and suggestions for how the two-board model for energy regulation in Alberta can be utilized to implement the Energy Strategy.[9] To that end, the balance of this paper proceeds as follows: Part 2.0 describes the Energy Strategy, its key elements in particular, then situates the Energy Strategy in the context of other recently introduced and related policies;[10] Part 3.0 examines the roles of the ERCB and AUC under existing legislation, then in the specific context of the Energy Strategy; Part 4.0 describes steps that are required so that the ERCB and the AUC will be better able to carry out an integrated, system based approach to energy resource management and regulation in Alberta that supports the strategic outcomes of the Energy Strategy; and finally, Part 5.0 provides some concluding remarks.[11]

2.0. The Energy Strategy

2.1. Key Elements

The Energy Strategy has been described by the Minister of Energy as being "… a comprehensive plan for Alberta's energy future" that "supports our government's priority

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[6] Energy Strategy, *ibid.* at 47.

[7] *Ibid.* at 44.

[8] For a discussion of energy and utility regulation in Alberta and advantages and disadvantages of the two-board model, see: Cecilia A. Low, *Energy and Utility Regulation in Alberta: Like Oil and Water?*, Occasional Paper #25 (Calgary: Canadian Institute of Resources Law, 2009).

[9] This paper does not assess the merits of the Energy Strategy.

[10] Specifically: Alberta Dept. of Treasury Board, *Responsible Actions: A Plan for Alberta's Oil Sands* (February 2009) (Oil Sands Plan); Alberta Dept. of Environment, *Alberta's 2008 Climate Change Strategy: Responsibility, Leadership, Action* (January 2008); and the *Land-Use Framework* (Edmonton: Alberta Dept. of Sustainable Resource Development, December 2008), online: <http://www.assembly.ab.ca/lao/library/egovdocs/2008/alsrd/172020.pdf> (last visited, 30 July 2009).

[11] While each Part of this paper could easily be expanded into a paper in its own right, it is hoped that the overview it provides will stimulate discussion about the roles of the ERCB and the AUC in Alberta's energy system.

of ensuring that our energy resources are developed in an environmentally sustainable way."[12] The central theme of the Energy Strategy is the continuing development of Alberta's energy resources for the benefit of Albertans — with the emphasis on continuing development.[13] In this, successive Alberta governments have been consistent since the early 20th century when the first attempts were made at imposing conservation regulations on producers in the Turner Valley field in an effort to ensure that Alberta's petroleum resources were not wasted and long-term production was maximized.[14]

The Energy Strategy also highlights the need for the integrated development of resources in an environmentally sound manner, but the province has liberally peppered past pronouncements on energy policy with references to the need to adopt an integrated approach, so that theme is not new. Apart from the introduction of the *Environmental Protection and Enhancement Act*[15] and requirements for environmental assessment in 1992, the first significant move towards an integrated approach to the development of resources in Alberta has been the recent introduction of the *Alberta Land Stewardship Act* (*ALSA*)[16] to implement the plan outlined in the *Land-Use Framework*.[17]

Key aspects of the Energy Strategy that are new are the explicit acknowledgement of the importance of renewable energy to the Province's energy resource portfolio as well the importance of addressing the demand or consumption side of the energy equation. Alberta has already developed a portfolio of renewable energy resources, but for renewable energy to play a substantial part in Alberta's energy system, it needs to be taken to the next level.

Another important theme in the Energy Strategy is that, as an energy producer and exporter, Alberta is necessarily connected with and exposed to influences from beyond its borders. For example, the National Energy Board's (NEB) regulation of interprovincial

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[12] Energy Strategy, *supra* note 1 at 2.

[13] The development theme runs throughout Alberta's broader energy and environment framework: for example, the following statement is found in *Alberta's 2008 Climate Change Strategy* at 13:

> "Alberta's strong and vibrant economy is founded on resource extraction and value added upgrading, so our strategy ensures we build on this strength — we are not prepared to forgo the opportunities our strong and vibrant economy provides."

[14] See: Cecilia A. Low, "The Rule of Capture: Its Current Status and Some Issues to Consider" (June 2009) 46 Alta. L. Rev. 3 at 799.

[15] R.S.A. 2000, c. E-12.

[16] S.A. 2009, c. A-26.8. The Act received Royal Assent on 4 June 2009 and will come into force on proclamation.

[17] *Land-Use Framework*, *supra* note 10.

and international pipelines affects the development of energy resources in Alberta.[18] Similarly, the federal government's jurisdiction over international treaties and aspects of environmental law means that Alberta's regulation of its energy resources will be affected by federal government action — such as action on climate change.[19] Changes in demand in world markets for crude oil or in the continental markets for natural gas, whether as a direct result of economic cycles or as a result of changes in laws in other jurisdictions, also have an impact on Alberta as an energy producer and exporter.[20]

In addition to the broader themes running through the Energy Strategy, it identifies seven specific "levers" to be applied and associated actions to be taken for the purpose of achieving clean energy production, wise energy use and sustained economic prosperity.[21] The levers, and associated actions relevant to regulation by the ERCB and the AUC, are:

- Address the environmental footprint of energy.
    - Ensure an integrated approach to development of energy resources.
- Add value to Alberta's energy industry.
    - Support for the development of a world-class hydrocarbon processing cluster integrated with oil sands production, energy consumption and carbon capture.
    - Support for optimization of basin resources.
    - Support for alternative and renewable energy development.
- Change energy consumption behavior.
    - Implementation of energy conservation measures.
- Innovate in energy technology, leadership and development of people.
- Enhance the capability of the electricity system.
- Improve knowledge and awareness of energy issues.

[18] For example, NEB approval of new or expanded oil pipeline capacity originating in Alberta (or with Alberta receipt points) and serving U.S. markets can stimulate and support increased exploration and production activity (whether conventional or otherwise) in Alberta.

[19] Indeed, the reality in Canada is that the divided jurisdictions in our federal system do not readily accommodate a fully integrated, energy system approach to energy, the economy and the environment.

[20] For example, laws in California requiring cleaner production of electricity or encouraging the use of natural gas as an automotive fuel could have the effect of increasing demand for Canadian natural gas.

[21] Energy Strategy, *supra* note 1 at 21.

- Ensure alignment of other initiatives, programs, policies and regulations.
    - Alignment with related provincial and federal initiatives.
    - Changes to ensure regulatory and institutional alignment with the energy strategy.[22]

Except for the last one, none of the levers is expressly tied to measures to be taken by the ERCB or the AUC, or to changes to be made to the way in which they regulate energy resources and utilities. There is no elaboration in the Energy Strategy of what changes will be made to ensure regulatory and institutional alignment.

Having said that, the description of the approach the Province plans to take in order to achieve the desired outcomes reveals opportunities for the ERCB and the AUC to play a part. For example:

- Cleaning Alberta's energy production is to be accomplished in a number of ways, including respecting limits established through a cumulative effects approach and ensuring that relevant regulations are aligned and that monitoring and enforcement are aimed at achieving sustained, cleaner energy production.[23]

- Wise energy use is to be accomplished by, among other things: supporting the adoption of energy conservation measures in buildings; supporting upgrades to the electricity system to increase its capacity and enable Albertans to make better use of it; and supporting the realization of greater efficiency in the production, conversion and consumption of energy.[24]

- The challenge of sustained economic prosperity is to be addressed in a number of ways including: developing increased capacity and robustness in the province's electricity system; providing long-term certainty required to attract capital; and creating better understanding of efforts to manage the environmental footprint of energy development.[25]

The ERCB already plays a role in cleaning Alberta's energy production, for example in establishing and enforcing well abandonment and reclamation directives or in

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[22] Energy Strategy, *supra* note 1 at 31. The ERCB's recent re-organization is for the purpose of ensuring that it becomes a world-class regulator of unconventional energy resources by 2013 — see ERCB Bulletin 2009-022: *Energy Resources Conservation Board Reorganizes to Meet the Needs of Alberta's Energy Future* (29 June 2009). While the attainment of that purpose may align with Energy Strategy goals, it will not necessarily contribute to the advancement of the stated objectives.

[23] Energy Strategy, *ibid.* at 24.

[24] *Ibid.* at 26.

[25] *Ibid.* at 29.

developing directives to apply to oil and gas developments within or proximal to water bodies.[26] Undoubtedly, the ERCB can play an even greater role in cleaning energy production in Alberta. In particular, as less conventional means of oil and gas exploration and production are implemented in Alberta, the ERCB should strive to be ahead of, or at least on the front of, the curve in terms of identifying and employing appropriate regulation to ensure that such production takes place in as "clean" a manner as possible.[27]

The AUC can play a role in promoting wise energy use by encouraging the development of and approving rates that incorporate incentives for the implementation of demand side management, such as tariffs differentiated by time of use.

Both regulators can aid in meeting the challenge of sustained economic prosperity by ensuring that they support and are responsive to new developments in technology, engineering, environmental science and economics. Both regulators can also work towards meeting the three goals of clean energy production, wise energy use and sustained economic prosperity by exercising their information gathering and assessment powers to identify potential roadblocks to the achievement of the goals of the Energy Strategy.

