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June 7, 2011

Alberta Utilities Commission
Fifth Avenue Place
Fourth Floor, 425 First Street S.W.
Calgary, Alberta T2P 3L8

Attention: Giuseppa Bentivegna

Dear Ms. Bentivegna:

Re: **APPLICATION NO. 1604766 - PROCEEDING 203**
MAXIM POWER CORP.
HR MILNER POWER PLANT EXPANSION

Maxim Power Corp. ("Maxim") is in receipt of the Commission's letters dated May 27, 2011 to the Residents Coalition, Alberta Wilderness Association ("AWA") and [redacted] The Commission has determined that none of the parties who have sought to trigger a hearing have standing in Maxim's application.[1]

However, the Commission's three letters state that the Commission may hold a hearing on its own initiative even when no person has standing. The three letters also say that *before* the Commission makes a decision on whether to hold a hearing, the Commission seeks comment from Maxim and "interested persons" in relation to the application:

> However, pursuant to section 9 of the Alberta Utilities Commission Act, the Commission may hold a hearing on its own initiative, even when no person has standing. Before the Commission makes a decision on whether to hold a hearing, the Commission seeks comments from Maxim and interested persons regarding the issues to be considered by the Commission in relation to this application. Please submit comments by June 7, 2011.

Maxim appreciates the opportunity to provide its views to the Commission. Maxim believes that the question of whether the Commission will hold a hearing in this case, when no person has standing, is significant for the Commission's regulatory framework and absolutely critical for Maxim's project.

Summary

Maxim respectfully requests that the Commission issue a decision on the merits of the power plant application on or before June 30, 2011:

[1] The other two parties who filed Statements of Intention to Participate ("SIPs") – EnCana and Capital Power – likewise do not have standing in accordance with the judgment of the Alberta Court of Appeal in *ATCO Midstream v. Alberta (Energy Resources Conservation Board)* 2009 ABCA 41. EnCana withdrew it SIP and Capital Power only sought observer status. Neither asked for a hearing and neither have standing.

1. The delay of a hearing would kill the project. Maxim is able to comply with pending federal legislation with an AUC decision on the merits of its application issued by June 30, 2011 at the very latest. Any delay past June 30, 2011 will cause significant harm to Maxim and its investment in the Alberta generation business. The delay of a hearing will also harm Alberta's direct public interest as recent legacy PPA generation outages have placed the Province in need of preserving all generation options. Investor confidence in building new power plants would be harmed. These consequences all run counter to the very purposes of the legislation the AUC has been asked to administer in the Alberta public interest.

2. Nothing useful will be accomplished through a "public interest" hearing or inquiry. Much harm will be caused by the delay. The Commission has already accomplished everything it is required to do under the legislation. The Environmental Impact Assessment has been signed-off on by Alberta Environment. The AUC has fully reviewed the application. The AUC has called for interventions by directly affected parties in a public notice. No directly affected parties came forward. The AUC has done everything it is supposed to do. All it needs is to make a decision on the merits and finish the job.

3. Industry relies on the "rules of the game" to make investment decisions in new power plant. Section 9 of the *AUC Act* has never been used to hold a hearing in the absence of a person who has standing. There is no indication that the AUC can hold broad policy hearings or "inquiries" without an Order in Council. AUC power plant hearings are not supposed to be held without an actual person whose rights may be directly and adversely affected by the application.

4. Maxim relies on the AUC to be fair and open and transparent in its regulatory process and to deliver sound and principled decisions. The AUC's Notice of Application specifically said that, consistent with settled expectations in industry, if no submissions were received by persons with standing, the AUC would make a decision on the merits "without a public hearing." An abrupt change in the way the AUC interprets and applies its legislation and what it said in the Notice of Application without any forewarning or consultation is unfair. Maxim will face irreparable harm if a hearing is now held and its in-service date is delayed past June 30, 2015. If the AUC wants to change the well-established process for power plant approvals, a full consultation is necessary and such a change in law should not sacrifice a generator with a complete application.

