1 November 2007

The Honourable Ed Stelmach
Premier of Alberta

Office of the Premier
Room 307, Legislature Building
10800 - 97th Avenue
Edmonton, Alberta
T5K 2B6

Dear Premier Stelmach,

RE: Bill 46 *Alberta Utilities Commission Act*

The Pembina Institute has reviewed Bill 46 (*Alberta Utilities Commission Act*) and welcomes the opportunity to submit our comments on the important issues raised by this proposed legislation. The Pembina Institute is a non-governmental organization which promotes sustainable energy solutions and has been reviewing energy issues in Alberta since 1985. We have regularly provided constructive input on government proposals, taking part in many consultative processes both on our own initiative and, upon occasion, at the invitation of the government.

The proposed Alberta Utilities Commission will have jurisdiction over all types of utility facilities and lines, including electricity generation and transmission lines. The location of such facilities and lines are often contentious matters since they adversely affect the property of individual landowners and are likely to have negative impacts on air quality and water, thus impacting a broader public. These decisions also have broader implications for the development of a sustainable energy system for Alberta. In a democracy, the public expects to have the rights and freedom to defend their interests and to contribute in an effective and constructive manner to important decisions. Bill 46 as it stands will considerably undermine those rights and some sections must therefore be drastically amended.

We do not object to the proposal to split the current Alberta Energy and Utilities Board ("EUB") into two separate bodies, but we are very concerned with provisions in Bill 46 that have the potential to seriously limit and even remove the rights of individual Albertans and stakeholder groups to appear before the proposed Alberta Utilities Commission ("the Commission"). By further curtailing participation rights that are already very restrictive under existing legislation, the proposed legislation in its current form, we believe, will greatly impede the Commission's ability to apply its broad 'public interest' test and to facilitate the resolution of conflicts between landowners and utility companies with respect to new projects. For these reasons – set out in more detail below – we agree

with other environmental and landowner groups in Alberta that Bill 46 should not be passed in its current form.

Our position on Bill 46 is informed by the intense public controversies around energy development in Alberta, notably in relation to the very types of projects that will come under the jurisdiction of the new Utilities Commission. The EUB's spying activities have created a major breach of trust between the government and the public with respect to decision making on energy issues. This incident has increased suspicion among individuals and stakeholder groups who were already frustrated with the obstacles to meaningful public involvement in a broad range of key decisions about energy development in Alberta. We would expect the government to build a bridge to repair the damage that has been done; yet Bill 46 is doing the opposite.

From the perspective of many landowner groups, environmental organizations and other stakeholders, Bill 46 is another indication that their legitimate concerns about energy development and their democratic right to participate in important decisions that affect them are not respected by the Government of Alberta. This perception is reinforced by the fact that the Bill contains a clause which makes an amendment to the *Hydro and Electric Energy Act* retroactive to 2003 and would, if passed, explicitly remove the current right to contest whether transmission lines that have already been proposed and have come before regulatory hearings are actually needed. In other words, this section changes the rules mid-way through the game for stakeholders who have participated in good faith in regulatory hearings under the existing legal regime.

The most serious flaws in Bill 46 are provisions that explicitly restrict rights to public participation or grant very broad discretion to the proposed Utilities Commission restrict those rights. For example:

- The Commission is allowed to make an order or decision without giving notice and without holding a hearing unless it appears to the Commission that its decision "may directly and adversely affect the rights of a person" (sections 9(1), (2)). The 'directly and adversely affected test' has been a continuing source of controversy and litigation in Alberta because it is highly restrictive, often preventing participation by individuals and organizations who have bona fide and legitimate concerns with proposed projects.

- Even when the rights of persons are 'directly and adversely affected', the Commission may further restrict public participation by deciding not to hold a hearing in several circumstances.

    - The Commission is not required to hold a hearing when it considers that "no person will be directly and adversely affected *in a material way*" (section 9(3)(b) – emphasis added). This section adds another obstacle to public participation to the "directly and

adversely affected" restriction and there is no way of determining how the Commission will interpret "in a material way".

- The Commission is not required to hold a hearing when it is satisfied that the applicant has met the relevant Commission rules respecting each landowner that may be directly and adversely affected (section 9(3)(c)). These rules have not been developed and the Commission has broad discretion to create rules that could be used to restrict the use of hearings. For example, the rules could provide an easy path for an applicant to undertake limited public consultation and then argue that a full public hearing should not be ordered.