Finally, it is important to bear in mind that the Energy Strategy is not a legal document: it is binding on no one. Absent amendments made to legislation governing or administered by the ERCB and or the AUC and rooted in the Energy Strategy, the Energy Strategy cannot, in and of itself, affect how the ERCB and the AUC discharge their duties except to the extent that the ERCB and the AUC have regard to the Energy Strategy in considering the scope and details of the broad public interest in applications before them.[28]

2.2. The Energy Strategy within the Broader Energy Resource Framework

Although the Energy Strategy, the Climate Change Strategy, the *Land-Use Framework* including the *ALSA*, and the Oil Sands Plan (collectively the Strategies) are not being expressly touted as part of a comprehensive framework for integrated resource

[26] ERCB Directive 20: *Well Abandonment Guide* (7 December 2007); Draft Directive: *Oil and Gas Development Within or Proximal to Water Bodies* (released for consultation 10 February 2009).

[27] Note that "clean" should be interpreted as meaning both unpolluted as well as sustainable in a broader energy system sense. For example, the ERCB could work with the AUC to establish goals for the energy industry as a whole that would support the recycling of CO_2 produced by electric power plants for use in enhanced recovery schemes.

[28] That is the broader public interest as opposed to the specific interests of members of the public who may be directly affected by a given application.

development in Alberta, successful implementation of the Strategies requires that they be viewed and used as such. While a detailed analysis of each of the strategies identified above is beyond the scope of this paper, the goals for each strategy will be outlined briefly to provide the context for understanding the energy resource regulatory framework of which they will form a part.[29]

The Climate Change Strategy is Alberta's second response to the threat of climate change.[30] Rather than setting hard targets for emissions or emission intensity, the Climate Change Strategy adopts three overarching goals with associated actions. Those are:

- Conserving and using energy efficiently.
    - Reduce greenhouse gas emissions by transforming energy use, applying energy efficient solutions and conserving energy.
- Implementing carbon capture and storage.
    - Store CO_2 in Alberta's geological formations rather than releasing it to the atmosphere.
- Greening energy production.
    - Transform the way energy is produced to introduce cleaner, more sustainable approaches to energy production.[31]

Depending on how the government of Alberta goes about achieving those goals, it seems obvious that such action will involve energy utility services (conservation) and therefore the AUC. Such action will also involve the development of Alberta's carbon based energy resources (carbon capture and storage and greening energy production) and therefore the ERCB.

The *Land-Use Framework* is intended to provide an approach to managing public and private lands and natural resources in Alberta to achieve the Province's long-term economic, environmental and social goals.[32] It applies across sectors and is a mechanism

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[29] There are other provincial strategies and plans dealing with the broader theme of resource development in Alberta. The Strategies were singled out for the purposes of this analysis because of their direct bearing on the Energy Strategy and the roles of the ERCB and the AUC in implementing the Energy Strategy. Others, such as the Carbon Capture and Storage initiative, form part of the broader Strategies.

[30] The first was released in October 2002 by the Government of Alberta and was entitled: *Albertans and Climate Change: Taking Action*. For a detailed consideration of Alberta's Climate Change Strategy, see Jenette Poschwatta, *Alberta's 2008 Approach to Climate Change: A Step Forward?*, Occasional Paper #24, (Calgary: Canadian Institute of Resources Law, 2008).

[31] *Alberta's 2008 Climate Change Strategy*, *supra* note 10 at 15, 17 and 19.

[32] *Land-Use Framework*, *supra* note 10 at 7.

for horizontal integration of land use, natural resource management, environmental protection and energy resource management. The primary way in which the *Land-Use Framework* will interact with the provincial Energy Strategy and affect the work of the AUC and the ERCB is in the requirement for compliance with regional land use plans as they are established. In particular, when proclaimed, the *ALSA* will amend the relevant legislation to require the AUC and the ERCB to act in accordance with any applicable regional land use plan in carrying out their mandates.[33]

The Oil Sands Plan is the Alberta government's strategic plan for "responsible development" of the Alberta oil sands.[34] It is intended to balance future energy development with respect for the environment as well as fostering a high quality of life for Alberta families while developing the economy.[35] The Oil Sands Plan is to be guided by the Energy Strategy and connected to the *Land-Use Framework*.[36] Four factors are identified as being keys to the success of the Oil Sands Plan. Those are:

- Increased coordination of the roles and responsibilities among regulatory bodies including the ERCB and provincial ministries.
- Increased coordination across government in the review of environmental assessment.
- Clear and consistent processes to enable incentives for compliance and penalties for non-compliance.
- Clear rules regarding transitions to new guidelines, technology applications and program changes.[37]

Each of the four factors will involve the ERCB either directly or indirectly. To the extent that new electricity or natural gas utility pipeline infrastructure is required to support oil sands development, the AUC will also have a role to play in the execution of the Oil Sands Plan.

2.3. Characterization of the Energy Strategy Framework

When taken together, the Strategies establish a more comprehensive approach to the management, development and delivery of Alberta's energy resources than Alberta has

[33] *ALSA*, *supra* note 16, ss.73-74.

[34] Oil Sands Plan, *supra* note 10 at 2.

[35] *Ibid.*

[36] *Ibid.*

[37] *Ibid.* at 40.

taken in the past: an approach that could be characterized as an energy systems approach.[38] The National Advisory Panel on Sustainable Energy Science and Technology in Canada has said that it views the Canadian energy economy as:

> "… an interconnected system, containing large flows and conversions of energy, strong interdependencies between producers and users of energy, and significant exports."[39]

There is no single definition of an energy system, but it has been described as:

> "… combined processes of acquiring and using energy in a given society or economy."[40]

Alternately energy systems have been described as:

> "An energy system is made up of an energy supply sector and energy end-use technologies. The object of the energy system is to deliver to consumers the benefits that energy offers."[41]

The UNDP describes energy systems as having the following components:

- the energy sector made up of extraction and treatment, primary energy, conversion technologies, distribution technologies and final energy;
- end use technologies (industrial), useful energy and end use technologies (domestic); and
- an energy services sector.[42]

Energy systems include primary energy, secondary energy and energy services.[43] Primary energy is energy that is available without the need to transform the original source. In Alberta, primary energy includes fossil fuels and renewable resources. Secondary energy is energy that is derived or transformed from primary energy and

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[38] For a detailed discussion of what it would take to develop a comprehensive energy strategy in Alberta see: Michael M. Wenig & Jenette Poschwatta, *Developing a 'Comprehensive Energy Strategy' with a Capital 'C'*, Occasional Paper #22, (Calgary: Canadian Institute of Resources Law, 2008).

[39] National Advisory Panel on Sustainable Energy Science and Technology, *Priorities and Directions in Energy Science and Technology in Canada* (Ottawa: 2006) at 7.

[40] Marc Jaccard, Sustainable Fossil Fuels the Unusual Suspect in the Quest for Clean and Enduring Energy (New York: Cambridge University Press, 2005) at 6.

[41] José Goldemberg, ed., World Energy Assessment: Energy and the Challenge of Sustainability (New York: UNDP, 2000) at 4.

[42] Jaccard, *supra* note 40 at 5.

[43] *Ibid.* at 57.

includes hydrogen and electricity.[44] In Alberta, energy services include electricity and natural gas distribution and delivery service provided by utilities regulated by the AUC.

Clearly, regardless of the specific definition, energy systems are complex and highly interactive. It is also clear from the various definitions of energy systems that the intra-Alberta energy system is and must be regarded as part of a broader energy system. As noted earlier, Alberta's energy system interacts with and is affected by government policies both within and outside of Alberta as well as domestic and international economic and commodity market cycles.[45] The energy system within Alberta is not isolated physically, nor is it isolated economically or legally. It is affected, sometimes significantly so, by external forces including changes in federal laws relating to the export of energy, interjurisdictional infrastructure developments that enable access to previously inaccessible markets and changes in market prices for commodities.

To be sustainable, an energy system must be enduring in terms of the types and level of energy services it provides and it must be benign to people and ecosystems.[46] Energy system sustainability depends on an appropriate balance between economic, environmental and energy objectives and on finding and reinforcing the common links between and among those objectives.[47] To be benign, the flows of energy and associated materials and by-products into and out of energy systems "must not exceed the ability of land, air and water to absorb and recycle them without significant negative disruption."[48]

Fuel substitution, energy conservation and efficiency initiatives and the development of new energy technologies all contribute to an enduring energy system. Using existing resources in new ways in other parts of the energy system can also support sustainability of the system. For example, using petroleum coke, a by-product of upgrading bitumen, in place of natural gas to generate hydrogen and steam or by-products of oil sands

[44] *Ibid.*

[45] A recent article in the Calgary Herald illustrates the point. Premiers of Canada's western provinces met with governors of western states and the premiers and governors are said to have "hailed … their push to develop a cross-border western energy corridor that will be the largest on the planet and one that develops both non-renewable and clean-energy options." Jason Fekete, "Western premiers tout energy corridor at U.S. conference" *Calgary Herald* (15 June 2009). The article goes on to quote Saskatchewan Premier Brad Wall as saying "The western part of North America has this great swath of both renewables and nonrenewable in terms of energy sources and huge opportunities around sustainable development, but we need to be co-operating."

[46] Jaccard, *supra* note 40 at 12.