Maxim's Power Plant Expansion Project

Maxim began work on its HR Milner power plant expansion project in 2007. The power plant expansion will increase capacity at the existing facility by 500 MW. Expected total investment is over $1.7 billion to bring this additional capacity online and deliver needed generation for Albertans.

On February 3, 2009, Maxim filed its power plant application with the AUC. An Environmental Impact Assessment was also filed with Alberta Environment. The Environmental Impact Assessment addresses all emissions and environmental impacts associated with the power plant expansion. On November 24, 2010, Alberta Environment determined Maxim's Environmental Impact Assessment to be complete.

After a further five month review period by the Commission, on March 4, 2011, the Commission issued its Notice of Application. In that Notice of Application, the AUC stated that persons that "may be directly and adversely affected by the Commission's decisions on the application are entitled to participate in the review process of the application." The Notice of Application went on to say:

> If no submissions are received, the AUC will continue to process and make a decision on the application without further notice or without a public hearing. [emphasis added]

The deadline for SIPs was set at March 24, 2011. SIPs were filed by [redacted] the AWA, The Pembina Institute ("Pembina"), EnCana Corporation ("EnCana") and Capital Power Corporation ("Capital Power"). Maxim replied to these SIPs on March 29, 2011. [redacted] also filed a SIP; however, this SIP was not received by Maxim until after it had written its March 29, 2011 letter. Parties who filed SIPs (including [redacted]) raised generalized environmental issues, most notably greenhouse gas ("GHG") policy issues. [redacted] s SIP stated that he does not oppose the power plant development and his real concern is with Mine 14, which has already received regulatory approval by the Energy Resources Conservation Board ("ERCB"). EnCana subsequently withdrew its SIP and Capital Power did not require a hearing, seeking only observer status if a hearing was to be held.

On April 19, 2011, the AUC wrote to [redacted] asking for additional information specifically directed at whether he and his land may be directly and adversely affected by the proposed power plant. Instead of replying to these questions [redacted] and Pembina submitted a new SIP which identified certain individuals who, it later emerged, did not actually authorize [redacted] and Pembina to represent them. The new SIP presented by this "Residents Coalition" also repeated Pembina's generalized environmental policy matters.

A recent development that is of extreme concern to Maxim is the proposed federal carbon legislation announced to industry by Minister Kent on May 26, 2011. Maxim has consulted with the Minister on this new legislation and understands that the Milner expansion will be considered an Existing Plant if it is commissioned by July 1, 2015. As a result of the anticipated financing, construction and commissioning timeframes, Maxim requires an approval from the AUC as soon as possible and no later than June 30th, 2011 in order to qualify as an Existing Plant under this new federal legislation. Maxim has no chance to complete the power plant expansion by July 1, 2015, unless it receives an approval from the AUC by June 30, 2011. Any regulatory delay, even from today's date, in issuing an AUC approval magnifies the risk of irreparable harm to Maxim. Maxim's plant is accommodated by the pending federal legislation. But a delay at this time by the AUC would set the project back years, at a minimum. Maxim would have to re-file its application, proceed with another two-year regulatory process, repeat its consultation with stakeholders and spend millions of more dollars. As a threshold decision, Maxim would need to decide whether to take the risk that a new project would even be justified in light of the market and regulatory risk going forward. Any delay in the AUC's decision will prejudice Maxim in the extreme with significant probability of killing the project outright.

An unintended consequence of the delay of a hearing would be not only very harmful to Maxim, but also to Albertans. Alberta desperately needs to preserve generation options as existing legacy PPA generators are taken offline. Alberta's competitiveness relies on a vibrant wholesale electricity market. Only private investors can bring on new generation in Alberta. Creating barriers to new generation at this time would be immediately harmful to Alberta's power supply. Sending a message that Alberta regulators will alter settled expectations and delay projects on the verge of construction will dampen investment and tighten long-term supply to the detriment of all Albertans.

