

## **MH/NCN COMMENTS ON CEC SCHEDULE ISSUES ARISING FROM JULY 28/03 CEC PRE-HEARING CONFERENCE**

As requested by the Manitoba Clean Environment Commission (CEC or Commission), Manitoba Hydro (MH) and Nisichawayasihk Cree Nation (NCN) provide comments on the following CEC schedule matters arising from the July 28, 2003 Pre-Hearing Conference:

- MH/NCN draft pre-hearing schedule – blending of CEC and PUB practices
- Other submissions to date on the pre-hearing schedule
- Requirements for CEC review of the EISs
- Requirement for CEC review of the NFAAT submissions
- Pimicikamak's initial position on the CEC hearing schedule
- Concluding comment on pre-hearing schedule issues

In summary, it is clear from the July 28<sup>th</sup> CEC Pre-Hearing Conference that the pre-hearing schedules proposed by all parties other than MH/NCN would render it not possible for the Commission to forward its report to the Minister by the date specified by the Minister (i.e., December 1, 2003).

In light of the major implications at stake here, including elimination of any possibility for a 2009 in-service date for Wuskwatim, MH/NCN reviewed with care the basis for their proposed schedule (which protects the Commission's possibility of forwarding its report by December 1<sup>st</sup>), as well as the reasons submitted by others to support material delays. MH/NCN suggest that the ultimate test for the Commission to apply in this instance is whether or not such delays are required, based on the evidence and the normal practices of the CEC and the Public Utilities Board, for a credible and rigorous public hearing to proceed in accordance with the terms of reference provided by the Minister.

### **MH/NCN Draft Pre-hearing Schedule - Blending of CEC and PUB Practices**

MH/NCN prepared and circulated to the Commission on July 25, 2003 a draft pre-hearing schedule (Attachment 1 to the July 25 filing) as directed by the Commission's letter of July 22. The draft schedule sought to propose a fair and reasonable approach that:

- included the three elements directed by the Commission, i.e., a minimum of one round of interrogatories for funded participants, a minimum of one pre-hearing session for motions to be heard, and a proposed date (Sept 16, 2003) for pre-filing of all hearing submissions and documentation;
- blended CEC and Manitoba Public Utilities Board (PUB) practices, in accordance with the Commission's instructions, while recognizing that this hearing will basically use CEC procedures;
- recognized information exchange activities to date; and
- addressed the need to provide for the hearing to start in sufficient time to enable the CEC report to be forwarded, as specified by the Minister, by December 1, 2003 if possible.

To assist in expediting the process, MH/NCN also included elements not found before in the normal CEC and PUB hearing practices (e.g., technical workshops as well as ongoing consultation work plans with specific affected aboriginal communities).

CEC and PUB elements were blended in the draft pre-hearing schedule proposed by MH/NCN. The use of each element in the proposal is reviewed separately below:

- 1) **Environmental assessments review based on CEC practices** - CEC and Manitoba Conservation practices for environmental assessments and Environmental Impact Statement (EIS) reviews indicate that the Wuskwatim CEC hearing could reasonably start by about September 22. The following practices apply to the Wuskwatim EIS submissions in the MH/NCN draft schedule (see Attachment A for a more detailed review):
  - a) **Pre-Hearing Adequacy Review** - Manitoba Conservation normally reviews adequacy of environmental filings through public registry access to documents and a 60-day government Technical Advisory Committee (TAC) and public comment review followed by supplemental information requests to the proponent. These activities have already been carried out. MH/NCN's draft schedule includes reasonable provisions to conclude this process.
  - b) **Pre-Hearing Written Questions on Environmental Assessments (EISs)** - CEC Process Guidelines allow for written questions received before the hearing to be answered. MH/NCN's draft schedule fully incorporates this practice with respect to the EIS submissions.
  - c) **Pre-Hearing Motions** – CEC Process Guidelines provide for the Commission to accept motions respecting procedural matters from any registered hearing participant – including where possible preparing and serving Notice of Motions prior to the opening of a hearing session. MH/NCN's draft schedule fully incorporates this process, while providing specific time periods and dates when motions may be considered.
  - d) **Pre-Hearing Submissions and Replies** - Participants can file pre-hearing submissions with the CEC under the current Process Guidelines up to 14 days before the start of the hearing, and “replies” to such submissions can be filed within 7 days of receipt of a submission . MH/NCN's draft schedule fully provides for this process for both EIS and NFAAT related submissions and replies.
- 2) **NFAAT review incorporates PUB practices** - Based on PUB experience and the CEC's direction to date for an interrogatory round in this hearing, MH/NCN estimated that the Wuskwatim CEC hearing could reasonably start by September 29 as proposed in the MH/NCN draft pre-hearing schedule. As demonstrated below, the MH/NCN draft pre-hearing schedule with a hearing start at Sept. 29 (a

week later than otherwise estimated above based on normal CEC practice), is compatible with timing allowed by the PUB for its 1990 Conawapa review process and its recent MH Status Update process other than for the proposal to waive interrogatories on intervenor evidence (see Attachment B for a more detailed review):