[47] Francisco Barnés, Commissioner Comisión Reguladora de Energía "Triple Policy Issues: a regulatory perspective" (Presentation to the 2008 CAMPUT Conference, Banff, Alberta, 22 April 2008).

[48] Jaccard, *supra* note 40 at 12.

processing as feedstock for the petrochemical industry can support sustainability by making more efficient use of existing resources.[49]

Given all of the variables involved, energy systems clearly must be adaptable to be able to continually move towards sustainability. Likewise, regulation within such a system will have to be able to adapt to the changing landscape in order not to be a bar to progress towards a sustainable energy system. For example, as environmental standards are adopted outside of Alberta, Alberta's regulators may have to adapt.[50]

The documents containing the Strategies use language that suggests that they are intended to be adaptive. The Strategies describe continuous improvement, or adaptive systems for establishing their respective visions through the creation and implementation of plans, gathering feedback on outcomes and making adjustments as necessary in light of the feedback. For example, the *Land-Use Framework* is described as being a "continuous improvement system supported by building information, knowledge and tools."[51] Specifically, the system is to incorporate checks that will monitor, evaluate, report and adjust performance of actions and plans against economic, environmental, and social objectives.[52]

Similarly, the Climate Change Strategy states:

> "… action on climate change cannot happen in isolation … Within the provincial government, this work must be integrated with land use planning policies, a comprehensive energy strategy … The strategy will be adapted and changed as we learn more, achieve positive results and assess the impact of our actions."[53]

Leaving aside the question of whether the Climate Change Strategy will be adapted in the face of negative outcomes, it too is set up as an adaptive system that is intended to be integrated with the land use planning and energy strategy processes.

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[49] Len Bolger & Eddy Isaacs, "Shaping an Integrated Energy Future" in Andrew Heintzman & Evan Solomon, eds., *Fueling the Future: How the Battle Over Energy is Changing Everything* (Toronto: House of Anansi Press, 2003) at 7.

[50] An illustration of this point may be found in the Speaking Notes of a speech of Willie Grieve, Chair of the Alberta Utilities Commission at the CERI 2008 Electricity Conference in Calgary, Alberta on 28 October 2008. Mr. Grieve was giving an example of the complexities and uncertainty faced by regulators in dealing with new electricity infrastructure when he said: "Entirely new layers have been added to the regulation of electricity generation and transmission in Alberta, building from local to provincial to national to international complexities. And nobody is entirely certain at this point how the rules of the game will change as these different levels of complexities interact and influence each other."

[51] *Land-Use Framework*, *supra* note 10 at 7.

[52] *Ibid.*

[53] *Alberta's 2008 Climate Change Strategy*, *supra* note 10 at 29.

The Oil Sands Plan has also been developed to be coordinated with the Energy Strategy and implemented through the *Land-Use Framework*. The diagrammatic description of the Oil Sands Plan shows that it is intended to work within a system approach and to adapt in response to feedback gathered as the strategy is implemented.[54]

In the overall framework of the Strategies, the Energy Strategy enables an approach to the development and regulation of Alberta's energy resources that better reflects the fact that they are part of a complicated, interconnected system. The ERCB and the AUC will necessarily play important roles in that approach.

3.0. Roles of the ERCB and the AUC within the Energy Strategy

3.1. Roles of the ERCB and the AUC under Existing and Newly Introduced Legislation

The roles of the ERCB and the AUC are defined by their governing legislation and by the legislation they administer. The ERCB is subject to and or administers some 13 major pieces of legislation and 15 major regulations made under that legislation. The AUC is subject to and or administers seven major pieces of legislation and more than two dozen regulations. At present, neither agency is expressly enabled or directed to consider the Energy Strategy when carrying out their mandates.

Broadly speaking, the ERCB has responsibility for hydrocarbon resource development and conservation in Alberta and for intra-provincial oil and non-utility natural gas pipeline regulation. The AUC has responsibility for the regulation of utilities, including gas utility pipelines, and of electric energy generation and transmission within Alberta.

At a general level, the fundamental role of the ERCB's predecessors was always first and foremost to ensure that Alberta's carbon-based energy resources, oil and natural gas in particular, were developed in a manner that benefited Albertans. The ERCB has always regulated the exploitation of public resources for profit by private enterprise: its role being to protect the broader interest of all Albertans in the development of the province's oil and gas resources through conservation.[55] Through all of its incarnations, the ERCB's role has not strayed from that path.

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[54] Oil Sands Plan, *supra* note 10 at 7.

[55] "Conservation" being interpreted as efficient, *i.e.* not wasteful, energy resource development and not as saving energy resources for future use. See: Low, *supra* note 14. Also see Wenig & Moore, *infra* note 79.

The underlying role of the AUC's predecessors has been more narrowly focused. It has been to set and or approve rates for utility service and to protect the rate-paying public's interest in the nature and quality of the service provided by public utilities in Alberta.[56] The AUC's primary role has been to regulate the use of private resources in service to the public for profit and has been geared to the specific relationships, mostly pecuniary, between utility service providers and their ratepayers. Those functions remain at the core of the AUC's public interest role: although, since the initiation of the restructuring of the electricity sector in Alberta in 1995, the AUC has also been responsible for managing the impact of transitions in that sector, usually implementing legislated policy directives in doing so.[57]

At a more specific level, under the current legislative framework there are a number of areas where the existence of two energy system regulators with different mandates gives rise to cause for concern both generally and in terms of implementation of the Energy Strategy. Four areas stand out: the first is the split jurisdiction over pipelines; the second is the lack of clarity in respect of responsibility for energy resource assessment, information gathering and dissemination; the third is the lack of uniformity in the specific public interest considerations guiding each regulator; and the fourth is the uncertainty arising from the implementation of the new provincial land-use framework. Each area of concern will be addressed in turn below.

3.1.1. Split Jurisdiction over Pipelines

Until the *Alberta Utilities Commission Act* (*AUCA*)[58] came into force in January 2008, responsibility for the regulation of all intra-provincial pipelines lay with the Alberta Energy and Utilities Board (AEUB) and with the ERCB before that. With the transfer of jurisdiction over utility pipelines to the AUC there are now three regulators that exercise responsibility over pipeline construction, operation and abandonment in Alberta: the ERCB, the AUC and the NEB.[59] This raises concerns about consistency in the regulation

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

[57] For example, the directive in the *Hydro and Electric Energy Act*, R.S.A. 2000, c. H-16, s. 3 that the AEUB (and now the AUC) not consider whether a proposed new generating unit is needed or economic.

[58] S.A. 2008, c. A-37.2.

[59] With the recent transfer in jurisdiction over the former Nova Gas Transmission Ltd. system to the NEB, the federal regulator now regulates a significant proportion of the pipeline infrastructure in Alberta. The pipeline network within Alberta spans more than 403,500 km. Of that, approximately 23,500 km of pipeline gathering, processing and transmission facilities previously regulated by the ERCB/AEUB now fall under federal jurisdiction. In addition, approximately 62,000 km of natural gas pipeline facilities in Alberta that provide gas utility transmission and distribution services are now regulated by the AUC and approximately 392,000 km of pipelines fall within the jurisdiction of the ERCB. Online sources: <http://www.energy.gov.ab.ca/Org/Publications/AR2008.pdf>; <http://www.transcanada.com/gas_transmission/alberta

of pipelines at all phases of their life cycle, both generally and in the specific context of the Energy Strategy.[60] For example, pursuant to subsection 4(d) of the *Pipeline Act*[61] both the ERCB and the AUC are empowered to inquire into, examine or investigate any matter relating to the control of pollution and conservation of the environment in the development, operation, discontinuation and abandonment of pipeline facilities. In the context of the Energy Strategy, it would not make sense for the AUC to conduct an inquiry into minimizing the environmental footprint of gas utility pipelines if the ERCB were not also considering the same issues as they relate to pipelines it regulates.[62]

Similarly, both the ERCB and the AUC have the power to make extensive regulations applicable to and in respect of pipelines.[63] While there is currently a uniform body of regulations in place that applies to all pipelines in the Province falling under the *Pipeline Act*, there is nothing that would prevent either the ERCB or the AUC from making a new regulation applicable to pipelines falling under their exclusive jurisdiction.

For matters that are common to both natural gas utility and other pipelines, such as measures to be taken to locate a pipeline and protect it from any ground disturbance or respecting the construction, operation, testing, maintenance and repair of pipelines,[64] regulatory efficiency, certainty and clarity require that the AUC and the ERCB be given more specific policy direction on the adoption of uniform standards and practices in respect of all provincially regulated pipelines.

Presumably, to that end, under the *AUCA* the AUC is empowered to make rules that adopt or incorporate standards, practices, codes, objectives or any other rules of any government organization or person. While the ERCB is arguably either a "person" or an "organization" it is left entirely to the Commission's discretion whether or when to do so.[65] In the same vein, under the *Gas Utilities Act*,[66] the AUC may delegate its powers, duties and functions in respect of operational and compliance matters relating to gas utility pipelines to the ERCB. In fact it appears that it has done so in respect of gas utility

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.html>; <http://www.atcopipelines.com/About%20Us/Our%20Business/>; <http://www.altagasutilities.com/aboutUs>; and <http://www.atcogas.com/About_Us/Profile/Profile_ATCO_Gas.pdf>.