The AUC's Statutory Duties

Holding a hearing in these circumstances would appear to be contrary to the purposes of the legislation administered by the AUC.

Maxim's application is filed pursuant to section 11 of *HEEA*. In *HEEA*, the legislature has issued guidance to the Commission. Section 3 of *HEEA* states that where the Commission is considering an application under

section 11 for the construction or operation it must have regard for the purposes of the *Electric Utilities Act* ("*EUA*"). In addition, the Commission must have regard for the purposes of *HEEA* itself, as set out in section 2 of that statute.

The Commission is supposed to promote the policies and objectives of *HEEA* and the *EUA* and not "frustrate or thwart" the intention of these statutes:

> Discretion is not absolute or unfettered. Decision makers cannot simply do as they please. All discretionary powers must be exercised within certain basic parameters. The primary rule is that discretion should be used to promote the policies and objects of the governing Act. These are gleaned from a reading of the statute as a whole using ordinary methods of interpretation. Conversely, discretion may not be used to frustrate or thwart the intent of the statute.[2] [footnotes deleted]

As is outlined below, holding a hearing would fail to promote and would frustrate the following purposes of *HEEA* and the *EUA*.

To provide for the economic, orderly and efficient development, in the public interest, of generation in Alberta[3]

The Commission has already determined in its Shepard ruling that a regulatory regime that allows one administrative decision to undermine another regulator or agency cannot be considered "orderly."[4] Any hearing to revisit determinations made by Alberta Environment with respect to its review of Maxim's Environmental Impact Assessment, the ERCB's approval of Mine No. 14 or to review federal approvals that are or might be required by Maxim cannot be considered "orderly." Holding a hearing to duplicate the responsibilities of other agencies or branches of Government is neither "efficient" nor "orderly."

In addition, the AUC has already determined Maxim's application to be complete and would be "decided without a hearing" in absence of submissions filed by persons who are directly and adversely affected. To now hold a hearing would be inconsistent with the orderly and efficient regulatory process already established by the Commission and would cause material and irreparable harm to an actual generation project.

Assist the Government in controlling pollution and ensuring environment conservation in the development of generation in Alberta[5]

It cannot "assist the Government" if the AUC were to hold a hearing to reconsider Alberta Environment's review of the matters within Maxim's Environmental Impact Assessment. Neither will it assist the Alberta Government for the AUC to hold a hearing on GHG policy issues at the very time that the Federal Government is introducing new legislation. If the Alberta Government believes that the AUC should hold a public proceeding on GHG policy, the Alberta Government would direct an inquiry.

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[2] Sara Blake Administrative Law in Canada (2006), page 95.
[3] *HEEA*, section 2(a)
[4] AUC Ruling on Issues set out in Decision 2009-244 (Application No. 1605340; Proceeding ID 241) dated January 18, 2010, para. 57 (the "Shepard Ruling").
[5] *HEEA*, section 2(c).

Continue a flexible framework so that decisions of the electric industry about investment in generation are guided by competitive market forces[6]

Generators need certainty to make large capital investments, in this case $1.7 billion. A stable regulatory framework is needed to support significant investment decisions. Changing settled expectations that hearings under section 11 of *HEEA* will not be held in the absence of persons with standing was relied upon by Maxim. This settled expectation was expressly stated in the Commission's Notice of Application. Introducing a significant change in the way the Commission and its predecessors have interpreted and applied section 9 of the *AUC Act after* an application has been determined to be complete and is ready for a decision will impair reliance on competitive market forces, both for this project, future generation projects and potentially other energy infrastructure like gas plants and upgraders.

