

Amendments to Bill 46 Fall Far Short

The proposed amendments to Bill 46, released by the government on Tuesday, November 27, fall far short of ensuring effective public participation in the decision-making process of the new Alberta Utilities Commission (AUC). Although the government has attempted to respond to public concern by removing or amending some particularly egregious sections of Bill 46, two fundamental problems remain unresolved. First, it is difficult to determine what participation rights will be recognized in practice because of the complexity and vagueness of Bill 46 and the discretion granted to the AUC. Second, Bill 46 reverts to the highly restrictive test for public participation that is currently used by the Alberta Energy and Utilities Board (AEUB). Referring Bill 46 to public hearings before an all-party committee is the best way to fully address these important issues before the Bill is passed in the legislature.

The Government's Proposed Amendments

Three amendments are particularly relevant to public participation.

1. Changes to subsection 9(3) have removed the provision that would have allowed the AUC to refuse to hold a hearing when it appears that “no person will be directly and adversely affected in a material way” by its decision. The AUC’s discretion to refuse to hold a hearing when it is satisfied that the applicant has met the relevant rules respecting each landowner that may be directly and adversely affected (section 9(3)(b)) has now been limited to situations where no person has requested a hearing. [Amendment A]
2. Section 21 has been amended to give the AUC discretion to make rules allowing eligibility for funding to any intervener, not simply local interveners (i.e., directly and adversely affected landowners). [Amendment C]
3. Consequential amendments to the Electric Utilities Act have changed wording regarding the consideration of the need for transmission facilities. [Amendment O(b)(c)(d)]

Remaining Uncertainty Regarding Rights to Public Participation

Despite these amendments, public participation rights under Bill 46 remain uncertain in several key areas.

1. It is unclear what rights will be accorded interveners in the event that the AUC decides not to allow oral submissions (subsection 9(4)). Bill 46 does not include the specific procedural rights enumerated in subsection 26(2) of the *Energy Resources Conservation Act*.
2. The eligibility of interveners (other than local interveners) for costs under section 21 is to be established through rules made by the AUC. These rules have not been made, so it unclear what these rules will contain and whether or how the AUC will exercise its discretion to make these rules.

3. The amendments dealing with the consideration of the need for transmission facilities are complicated and their practical implications for the ability of landowners and public interest groups to address this issue remain unclear.

Return to the Restrictive “Directly and Adversely Affected” Test

The fundamental problem with Bill 46 is that it perpetuates the highly restrictive test for public participation that is currently used by the Alberta Energy and Utilities Board (AEUB). Only Albertans who can demonstrate that their rights may be “directly and adversely affected” by a decision of the regulator have the right to a hearing. This test silences many Albertans with legitimate interests in decisions on utilities and energy projects and has contributed to widespread dissatisfaction with the AEUB.

The practical effect of this test is that only landowners whose residential property rights are directly affected by utilities and energy projects have the right to a hearing. This test has been used to deny the right to be heard to non-resident landowners, adjacent landowners, landowner organizations, municipal governments and other Albertans who use the land in question for recreational, business or other purposes. For facilities on public land, there may be no one who qualifies as “directly and adversely affected” and therefore no opportunity for a public hearing to be held.

The “directly and adversely” affected test has been a continuing source of controversy and litigation in Alberta. It is also inconsistent with the “public interest” mandate of the AUC because it can prevent participation by groups and individuals with important perspectives on the “public interest” issues raised by proposed projects.

The government’s proposed amendments are entirely unresponsive to the arguments of landowner groups, environmental groups and other organizations representing Albertans that the “directly and adversely affected” test should be replaced with a broader “public interest” test to allow participation by the full range of individuals and organizations who have legitimate concerns with proposed projects, consistent with the Supreme Court of Canada definition for public interest standing.

The Need for All-Party Public Hearings on Bill 46

The intense public controversy around Bill 46 is evidence that many Albertans feel that their voices are not being heard in important decisions about utilities and energy development. There is still far too much uncertainty regarding the practical implications of Bill 46 for the public’s right to be heard in decision-making by the AUC. Reverting to the “directly and adversely affected” test is also a return to a status quo that is clearly unacceptable to many Albertans. Bill 46 should therefore be referred to an all-party committee of the Legislature for public hearings to permit a full and open discussion of the serious deficiencies in the Government of Alberta’s current approach to public participation and to enable Albertans to work together to correct those deficiencies in the new legislation that divides the AEUB into the AUC and the Energy Resources Conservation Board.