[60] A full and detailed analysis of the potential uncertainties in the interpretation of the *Pipeline Act* in light of the parallel responsibilities of the ERCB and the AUC for intra-Alberta pipelines is beyond the scope of this paper. Concerns that relate specifically to the goals of the Energy Strategy will be highlighted.

[61] R.S.A. 2000, c. P-15.

[62] Ideally, the same holds true for NEB regulated pipelines.

[63] *Supra*, note 61, s. 3(1).

[64] *Ibid.,* ss. 3(1)(p) and (k) respectively.

[65] *AUCA*, *supra* note 58, s. 76(2). It is also worth noting that the definition of "person" does not unequivocally include the ERCB although it does include a corporation. The ERCB is a corporation.

[66] R.S.A. 2000, c. G-5.

pipeline abandonment as well as reclamation supervision and compliance.[67] However, to avoid uncertainty and to ensure uniformity, the Alberta government should make clear whether one or the other of the ERCB or the AUC is to be the lead agency for the purposes of pipeline regulation: at least in respect of common construction and operational standards and of safety, decommissioning, abandonment and reclamation. It should also clearly set out in the legislation whether and for what purposes one or the other is to take the lead. If one agency is not directed to take the lead, then both should be directed to work collaboratively to maintain uniformity of intra-provincial pipeline regulation and to ensure that all intra-Alberta pipelines are constructed and operated in a manner that minimizes their negative impacts and makes the most efficient use of Alberta's energy transmission infrastructure.

A significant level of cooperation between the three regulators that now have responsibility for energy pipelines in Alberta will have to be maintained to ensure consistency in pipeline regulation and more particularly to ensure that regulation of pipelines in Alberta does not become an impediment to the effective implementation of the Energy Strategy.[68]

Finally, at present, the rules established by each of the ERCB and the AUC for pipeline applications, including their public notification and participation requirements are essentially the same; however, it is not unthinkable that as each regulator is asked to deal with pipeline applications and issues they will develop their own unique approaches and considerations for public participation in pipeline applications. If the public in Alberta is to have and maintain confidence in the Energy Strategy in general, and the government's commitment to an enduring energy system in particular, then consistency in approach to public participation in energy project applications, including pipelines, is a minimum requirement.

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[67] Through a Memorandum of Understanding, on behalf of the AUC, the ERCB reportedly monitors and oversees the decommissioning of pipeline transmission facilities of those gas utility pipeline owners it regulates. Source: AUC, "Who We Regulate", online: <http://www.auc.ab.ca/about-the-auc/who-we-regulate/Pages/default.aspx>. At the time of writing no MOU had been posted to either board's website but the information was confirmed by an AUC staff member.

[68] Examples of how the split in jurisdiction over pipelines could inhibit the implementation of the Alberta Energy Strategy are: uncertainty over jurisdiction and regulation could cause protracted litigation; or, the split in jurisdiction over pipelines could result in an unnecessary proliferation of pipelines/pipeline facilities or inefficient use of existing facilities. Unfortunately, the most significant impediment could be jurisdictional issues in respect of Alberta pipelines. Because of the division of powers under the Canadian constitution, Alberta cannot address the issue on its own.

3.1.2. Energy Resource Assessment

The second area in which the specific legislated jurisdictions of the ERCB and the AUC create the potential for duplication and or inconsistency is in information gathering and forecasting in respect of energy resource and infrastructure development in Alberta. Subsection 2(d) of the *Electric Energy Act*, administered by the AUC, provides that a purpose of the Act is to "provide for the collection, appraisal and dissemination of information regarding the demand for and supply of electric energy that is relevant to the electric industry in Alberta." Since a purpose of the *Energy Resources Conservation Act* (*ERCA*),[69] administered by the ERCB, is to "provide for the recording and timely and useful dissemination of information regarding the energy resources of Alberta" and "energy resource" is defined to mean "any natural resource within Alberta that can be used as a source of any form of energy"[70] the legislation creates the potential for each of the AUC and the ERCB to collect and publish information in respect of energy resources in Alberta relevant to the electric industry and others.

Indeed, since the inception of the AUC, only the ERCB has published information regarding demand for and supply of electric energy in Alberta. In *Alberta's Reserves 2007 and Supply/Demand Outlook 2008-2017* (ERCB ST98-2008), the ERCB noted that:

> "While the utilities sector is the focus of the AUC, the ERCB continues to forecast electricity supply and demand as it is essential in determining the future domestic demand for Alberta's primary energy resources. Of particular importance are the relationships between electricity supply and natural gas and coal resources, as power plants that use these fuels supply over 90 per cent of the electricity generated in Alberta. Because of this and the fact that the ERCB analysis of electricity capacity, supply and demand compliment the other sections of the *ST98* annual report, the ERCB will continue to offer a perspective on the supply and demand for this growing sector of the economy despite the realignment of the EUB into two distinct regulatory bodies."[71]

Given the interrelationships between supply of and demand for the different energy resources, it makes sense that a single comprehensive assessment of energy supply and demand in Alberta be prepared that includes electric energy. In light of the purposes provisions in the *Electric Energy Act* set out above, however, the question arises whether the AUC can adopt the ERCB's *Supply/Demand Outlook* or whether it must carry out its own independent inquiry and analysis: the legislation is silent on that issue.

The issue is further compounded by the fact that the Independent System Operator, (ISO) is charged with the duty to: "… assess the current and future needs of market

[69] R.S.A. 2000, c. E-10, s. 2(f).

[70] *Ibid.*, s. 1(c).

[71] Online: <http://www.ercb.ca/docs/products/STs/st98_current.pdf>, at 9-1.

participants and plan the capability of the transmission system to meet those needs."[72] The ISO is also required to "… forecast the needs of Alberta" in order to develop transmission system plans, including plans for the timely implementation of expansions and enhancements."[73] Because of the linkages identified by the ERCB in its *2007 Supply Demand Outlook*, the ISO can't forecast the needs of Alberta for transmission system planning purposes without an assessment of supply of and demand for energy resources in Alberta generally as well as an assessment of demand for energy resources to be exported from Alberta.[74]

In the context of the Energy Strategy, the issue of multiple energy forecasts is not necessarily a problem. The different perspectives of the regulators may result in a body of information that is robust and useful; however, since continuous improvement processes such as those to be used in implementing the Strategies are only as effective as the information incorporated into the process, in order for the provincial government to effectively implement the Strategies, the Energy Strategy in particular, there is a need to clarify who is responsible for acquiring and reporting what information when and to whom. At a minimum the AUC and the ERCB should coordinate their information gathering efforts to produce a complete and comprehensive analysis of energy supply and demand for Alberta. If not given legislative direction to cooperate on this point, the provisions of the *ERCA* and the *AUCA* that provide for joint or cooperative processes would enable the ERCB and the AUC to do so.[75]

Regardless of whether the respective information gathering and assessment roles of the ERCB and the AUC are coordinated, it will be essential for the information gathering and feedback loops for both regulators to be clearly defined, both generally and in respect of specific regulatory initiatives. Benchmarking and audit requirements should be established for the purpose of tracking progress towards the goals set forth in the Energy Strategy so that any necessary adjustments may be made.[76]

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[72] *Electric Utilities Act*, S.A. 2003, c. E-5.1, s. 17(1). Although at the time of writing the ISO's transmission planning role has been taken over by the provincial government which is proposing legislation that specifies transmission system plans, including expansions and reinforcement, to be undertaken as soon as possible.

[73] *Ibid.*, s. 33.

[74] The ISO's planning and forecasting role, for the present, has been usurped by the government of Alberta which has introduced legislation, as part of the Energy Strategy, effectively directing the development of new transmission infrastructure in Alberta.

[75] Sections 22 and 16 respectively.

[76] A specific example of when efficient and effective information gathering and dissemination will be crucial for successful implementation of the Energy Strategy is in the implementation and adaptation of energy efficiency and conservation measures. Saved energy, that is energy not consumed, forms a part of

3.1.3. Lack of Uniformity in Public Interest Considerations

The third area of concern arises from the split in jurisdiction over energy projects, transmission infrastructure in particular. As noted earlier, the public interest roles of the two regulators are fundamentally different. As a result, notwithstanding the fact that both the ERCB and the AUC are required to consider the social, economic and environmental effects of energy projects falling within their respective jurisdictions, their public interest considerations may be expected to develop differently.[77] The fact that the *ERCA* contains purposes provisions that the *AUCA* does not only serves to compound the problem.

The purposes provisions of the *ERCA* include the following:

> "2 (c) to effect the conservation of, and to prevent the waste of, the energy resources of Alberta;
>
> …
>
> (d) to control pollution and ensure environment conservation in the exploration for, processing, development and transportation of energy resources and energy"

As a result, when the ERCB is considering an energy resource project application, while it will consider the social, economic and environmental effects, its decision must also be guided by those purposes. The legislation does not provide any direction on which, if any, of the purposes is to take priority in the event of a conflict; however, the ERCB has always considered conservation of Alberta's energy resources to be at the heart of its mandate and the courts have confirmed that conservation is at the "very root" of the ERCB's mandate.[78] While the ERCB has never articulated a normative conservation theory, and its approach to its conservation mandate may have shifted somewhat in perspective over the years,[79] a consistent theme in its approach has been the management of competitive forces to maximize the benefit to the province of the production of its oil and gas resources.[80]

The AUC, by contrast, in considering a gas utility pipeline or transmission line application has to take into account the fact that the project proponent expects to both

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the Energy Strategy since energy not consumed can be used productively later or elsewhere. See Energy Strategy, *supra* note 1 at 11.