Further, in the case of this particular project, Maxim has been consulted by the federal Minister and has been given to understand that Maxim's project will be accommodated as an "Existing Plant" if it is commissioned by July 1, 2015. In this way, the federal legislation respects investment decisions in generation projects that can meet the July 1, 2015 in-service date. For the Commission to hold an unprecedented hearing to delay Maxim and subject it to more onerous requirements clearly interferes with Maxim's investment decision in a material fashion.

To provide a framework so that the Alberta electric industry can, where necessary be effectively regulated in a manner that minimizes the cost of regulation[7]

Effective and efficient regulation is not advanced by changing longstanding rules without very sound reasons and sufficient notice of a pending change to industry. The AUC was clear in its Notice of Application that a hearing is only necessary if directly and adversely persons are in the room. The cost of the regulatory change – a new kind of "hearing" triggered without any person having standing and contrary the AUC's own Notice of Application – will be very high in the case of Maxim, to the point of killing the plant expansion itself.

Further, the May 27 request for "issues" is inefficient duplication. On March 24, 2011, the AUC issued its Notice of Application and invited qualified persons to file SIPS with "a brief description of the issues you want the Commission to consider when deciding upon the application." On April 19, the Commission gave [redacted] a second chance to "provide your reasons for opposing the coal fired power plant." All of the addressees of the May 27 letters had ample opportunity to set out the issues they wanted the Commission to consider. All of the addressees did so. It is wasteful and duplicative for the Commission, in its May 27 letters, to again ask these persons (who we now know do not have standing) to identify issues for a hearing that the Commission *may* convene. The question of issues has been asked and answered. Asking the same questions is neither efficient nor effective.

The fact of the matter is that the Commission has already done everything that it is required to do in order to make a decision on a power plant application. The AUC received Maxim's application. The Environmental Impact Assessment was deemed complete. The AUC did further review of the filed application after Alberta Environment finished its work. A Notice of Application was published. The AUC asked whether parties have standing, even giving parties a second chance to show whether they may be affected. A determination on standing was made. The Commission is now at the stage where the application is ripe for determination on the merits. The Commission is perfectly positioned to finish its job and make a decision on the merits of the power plant application.

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[6] *EUA*, section 5(d).
[7] *EUA*, section 5(h).

The alternative approach of embarking on an uncharted course of holding a hearing without any persons having standing, determining scope, determining issues and deciding who can participate and to what extent will not be effective or efficient. Holding a hearing at this stage will open a multitude of procedural and administrative law issues precisely because the current regulatory framework does not contemplate facilities hearings being held without a party with standing. A hearing that does far more harm than good cannot be efficient and effective regulation.

No legislative power under section 9 of AUC Act to hold hearing on AUC's initiative

As a matter of statutory interpretation, Maxim respectfully disagrees that section 9 of the *Alberta Utilities Commission Act* (the "*AUC Act*") contemplates that the Commission "may hold a hearing on its own initiative, even when no person has standing." The Commission has ruled in other cases where it has been called upon to interpret its legislation that the words and their immediate context must be supplemented by consideration of the rest of the Act:

> As noted by Sullivan in Sullivan on the Construction of Statutes, fifth edition, at page 359, "when words are read in their immediate context, the reader forms an initial impression of their meaning. …But any impression based on immediate context must be supplemented by considering the rest of the Act, including the other provisions of the Act and its various components." Further, at page 364, the author notes "[w]hen analyzing the scheme of the Act, the court tries to discover how the provision or parts of the Act work together to give effect to a plausible and coherent plan. It then considers how the provision to be interpreted can be understood in terms of that plan. …The fundamental presumption in scheme analysis is being able to grasp and explain the basic structure on which the Act is built and how the various parts and provisions were meant to function within this structure to achieve the desired goal, or more often, the desired mix of goals."[8]

The plain words of section 9 of the *AUC Act* do not state or imply that the AUC may hold a hearing on its own motion when no person has standing. Subsection 9(1) of the *AUC Act* says that unless "expressly provided for by this Act or any other enactment to the contrary, and subject to this section", the Commission is authorized to make a decision "without the holding of a hearing."[9] This subsection does not say or imply that the AUC may hold a hearing on its own initiative.