- Even if a person is entitled to "make representations" to the Commission because he or she qualifies as directly and adversely affected, this right only includes the opportunity to make a written presentation. The right to a "hearing" does not include an automatic right to make an oral presentation or to be represented by counsel (section 9(4)). This provision is another restriction of existing procedural rights found in the *Energy Resources Conservation Act* (section 26(2)). It will limit the ability of some people to participate effectively in the Commission's decisions.

- The Commission is not required to give notice to interested parties when making decisions on matters that it considers to be urgent or "for other reasons appearing to the Commission to be sufficient" (section 24(1)). This provision is an extraordinarily broad grant of discretionary power to deny the most basic procedural right that people should have prior notice of orders and decisions that may affect their interests.

- As mentioned above, there will be no requirement for the Commission to review whether a transmission line is actually needed and in the public interest when considering an application for a permit to construct a line; section 96(14)(c)(ii), amends the *Hydro and Electric Energy Act* to remove section 14(3) which, at present, is the only legislation that allows the future public convenience and need for a transmission line to be considered. The government has contended that since deregulation the need for a facility should be determined by the market through the *Electric Utilities Act* (sections 17(i) and 34 – 36). However, the *Electric Utilities Act* provides no opportunity for public input and fails to address the issue of the public interest (which includes protection of the environment) which may be better served by conservation measures or by alternative forms of generation or transmission rather than an option that is purely in the interest of the market. The government must ensure that there is an opportunity for public input on the future public convenience and need for a transmission line to be considered before the line is approved, either at the initial stage under the *Electric Utilities Act* or under the *Hydro and Electric Energy Act.*

- Section 96(14)(c)(ii) is made retroactive to June 1, 2003 (section 98(2)), the date that the *Electric Utility Act* came into effect. This means that legitimate appeals under the current *Hydro and Electric Energy Act* would be terminated.

A more-detailed analysis of the bill's flaws is provided in a letter to Energy Minister Mel Knight from the Environmental Law Centre on July 11, 2007. We endorse this excellent analysis.

The Pembina Institute believes that the contribution of Bill 46 to the further escalation of conflict between stakeholders, government and the energy industry is regrettable and does not serve the best interests of any of these parties or the public at large. We therefore urge you to ensure that the many serious flaws in Bill 46 are addressed. We also believe that the controversy surrounding Bill 46 provides an opportunity for the government engage in constructive dialogue with stakeholders and individual Albertans about public participation in utilities regulation and other aspects of energy decision making.

To this end, we recommend that you stop the progress of Bill 46 through the Legislature and refer it to the Standing Committee on Government Services after Second Reading. This all-party Committee should invite all interested and affected parties, including landowner and environmental groups, to present their views and recommendations. It should then table proposals to amend the bill to remove or reword those sections that are currently so damaging and restrictive.

We believe that these amendments should be guided by the principles of open, inclusive and transparent decision-making and accountability to Albertans. Individual Albertans and the organizations representing them should be able to make their voices heard on important decisions that affect their specific interests and that have important implications for the broader public interest.

In particular, the restrictive 'directly and adversely affected' test should be replaced in Bill 46 by a provision granting participation rights to individuals and organizations having legitimate and bona fide interests in the issues raised by the Commission's decisions and who can contribute to the Commission's mandate to consider the broader public interest. Bill 46 should also include full procedural rights to ensure that these individuals and organizations can participate effectively in hearings through written and oral submissions, representation by counsel, cross-examination of the evidence and arguments presented by other parties, and intervener funding.

Finally, we recommend that the hearings on Bill 46 should lead to a broader review of public participation in energy decision making, including participation in project reviews by the new Energy Resources Conservation Board and participation in other important decisions, such as the issuance of mineral rights by the Department of Energy. If you provide these forums for public input on Bill 46 and the other obstacles to public participation, the Pembina Institute would be pleased to offer more detailed suggestions for strengthening the public's role in important decisions about energy development in Alberta.

Yours truly,

Marlo Raynolds, PhD
Executive Director

Steve Kennett
Senior Policy Analyst

cc. The Honourable Mel Knight, Minister of Energy
The Honourable Ted Morton, Minister of Sustainable Resource Development
Hugh MacDonald, Liberal Opposition Energy Critic
Brian Mason, New Democrat Party Energy Critic