[77] *Alberta Utility Commission Act*, *supra* note 65, s. 17 and *ERCA*, *supra* note 69, s. 3.

[78] *EnCana Corp. v. Alberta (Energy and Utilities Board)* (2005), 33 Alta. L.R. (4th) 223 at 227. (Alta. C.A.).

[79] Michael M. Wenig & Michael Moore, Is 'Conservation' Worth Conserving? The Implications of Alberta's 'Energy Resource Conservation Mandate' for Renewable Energy, Occasional Paper #20 (Calgary: Canadian Institute of Resources Law, 2007) at 24.

[80] See: David H. Breen, *Alberta's Petroleum Industry and the Conservation Board* (Edmonton: University of Alberta Press, 1993); and Low, *supra* note 14.

recover the costs of the project from ratepayers, who are generally interested in maintaining low costs, and to earn a fair return on its investment. In these circumstances, there is the very real prospect of different public interest considerations coming to bear on various parts of the energy infrastructure component of Alberta's energy system.

Regulation that has the potential to lead to inconsistency, particularly in public interest considerations relating to very similar projects or projects with similar social, economic and environmental effects is undesirable in any setting, but is particularly so in the context of an integrated, system based approach.

3.1.3.1. Uncertainty in Implementation of Provincial Land-Use Framework

The fourth area of concern arises from the *ALSA*. Once proclaimed, that Act and related amendments to the *ERCA* and the *AUCA* will require both the ERCB and the AUC to act in accordance with any applicable regional land use plan in carrying out their mandates.[81] As regional land use plans have not yet been finalized, it is not possible to say at this point what specific issues might arise and an analysis of how the implementation of the new *Land-Use Framework* might affect ERCB and AUC processes is beyond the scope of this paper. However, given the information set out in the *Land-Use Framework* document and in the *ALSA*, it is possible to identify issues that could arise relating to the roles of the ERCB and the AUC in the Energy Strategy context.

The first issue is that it is often the case that an application for a facility that affects land use does not go through a hearing process because there are no objections raised by (potentially) affected landowners, occupiers or users. Even when matters do go to a hearing, it is often the case that the relevant decision-maker will note that "no-one has raised an objection" in respect of land use matters and considers the issue no further.[82] As long as that practice continues, how will the ERCB and the AUC discharge their obligations to act in accordance with relevant regional land use plans? In particular, how will they consider broader land use and cumulative effects issues in the absence of anyone actually raising those issues? Will they put the onus on applicants to establish that their project is in compliance with the relevant regional land use plan? Or, will they interpret the obligation to comply with any applicable Regional Land Use Plan as giving rise to a positive duty on their part to take the initiative to inquire into and consider matters that might not otherwise be raised?

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[81] *Ibid.*, ss. 71 and 74.

[82] See for example: ERCB Decision 2008-087: *Devon Canada Corporation Class II Oilfield Waste Landfill Manatokan, Application No. 1508760* (16 September 2008); ERCB Decision 2008-122: *Nexen Inc. Application for Four Well Licences and a Pipeline Licence Crossfield Field* (9 December 2008); and ERCB Decision 2009-022: *ARC Resources Ltd. Applications for Two Pipeline Licences Pembina Field (Applications 1579701 and 1579704)* (17 February 2009).

Regardless of how the broader public interest and cumulative effects issues are dealt with, it will be important in the context of the Energy Strategy for the approaches used by the two regulators to be consistent so that activities with similar land-use impacts are assessed using similar criteria.

Another issue arising from the proposed *Land-Use Framework* relating to the respective roles of the ERCB and the AUC is that of consistency in dealing with appeals. The Land Use Strategy provides that existing appeal mechanisms will be employed to deal with situations where compliance with a regional land use plan is questioned. That would mean that the ERCB and the AUC may review their own decisions for compliance with a particular land use plan.[83]

In addition, both the *ERCA* and the *AUCA* provide for appeals to the Alberta Court of Appeal, although an appeal from a decision of either the ERCB or the AUC may only be taken on a question of law or jurisdiction.[84] A decision that a regulator's action is in compliance with a particular land use plan is arguably a question of fact or of mixed fact and law. Absent clear legislative direction on the point, the question of whether or not a decision of either regulator about compliance with a land use plan may be appealed to the Court of Appeal is one which will no doubt be the subject of vigorous debate before the courts at some point in the future.

Where two distinct decision-makers may be called upon to review previous decisions made by them relating to the same land use plan and similar types or degrees of land use/disturbance, there is the potential for the development of inconsistency in the body of decisions future developers will look to for guidance. Predictability will suffer. In order to avoid the uncertainty that will arise from differing decisions made on reviews of AUC and ERCB decisions relating to land use plans (in particular the same land use plan), legislators should consider directing that appeals with respect to land use compliance are always heard by the Court of Appeal or a separately established land use appeal board

Finally, the proposed *Land-Use Framework* raises other questions about the roles of the ERCB and the AUC. How will cumulative effects be addressed in an integrated, comprehensive fashion when there will be at least two decision-makers considering energy infrastructure and energy development applications affecting the same region?[85] In regions where cumulative effects are already an issue or where the regional

[83] Both the ERCB and the AUC may review, rescind, change, alter or vary an order they have made pursuant to ss. 39 and 10 of the *ERCA* and *AUCA* respectively.

[84] *ERCA*, s. 41 and *AUCA*, s. 29.

[85] In some regions the ERCB, the AUC and the NEB will deal with energy infrastructure applications such as pipeline applications. Leaving aside the question of differences of interpretation of what complies with a given regional land use plan between the ERCB and the AUC, absent federal legislation to the contrary, the NEB will not be bound to comply with provincial land use legislation.

development plan indicates that development should be limited, will there be a race to gain approval for major energy projects affecting land use? In such cases how will the two separate boards establish priorities? In carrying out cumulative effects assessments, how will the ERCB and the AUC take into account the effects of projects that may fall within the jurisdiction of the other board?

While there are no easy answers to the questions posed above, information sharing will play a critical role in ensuring that the two boards have sufficient information to be able to make appropriate enquiries and decisions. For example, for the purposes of the *Land-Use Framework*, the ERCB and the AUC could agree or be directed to adopt a formalized, regular exchange of notices of new applications involving significant land uses impacts. Alternatively, a common data base of energy project applications could be established and maintained in relation to each land use plan. As part of their information gathering and assessment responsibilities, the regulators could be required to provide regular updates of anticipated major energy project applications that may be expected to have land use impacts.

The *Land-Use Framework* indicates that the Energy Strategy will inform the development of regional land use plans. It also makes it clear that it is about managing the impacts of growth and development, not stopping growth and development. The proposed *Land-Use Framework* is a key cross-sector link or means of integrating energy, environment and development in Alberta. Energy system sustainability, particularly in terms of whether it can be enduring in light of land and water use impacts, depends on appropriate management and adaptive regulation of land use. To the extent that there is uncertainty relating to or arising from the roles of the ERCB and the AUC in the context of the *Land-Use Framework*, then the strategic outcomes of the Energy Strategy cannot be fully realized.

4.0. Enabling the AUC and the ERCB to be Effective Tools for Implementing the Energy Strategy

4.1. Issues to Address

As a first step in ensuring that the ERCB and the AUC can be effective tools in the implementation of the provincial Energy Strategy, the specific issues identified above relating to the roles of the ERCB and the AUC should be addressed. Any potential overlap, inconsistency or uncertainty will greatly diminish the ability of those regulators to effectively implement or add value to the Energy Strategy.

The specific levers and actions identified in the Energy Strategy itself also give rise to issues relating to the roles of the ERCB and the AUC. While by no means providing an

exhaustive examination of all the issues, the balance of this section will highlight some key concerns.

First, the Energy Strategy provides that a lever for achievement of the Strategy's goals is to address the environmental footprint of energy development.[86] This is to be accomplished by managing cumulative environmental effects through government set limits or thresholds which are to guide decisions of regulatory agencies and decision-makers.[87]

As long as there are two regulators with responsibility for approving energy projects, there will be the potential for differing interpretations of how specific government approved limits, thresholds, targets and the like are best met — or even whether they are met in any given circumstance. For example, the ERCB may be convinced that the best way to ensure that limits are met in a specific area is to issue a directive to those subject to its regulation incorporating the relevant limits while the AUC may decide that it will include conditions in individual authorizations issued in the same area. One may choose to use collaborative processes to bring limits to bear on energy related development while the other may choose a prescriptive process. More importantly, with two regulators responsible for different aspects of Alberta's energy system, there is the risk that cross-sector strategies for achieving government targets may be missed or made less economic to implement because of the need to deal with more than one regulator and multiple processes.