Subsection 9(2) makes it mandatory for the Commission to hold a hearing if its decision on an application "may directly and adversely affect the rights of a person."[10] However, this subsection does not apply because the Commission has ruled that nobody has standing. There is nothing in subsection 9(2) that says the AUC may hold a hearing on its own initiative.

Subsection 9(3) expressly states that even when a person has standing, the Commission is "not required to hold a hearing" in the case of a power plant application under *HEEA* where the Commission "is satisfied that the applicant has met the relevant Commission's rules respecting each owner of land that may be directly and adversely affected by the Commission's decision on the application."[11] There is nothing in subsection 9(3) that remotely suggests that the AUC may hold a hearing on its own initiative. In fact, the implication of subsection

[8] Decision 2010-115, para. 82.
[9] *AUC Act*, section 9(1).
[10] *AUC Act*, section 9(2).
[11] *AUC Act*, section 9(3).

9(3) is that in the case of a power plant application under *HEEA*, a hearing is the exception rather than the rule and the discretion of the Commission is to *not* hold a hearing even if there *are* persons with standing. This is consistent with the purposes of the legislation.

Subsection 9(4) states that even where there is a person with standing, the Commission is not required to hold an oral hearing and may afford the person an adequate opportunity to make representations in writing.[12] While the AUC can chose to hold a paper process, nothing in subsection 9(4) says or implies that the AUC may hold a hearing on its own initiative.

Nowhere in section 9 does it state or imply that the Commission is to hold a hearing "on its own initiative, even when no person has standing" as is stated in the May 27 letters. All implications are to the contrary. The immediate impression one forms on reading section 9 of the *AUC Act* is that the Commission was not intended to hold hearings on its own motion in the absence of directly affected persons, particularly in the case of a power plant application.

Moreover, and as noted above, consideration of the purposes of *HEEA* and the *EUA* strongly suggests that the legislature did not intend section 9 of the *AUC Act* to be expanded beyond its plain words to accord the Commission with the power to hold a power plant hearing on its own initiative in circumstances where no person has standing.

The legislative history and long-standing practice of the Commission and its predecessors under section 9 of the *AUC Act* further confirm that a hearing will not be held unless a directly and affected person comes forward. Section 9 of the *AUC Act* replicates a well known provision in the *Energy Resources Conservation Act*, which was administered by the Commission's predecessors for decades. The Commission's predecessors universally held that a hearing would not be triggered under the *Energy Resources Conservation Act* unless an actual person whose rights may be directly and adversely affected called for a hearing. While the Commission's predecessor would allow participation by public interest groups if a hearing had been triggered by a directly and adversely affected individual, in no facilities cases were hearings initiated by parties who did not have standing.[13] By using the same words in section 9 of the *AUC Act* (other than changing the word "Board" to "Commission"), the legislature can fairly be taken to have intended that the Commission would follow the same, well-established interpretation of the legislation: hearings will not be held in the absence of a directly and adversely affected person.

Maxim further notes that a "hearing" held without any directly and adversely person is actually a species of "inquiry." The Commission is not permitted to embark upon an "inquiry" under the *AUC Act* unless it has been ordered to do so by a duly enacted Order in Council. While the Alberta Government has called upon the AUC to conduct inquiries in certain circumstances, the Government has not asked for an inquiry in respect of any of the broad policy issues raised by the Residents Coalition, AWA or Pembina. Further, while the Commission may conduct a hearing or "other proceeding" relating to matters under the Commission's jurisdiction jointly or in conjunction with "another board, commission or other body constituted by the Government of Canada or an agency of it", the Commission may only do so "subject to the approval of the Lieutenant Governor in Council."[14] The legislature does not want the AUC to tread into the federal sphere unless it has been expressly called upon to do so by the Alberta Government.

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[12] *AUC Act*, section 9(4).
[13] See Hunt & Lucas *Canada Energy Law Service* (Alberta), para. 695.
[14] *AUC Act*, section 16(1)(b).

No Power under HEEA to hold a Hearing on AUC's Initiative

The context of *HEEA* further supports the proposition that the AUC is not supposed to call a hearing in the absence of a person with standing.

Section 11 of *HEEA* states:

> No person shall construct or operate a power plant unless the Commission, by order, has approved the construction and operation of the power plant.

There is nothing in section 11 which suggests that the Commission may hold hearings if it considers it necessary or "desirable" to do so in the absence of any directly and affected parties requesting a hearing. In contrast, the section of HEEA dealing with hydro developments says:

> 9(3) When the Commission receives an application for an order approving the construction of a hydro development, the Commission shall make any investigation, make any inquiry and hold any hearings it considers necessary or desirable in connection with the application. [emphasis added]

By expressly giving the Commission discretion to hold "any hearings it considers necessary *or desirable*" in connection with hydro developments, but not giving the Commission such discretion in the case of a section 11 power plant applications, the legislature intended that a hearing would only be held by the Commission under section 11 of *HEEA* when required because of a person directly and adversely affected by the power plant. The Commission cannot trigger a section 11 hearing even if it feels a hearing would be "desirable."

Alberta Utilities Commission's Purpose to be Fair, Open and Transparent in its Regulatory Process and Deliver Sound and Principled Decisions

The AUC's mission statement is to be "fair," in its regulatory processes. For Maxim, a critical "regulatory process" is whether a public hearing will be held. Maxim has complied with all requirements to construct and operate its power plant expansion. A thorough stakeholder involvement program was initiated and continues today. Its Environmental Impact Assessment is complete. Its *HEEA* application has been determined complete by the AUC. A Notice of Application has been published. The AUC said in the Notice of Application that, consistent with settled expectations, if no submissions are received by persons who are directly and adversely affected, the AUC will continue to process and make a decision on the application without further notice or "without a public hearing." Changing the rules of the game to now require a public hearing is patently unfair. Maxim understands that the Commission would not have known of the implications of the new federal carbon legislation on the proposed expansion when it wrote its letter of May 27, 2011. It is now apparent that Maxim will suffer irreparable harm if a hearing is held now and its in-service date is delayed past June 30, 2015.

The AUC's mission statement is to be "open and transparent" in its regulatory processes. In this case, there was no open and transparent consultation with industry. Nobody had any notice that the AUC might rewrite the established regulatory process for power plant hearings. Before the May 27 letters, Maxim had no idea that the AUC would seek to convene a hearing on its own initiative, even when no person has standing. Even if the AUC wants to change the well understood rules, there should have been advance notice, consultation and necessary legislative changes before setting aside decades of regulatory jurisprudence.

The AUC's mission statement is to "deliver sound and principled decisions." However, in the May 27 letters, the new interpretation of section 9 of the *AUC Act* is made in a single sentence. There is no sound and

principled reason provided anywhere in the May 27 letters which illuminate why the Commission is now interpreting section 9 of the *AUC Act* to allow it to hold a hearing on its own initiative even when no person has standing.

No useful purpose will be advanced by a hearing. A hearing will be very damaging to Maxim and the framework established for generators. There is no scope for the AUC to use section 9 of the *AUC Act* to order a hearing in the absence of directly and adversely affected persons or to convene a kind of "inquiry" to consider broad policy issues, including matters within the federal sphere. Suddenly changing established rules at this critical juncture without fully considering all of the implications does not seem to comport with the Commission's own mission statement.

Maxim respectfully requests that the AUC proceed with determining Maxim's application on the merits without the delay of a hearing.

Yours truly,

BURNET, DUCKWORTH & PALMER LLP

<ELECTRONIC MESSAGE>

John E. Lowe

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