A related issue that will arise in addressing the environmental footprint of energy development and use in Alberta is the participation (or lack thereof) in ERCB and AUC processes of parties with dissimilar outlooks. That is, the parties to the ERCB process will have different outlooks than those in an AUC process. On the ERCB side, proponents in the oil and gas industry are concerned with exploiting public resources for profit and do not enjoy the advantage of a regulatory compact to ensure returns on what are often high risk investments. In addition, their approach to limits and thresholds will necessarily be informed by the proponents' experiences in other parts of the world, if any, and in some cases by the need to answer to shareholders. Those participants in Alberta's energy sector will naturally bring a different perspective to a hearing than an Alberta electricity service provider who, as a result of the regulatory compact, can count on a minimum return on its investment and who must contend with the interest of its customers in minimizing the cost of service provided while ensuring reliability and safety.

Similarly, interveners in ERCB and AUC processes may bring different views and concerns to the table. Albertans are, by and large, familiar with oil and gas activities and

[86] Energy Strategy, *supra* note 1 at 32.

[87] *Ibid.*

the potential impacts of those activities on the environment. However, because, in relative terms, there has been little recent activity on the ground relating to development of facilities and resources in the electricity sector, Albertans are much less familiar with such activity and related impacts on the environment. In addition, activities relating to the electricity sector can often leave a highly visible reminder of their presence — such as windmills or new transmission towers — whereas a pump jack has a smaller profile and footprint, and a pipeline is buried for most of its length.[88]

In addition, as noted earlier, there is the ever present possibility that on any given application for an energy development, the project proponent may have secured the agreement, or at least lack of active opposition, of directly affected landowners/occupiers. In such cases, the AUC may not even hold a hearing[89] and where the ERCB might be expected to take steps to assess the environmental, economic and social impacts of the project for which approval is sought, it has been Board practice to simply note that there were no objections raised and go no further with the issue.[90]

If the environmental footprint of energy development is to be addressed in a comprehensive way from an integrated system perspective, then steps should be taken to ensure that, in any given process established to deal with an energy project application, issues relating to appropriate land use, cumulative environmental effects and related concerns are consistently raised, tested and considered. Whether the onus is placed on applicants to make the case regardless of opposition or lack thereof or whether a sustainability advocate (or other form of amicus for the boards) is created, the issue of environmental footprint and cumulative effects can't be credibly addressed if the status quo is not changed.

The second concern about the roles of the AUC and the ERCB that arises from a specific lever described in the Energy Strategy is that, as long as there is more than one regulator involved in issuing approvals that affect the development of Alberta's energy system, efficient and or effective integration will be difficult. Integration in the long-term development of Alberta's energy system is a key lever of the Energy Strategy. An example of integrated development given in the Energy Strategy is the establishment of a petrochemical cluster that would use bitumen piped from the oil sands region, send

[88] Of course compressor stations and other above-ground pipeline facilities also provide a permanent, visible and often audible reminder of the presence of oil and gas activity but they have the advantage of not towering over their surroundings.

[89] *AUCA*, *supra* note 58, s. 9(3).

[90] The purposes and public interest provisions of the *ERCA* arguably create a positive obligation for the ERCB to consider the matters set out in those provisions even if they are not specifically raised by any party to a given process. For examples of where the ERCB has noted the lack of objections and proceeded no further with issues relating to land use impacts, see ERCB Decision 2008-087, *supra* note 82.

diluent back to the oil sands, capture and sequester CO_2 and return excess energy to the Alberta electricity grid.[91]

The development of the envisioned petrochemical cluster would trigger both ERCB and AUC approval processes. Specifically, both the ERCB and the AUC may be expected to deal with pipeline applications relating to the development of a petrochemical cluster: the ERCB would consider applications for the bitumen and diluent pipelines and the AUC would consider any applications for natural gas utility pipelines supplying the complex. In addition, the AUC would handle electricity infrastructure approvals for the complex as well as any industrial system designation applications. It is not yet clear which regulator would deal with applications relating to the capture and sequestration of CO_2, initial indications are that it would be the ERCB.[92] If the cluster is tied to a new oil sands project or projects, then the ERCB would be involved in approving those projects as would other regulators.[93]

The petrochemical cluster scenario raises at least some, if not all, of the issues discussed earlier in this paper. In particular, the scenario squarely raises the issue of the difference in the purposes provisions of the relevant energy resource legislation. As noted earlier, a relevant purpose of the *Energy Resource Conservation Act* that the ERCB would take into account in considering applications before it is:

> "… to control pollution and ensure environment conservation in the exploration for, processing, development and transportation of energy resources and energy"[94]

"energy resource" is defined to mean:

> "… any natural resource within Alberta that can be used as a source of any form of energy."[95]

The purposes provisions of the *Oil Sands Conservation Act*,[96] which is administered by the ERCB, could also come into play. The relevant portion of those provisions provides that a purpose of the Act is:

> "… to ensure orderly, economical and efficient development in the public interest of the oil sands resources of Alberta"

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[91] Energy Strategy, *supra* note 1 at 33-34.

[92] Alberta Carbon Capture and Storage Development Council, *Accelerating Carbon Capture and Storage Development in Alberta Final Report* (Edmonton: March 2009) at 12, online: <http://www.energy.gov.ab.ca/Org/pdfs/CCS_Implementation.pdf> (last visited, 4 August 2009).

[93] For example, a federal environmental impact assessment could be required.

[94] *ERCA*, *supra* note 69, s. 2(d).

[95] *Ibid.*, s. 1(c).

[96] R.S.A. 2000, c. O-7, s. 3.

The first enumerated purpose of the *Hydro and Electric Energy Act*[97] that would inform decision making by the AUC in respect of any electricity generation or transmission component of the petrochemical cluster project is:

> "… to provide for the economic, orderly and efficient development and operation, in the public interest, of hydro energy and the generation and transmission of electric energy in Alberta".

The *Pipeline Act* does not contain a purposes provision. Instead, it provides that the relevant regulator, the AUC for gas utility pipelines and the ERCB for all other intra-Alberta pipelines, may conduct an inquiry into the orderly, economical and efficient development of pipeline resources in Alberta.[98] That provision, couched in the section describing specific matters that the regulators may or must investigate, does not establish guidelines or boundaries applicable to decisions like the purposes provisions do. So, for decisions regarding pipelines, the regulators are governed by the purposes provisions in the *ERCA* and the *AUCA* as well as the directions in those Acts relating to consideration of the public interest.[99]

In the integrated development scenario, which purposes provisions would prevail in the event of a conflict in views about whether a particular purpose is met by the relevant element of the overall development? For example, what if the AUC were to determine that the proposed electricity transmission component of the project was not in the public interest, but the ERCB had determined that the bitumen and diluent pipelines were in the public interest or, vice versa?

In light of the earlier discussion about the difference in the AUC's and ERCB's basic mandates, how broadly will each of the two regulators interpret "public interest" in the petrochemical cluster? There will certainly be members of the public directly affected: some will be more negatively affected than others by different components of such a project. While those components may be subject to the approval of different regulators, the overarching public interest in the project as a whole will be the same. How would such conflicts be managed? Joint hearings can deal effectively with ensuring that both regulators are hearing the same evidence and submissions but they cannot change the fact that different legislative provisions govern the decisions of the two regulators and, as a result, they may legitimately reach conflicting conclusions.

A related issue is that the fact that having two regulators in Alberta with separate jurisdiction over different sectors of the energy system gives rise to a risk that opportunities for adopting an integrated approach to addressing limits will be missed.

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[97] R.S.A. 2000, c. H-16.

[98] *Supra* note 61, s. 4.

[99] See Part 3.1.1 above.

Carbon capture and storage is the perfect example of an approach to meeting emission limits that could easily be implemented across sectors (oil and gas, and electricity). If the regulatory framework enabled an integrated approach by the ERCB and the AUC, project developers could collaborate with confidence to plan a new electric energy generation project that would be designed and constructed to capture and condition CO_2 emissions from the power plant for transportation by pipeline to an enhanced recovery (of oil) project. At present, however, while the relevant legislation gives the two energy regulators the ability to hold joint processes, they are required, by virtue of the same legislation, to take into account differing factors in considering energy project approval requests. Specifically, as discussed in more detail elsewhere in this paper, the ERCB and the AUC are governed by differing purposes provisions and by differing public interest considerations.

In order for project developers to avoid the uncertainty they will face as long as various components of an integrated project are subject to separate approval processes administered by more than one regulator, the ERCB and the AUC should be empowered to combine their decision making for integrated projects and not just their processes.[100]

To effectively implement an integrated approach to energy resource development in Alberta, decision-making that reflects an integrated approach may have to be directed through legislative amendment that requires decision makers to consider the bigger picture and, where necessary, compromise narrower interests where the broader public interest will be best served by a particular decision. Of course, direction through legislative amendment does not necessarily mean deeming certain projects to be in the public interest or beyond the consideration of the regulators in some other way. Such approaches, although expedient, risk rapid erosion of public confidence.

An alternative approach is suggested by the existing industrial system designation available under the *Hydro and Electric Energy Act*.[101] An "integrated energy resource project" designation could enable the assessment of and decision making for such projects to be carried out on the merits of the project as a whole, rather than on a piecemeal basis as would otherwise be the case.

[100] If the regulators were not explicitly empowered though legislative amendment to integrate their decision-making for a cross-sector project, circumstances could arise where one regulator could be accused of fettering its discretion or taking into account irrelevant considerations if it were to give weight to factors relating to the components of the overall project falling within the jurisdiction of the other regulator. This is particularly so if, in attempting to take a comprehensive approach, one regulator determined that the balance in its decision-making process was tipped by factors relevant to parts of the overall project falling in the other regulator's jurisdiction.

[101] Section 4 and the *Electric Utilities Act*.

The third concern that arises from the specific levers in the Energy Strategy is how best to change energy consumption behavior.[102] Implementation of energy conservation measures at the consumer level will require the AUC to support initiatives such as the development and use of smart grid technology.[103] The development and deployment of smart grid technology is an expensive, long-term investment. More importantly, it is arguably not necessary for the provision of utility service. In order to avoid the narrowly defined interests of the utilities and their customers prevailing over the broader public interest, the provisions of the *Electric Utilities Act* dealing with the question of what may or must be considered to be prudently incurred costs of electricity distribution service and electricity services should be amended to enable the AUC to approve investments in technology or other measures designed to encourage and enable conservation, even if they do not meet a narrow prudence test.[104]

As the Energy Strategy evolves in respect of the electricity components of the energy system, in order to ensure true integration in terms of access to service and to rates designed to encourage conservation as well as incorporation of renewable energy, the government of Alberta will have to consider taking further prescriptive action where the market does not anticipate and respond to the broader public interest.[105]

In addition, in order to achieve energy conservation, any direct connection between electricity sales and utility profits/returns will have to be broken. In a regulated system appropriately designed tariffs can achieve this end. The current provisions of the *Utilities Commission Act* go some way to facilitating this. Indeed, the AUC recently approved performance based rates that give the service provider incentives to achieve efficiencies in the provision of service with savings over a certain threshold to be shared with ratepayers.[106] To be sure, this is not the same as creating incentives for ratepayers to use less energy to the benefit of both ratepayers (short and long term) and service provider

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[102] Energy Strategy, *supra* note 1 at 38-40.

[103] "Smart grids" accommodate the flow of energy between new sources of supply, such as excess electric energy generated by residential solar power systems, and new sources of demand, such as electric vehicles. Smart grids are responsive, interactive and transparent in ways in which current electricity grids are not and cannot be. Smart grids rely on the installation and use of smart metering technology that requires substantial communications network and data management support. See: "Building the smart grid" *The Economist* (4 June 2009).

[104] *Electric Utilities Act*, *supra* note 72.

[105] In addition to its recent steps to direct the development of new and reinforcement of existing electricity transmission infrastructure, the government of Alberta has issued *Micro-Generation Regulations* (AR 27/2008) to allow Albertans to generate their own "environmentally friendly" electricity and receive credit for any electric power they do not use and are able to move onto the provincial electricity grid.

[106] AUC Decision 2009-035: *ENMAX Power Corporation, 2007-2016 Formula Based Ratemaking* (25 March 2009).

(long-term) but the decision affirms that the AUC is able, under existing legislative provisions, to approve a tariff that incorporates such measures.

Proponents of energy projects subject to ERCB approval ought also to be encouraged to continue to look for ways to improve their energy consumption. For example, a bitumen pipeline operator may be able to take advantage of time of use rates offered by its electricity service provider by incorporating renewable energy supply into its operation. Here again, it will be important for project proponents to be able to take a comprehensive approach that is not made more risky or economically inefficient by virtue of the fact that they are dealing with two different regulators.

A fourth concern arising from the specific action items identified in the Energy Strategy arises from the need to enhance the electricity component of the energy system through strengthening transmission infrastructure.[107] The AUC and the ISO are the key regulators with roles to play in regulating Alberta's electricity transmission infrastructure. Alberta has been in need of upgrades to its electricity transmission system for some time to accommodate growth and resulting growing demand, and to enable the incorporation of more renewable energy into the energy system in Alberta.[108] To that end, the government of Alberta has introduced a bill in the legislature that gives government the authority to identify "critical transmission infrastructure" and which, if passed as proposed, would effectively bypass the role of the ISO for such infrastructure and eliminate the requirement for the AUC to consider whether such infrastructure is in the public interest.[109] Notwithstanding that fact, the government of Alberta says that landowners and others affected by critical transmission infrastructure projects will have the opportunity to be heard at AUC hearings into those projects.

At the time of writing, the AUC is not to consider whether critical transmission infrastructure is in the public interest under the terms of Bill 50. As a result, it is not clear how the AUC will take landowner or broader public interest concerns into account in respect of a given critical transmission infrastructure project except with respect to specific routing and siting issues. In order to ensure transparency and credibility in those processes, the government of Alberta should provide the AUC and all stakeholders with more specific assurances and direction in this regard.

Finally, an issue that will have to be addressed if the ERCB and the AUC are to be effective tools in the implementation of the Energy Strategy is the fundamental difference underlying their public interest considerations identified earlier. Specifically, the AUC's

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[107] Energy Strategy, *supra* note 1 at 43-45.

[108] Alberta Dept. of Energy, "Talk About Alberta's Electricity Transmission System" (June 2009), online: <http://www.assembly.ab.ca/lao/library/egovdocs/2009/aleo/173127.pdf>.

[109] Bill 50, *Electric Statutes Amendment Act, 2009*, 2nd Sess., 27th Leg., Alberta, 2009 (Second Reading, 2 June 2009, adjourned).

public interest considerations have, to date, been narrower than those of the ERCB, limited by the existence of the regulatory compact and legislated focus on the utility service provider/ratepayer relationship. In the new world, to use the words of the Chair of the AUC when talking about the relevance of the AUC's traditional test applied to determine whether a utility will be allowed to recover its costs: "Prudence is not necessarily least cost … where it has been necessary to accommodate interests and where economic, social and environmental impacts must be taken into account."[110] To ensure that the narrower pecuniary interest in just and reasonable utility rates based on prudently incurred costs does not trump the broader public interest in, for example, a robust transmission system capable of accommodating and enabling energy conservation schemes and the development of both non-renewable and renewable electric energy resources, legislative amendments will be necessary to ensure the AUC has the tools and direction necessary to effectively regulate in the "new world".

Similarly, as the ERCB has clearly interpreted its conservation mandate as requiring it to ensure that Alberta's petroleum resources are developed to their fullest advantage relying on competition between those willing to take the substantial financial risks involved to do so.[111] If it is the government's intention that conservation should incorporate elements of intergenerational equity or that in the context of an energy system other factors should carry equal or greater weight, then it will have to give specific legislative direction to that end.

4.1.1. Characteristics of the ERCB and the AUC to Reinforce

Both the ERCB and the AUC are the most recent incarnations of long lines of energy resource and utility regulators in Alberta. Each has always brought distinct characteristics to their roles. While it may be early to say whether they will exhibit the same characteristics as their predecessors going forward, in terms of regulating within an energy system and carrying out their roles in a way that advances the Energy Strategy, there are some characteristics that may matter more than others.

Since its early days, the ERCB has employed a collaborative approach to the regulation of energy resource development. This enabled it to respond to changes within the sector such as new developments in science and technology (*e.g.* coal bed methane and directional drilling) or concerns arising outside of the oil and gas sector (*e.g.* flaring, water use/disposal). The ERCB's collaborative approach has also allowed it to effectively use goal oriented regulation including the extensive use of guidelines for industry. The use of guidelines, rather than prescriptive regulation, enables those subject to regulation

[110] Willie Grieve, Chair, Alberta Utilities Commission (Address to the Calgary Chamber of Commerce, 27 May 2008).

[111] See Low, *supra* note 14.

to take the lead in developing technologies or other ways and means to meet the guidelines. Goal oriented regulation that uses goals set in an energy system context, rather than a sector specific context, is a means of bridging the two-regulator gap.

A potential drawback of the collaborative approach to regulation is the risk that the regulator becomes too closely aligned with those subject to its regulation. To mitigate that risk, the ERCB will need to make a concerted effort to ensure that its well established consultative processes include a full-range of stakeholders that are not totally dominated by oil and gas sector participants. Indeed, the Chairman of the ERCB has identified the need to get local stakeholders involved in energy development falling under that board's jurisdiction.[112]

Since the creation of the Alberta Energy and Utilities Board (AEUB) in 1995 for the purpose of carrying out utility regulation and energy resource regulation under a single regulator, utilities regulation has been conducted using a more collaborative approach than was previously the case. The AUC appears to have adopted that approach.[113] As with the ERCB, a more collaborative approach, if it includes an appropriate range of stakeholders, will be useful to the AUC in the implementation of the Energy Strategy.

In addition to collaborating with stakeholders, the ERCB's predecessors had a history of cooperation with other boards, for example the NEB, to address matters of common concern. The ERCB and the AUC should continue to rely on the provisions in their governing statutes enabling cooperative processes to work with each other, the NEB and other regulators as necessary.[114] The recent AEUB *Inquiry into Natural Gas Liquids*

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[112] Dan McFadyen, Chairman of the ERCB, (Speech to Calgary Chamber of Commerce, 25 November 2008).

[113] See AUC Rule Development, online: <http://www.auc.ab.ca/rule-development/Pages/default.aspx>.

[114] Cooperation between independent regulators and between independent regulators and other agencies to achieve greater levels of integration has become the norm. For example, the NEB and the Federal Energy Regulatory Commission signed a Memorandum of Understanding on 10 May 2004 in which they agree, among other things that:

> "… appropriate coordination of their efforts could promote the public interest through increased efficiency, expedited and coordinated action on significant energy infrastructure projects, and cost savings to both the public and regulated entities. The parties agree that the regulatory efforts of both the NEB and FERC will benefit from increased communication and cooperation concerning the timing and other procedural aspects of related matters that may be pending before both agencies.
>
> The parties contemplate that coordinated reviews may be considered in cases where related matters are pending before both agencies. The parties further contemplate that the two agencies will, where practicable, coordinate the timing of related decision making, including but not limited to coordinating the submission of evidence, the timing of developing findings of facts and conclusions of law, and the ultimate resolution of the related matter."

(NGL) Extraction Matters (NGL Hearing)[115] is an example of a matter that falls within the jurisdiction of both the ERCB and the AUC and that affects the integrated long-term development of Alberta's energy system. The NGL Hearing was commenced by the AEUB prior to the announcement that it would be dissolved and the ERCB and AUC (re)created. If that hearing were to be convened now, it could be done jointly by the ERCB and the AUC in reliance on the cooperative proceeding provisions of the relevant acts.

For the purposes of implementing the Energy Strategy, inquiries conducted on a system, as opposed to sector specific, basis, with the participation of both the AUC and the ERCB will be critical to identifying potential areas for integration, synergy issues and consequences in one area of Alberta's energy system resulting from actions in another. The success of the Energy Strategy will depend on the two regulators sharing information, combining processes and coordinating responses in respect of matters that may or do cross sectors as seamlessly as possible.

Finally, given the interrelationships between the Strategies and the need to respond to external forces as well as the evolution of Alberta's energy system, a key to the implementation of the Energy Strategy within the overall context established by the Strategies will be a genuine commitment to the use of benchmarking, assessment and modification as necessary to ensure the positive evolution of the Energy Strategy. With their experience in and legislative provision for conducting inquiries and information gathering, both the ERCB and the AUC are well positioned to provide policy makers with information they will require to set benchmarks, assess whether they have been met and make appropriate adjustments.

4.2. Additional Ways to Effectively Employ the ERCB and the AUC in the Implementation of the Energy Strategy

At a more general level, the Energy Strategy identifies nimbleness in responding to challenges as being a key to success.[116] Certainly, if the outcomes identified in the Energy Strategy are to be achieved and if the Strategies are to be implemented in an integrated fashion that effectively employs the adaptive processes envisioned in the individual strategies, the ERCB and the AUC will have to be ready and able to adapt to developments in the energy system. They will also have to be ready and able to adapt in response to feedback as the individual strategies are implemented.

[115] EUB Decision 2009-009: *Inquiry into Natural Gas Liquids (NGL) Extraction Matters* (4 February 2009).

[116] Energy Strategy, *supra* note 1 at 7.

The approach of establishing guides or goals for industry as required by the circumstance and of revising those in response to whether previously identified goals are being met, can be characterized as a form of "responsive regulation" or "smart regulation".[117] Regardless of the label that is applied, the approach gives the responsible regulator the ability to assess each situation and decide what measures to use that are transparent to the regulated entities and appropriate to the circumstances. A responsive approach to regulating energy resources is often cited as being necessary to facilitate rationalization of regulation across multiple jurisdictions and sectors.[118] Responsive regulation employing a mix of regulations ranging from entirely prescriptive in nature (*i.e.* what is to be done and how it is to be done) to entirely goal based (*i.e.* this is the required outcome) is used by many North American regulators.[119]

In addition, in some jurisdictions, regulators are required to have regard to strategies prepared under specified legislation in carrying out their responsibilities.[120] Requiring both the ERCB and the AUC to have regard to the relevant Strategies as part of their public interest consideration in respect of any given application would be a means of ensuring that those regulators were adapting their thinking in line with the overarching Strategies. Of course, with the two different regulators considering the same Strategies, differences in interpretation and in application would undoubtedly arise; however, requiring both the ERCB and the AUC to consider whether a given application advances or hinders any of the Strategies would create a higher degree of integration in the regulation of the energy resource and utility sectors than would exist with the two-board model absent such a requirement.

If the ERCB and the AUC are not specifically required to have regard to the Strategies in the course of their public interest considerations, then other specific policy direction may be given regarding the scope and nature of those considerations. The key requirement for the use of specific policy direction is that it must be clearly set out in

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[117] Alastair R. Lucas & Veronica Potes, "Voluntary Approaches and formal Regulation: Climate Change and Canada's Energy Sector" in Barry Barton *et al.*, eds., *Regulating Energy and Natural Resources* (New York: Oxford University Press Inc., 2006) at 321-322.

[118] See, for example: Jody Freeman, "Collaborative Governance in the Administrative State" (1997-1998) 45 UCLA L. Rev. 1 at 28-29; Bob Vergette, "Goal-Oriented Regulation" (Presented at the NEB Forum 2009, Calgary, Alberta, 27 May 2009), online: <http://www.neb.gc.ca/clf-nsi/rpblctn/spchsndprsnttn/2009/glrntdrgltn/glrntdrgltn-eng.html> (last visited, 4 June 2009) and Joseph A. Doucet, "Triple E Policy Issues — What's a regulator to do?" (Presented at CAMPUT 2008, Banff, Alberta, 22 April 2008).

[119] For example: the NEB describes its approach as "goal oriented": Bob Vergette, Board Member (Presentation to the NEB Forum 2009, Calgary, Alberta, 27 May 2009); and the Ontario Energy Board, see Peter Fraser, Manager Wholesale Power OEB, "Sustainable Power: Regulatory Issues" (Presentation to the 2009 CAMPUT Conference, Saint John, New Brunswick, 12 May 2009).

[120] Barry Barton, "Renewable Energy in New Zealand" (2005) 23 J. Energy & Nat'l Res. L. 141 at 149.

legislation applicable to or administered by the agency.[121] The government of Alberta has already implemented this tool a number of times in the restructuring of the electricity sector.[122] It may be increasingly necessary to use specific policy direction with the ERCB as well in the Energy Strategy context.

Finally, in order to successfully implement adaptive regulation within an energy system framework, clear goals will have to be articulated for the regulators as well as the public. Complete performance metrics will have to be developed and used to gauge progress and make adjustments when appropriate and necessary. Perhaps the most critical point is for the regulators to be given clear, unambiguous direction on when and how they are to apply new, developing standards in their approval processes.[123] According to the Chair of the AUC in talking about the complexity and regulatory risk raised by multiple layers of regulation:

> "For us as a regulator, we need to understand how we are to take these standards into account in our approval processes. We need to know where our responsibility as a regulator to consider the effects of generation plants on the environment starts, and where it stops … and when it is responsibility of others. We really need to avoid overlap and multiple processes."[124]

5.0. Conclusion

Clean energy production, wise energy use and sustained economic prosperity — the goals of the Energy Strategy — require that policy makers at all levels consider energy resource development, regulation and use from an energy system perspective. Those outcomes also require the regulatory system to be adaptive in addition to transparent, credible and predictable.

The ERCB and the AUC are key elements in Alberta's energy system and will play vital roles in the implementation of the Energy Strategy. At present there are issues created by the legislative framework that applies to and is administered by those regulators that will impede their effectiveness as tools in the Energy Strategy's implementation and in an energy system context in general. Those issues — the split jurisdiction over pipelines, the lack of clarity in respect of responsibility for energy resource assessment, information gathering and dissemination, the lack of uniformity in

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[121] See, generally: *Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board)*, 2001 ABQB 624, 34 Admin. L.R. (3d) 289. To the extent that the policy direction leaves room for the exercise of discretion by the agency, then the policy direction will not be determinative.

[122] For example in directing that need for new generation is no longer a consideration for the AUC in applications for new generation projects under the *Hydro and Electric Energy Act*.

[123] For example, carbon emissions and clean water requirements.

[124] Grieve, *supra* note 110 at 8.

the specific public interest considerations guiding each regulator and the uncertainty arising from the implementation of the new provincial land-use framework — must be addressed.

A fundamental question that policy makers will have to ask and answer is whether the public interest considerations taken into account by the ERCB and the AUC as informed by the current legislative framework are appropriate if the Energy Strategy is to be fully implemented. In the context of the Energy Strategy, the public interest is the broader public interest in a sustainable energy system. With respect to the ERCB, the government of Alberta may choose to establish priorities and or provide explicit guidance on how "conservation" should be interpreted. With respect to the AUC, the government of Alberta ought to enable, if not require, the AUC to take into account the broader public interest in applications before it that have Energy Strategy implications.

In addition, if the ERCB and the AUC are to be effective tools for implementation of the Energy Strategy, issues relating to their respective roles arising from specific elements of the Energy Strategy will also have to be addressed. The ways and means of doing so will require thoughtful action on the part of both government policy makers and the regulators themselves. A major challenge will be finding the most effective way to enable integrated decision making by the ERCB and the AUC when appropriate.

The two-board model for energy resource and utility regulation in Alberta presents challenges to the successful implementation of the Energy Strategy. As long as government policy makers and the regulators are mindful that regulation must not only be transparent, credible and predictable but, in an energy system context, regulation must also enable innovation, be adaptive and effectively promote the broader public interest, none of those challenges is insurmountable.

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