- a) **Filing of NFAAT Information Requests** - Questions and information exchange already carried out in most key respects has achieved the same outcomes as the PUB “round one” interrogatory process. Funded participants focusing on NFAAT issues (who are equivalent to “intervenors” in the PUB process) are therefore now entering into what is equivalent to a round 2 type PUB interrogatory process. The proposed MH/NCN draft schedule, which allows 11 calendar days if NFAAT responses are filed on August 8, is fully consistent with PUB practice as shown in the Conawapa review (2 weeks) and the Status Update review (9 calendar days).
- b) **MH/NCN Response to NFAAT Information Requests** - The MH/NCN draft schedule for MH responses is fully consistent with PUB practice (which can allow from two to three weeks for MH responses to be filed).
- c) **Filing of Intervenor Evidence** – The MH/NCN draft schedule allows 7 calendar days for filing of NFAAT intervenor evidence after filing of all MH interrogatory responses and is fully consistent with PUB practice (which allows about one week for this step)
- d) **Information Requests re: Intervenor Evidence** –MH/NCN proposed to waive this step in the draft schedule in order to expedite an early start to the hearing. (The PUB can allow from two to four weeks for this step.)
- e) **Pre-hearing Motions and Rebuttal Evidence by MH** –The MH/NCN draft schedule for pre-hearing motions and MH rebuttal evidence is consistent with PUB practice (which allows for motions and MH rebuttal submissions to be filed during the week before the hearing); in addition, MH/NCN proposed potential consideration in August of motions if required to address as soon as practical any confidentiality and other information exchange or scoping issues for the hearing.

The MH/NCN July 25 filing included an updated overall project schedule (Attachment 2 to the July 25 filing) which confirmed that the proposed pre-hearing schedule would provide a reasonable basis for protecting the Commission’s ability to forward its report to the Minister by December 1, 2003, and retaining overall ability to achieve construction start in January 2004 as required to protect the 2009 In -Service Date (ISD) for Wuskwatim. The updated overall project schedule projected completion of the CEC hearing four weeks after its start, i.e., by October 24.

## Other Submissions to date on the Pre-Hearing Schedule

Larry Strachan (Manitoba Conservation) commented at the July 28 Pre-Hearing Conference that the MH/NCN updated overall Wuskwatim project schedule to secure licenses and approvals by late December 2003, including federal approvals and permits, was consistent with that discussed earlier with the provincial/federal Project Administration Team (PAT) and that Manitoba Conservation portions are doable in that schedule.

At the July 28 Pre-Hearing Conference several funded participants provided oral submissions which in essence proposed a hearing start date ranging from early November (Consumers Association of Canada/Manitoba Society of Seniors (CAC/MSOS) through to at least mid-January 2004 (Canadian Nature Federation (CNF)). The overall implication, whether the hearing starts in November or later, is that the Commission can not forward its report to the Minister by the specified date of December 1<sup>st</sup> and the possibility of Wuskwatim in-service in 2009 is eliminated.

In summary, the following comments on the draft schedule were provided by funded participants:

- a) **CAC/MSOS** provided its own detailed draft schedule for review, focusing on review requirements related to the NFAAT submission and in effect proposing a hearing start date around Monday November 3, 2003. CAC/MSOS also identified specific times when its experts had schedule conflicts in late September and the month of October. Compared with the MH/NCN draft schedule, the CAC/MSOS schedule included material differences on the following elements (almost all of the 6 weeks added time is accounted for by 3 extra weeks for intervenor evidence preparation and 2 weeks for inclusion of an interrogatory step related to intervenor evidence – the other additional week arises primarily from delay in filing of the initial information requests to MH):
  - **Item 18 - Filing of interrogatories/information requests** – proposed 10 working days rather than the 7 working days allowed in the MH/NCN schedule; as a result, **Item 22 (filing of MH/NCN responses)** is proposed to be delayed by almost a week (from September 9 to September 12). [When responses are provided by MH/NCN to information requests, CAC/MSOS propose that MH/NCN identify who will be on its witness panel(s) and provide CVs for these people - MH/NCN propose to adopt this suggestion.]
  - **Item 19 – Motions on confidentiality** - Proposed deferral of motions on confidentiality beyond August until all responses provided to information requests (as a result, proposed delay in hearing such motions until a Motions Day in late September).
  - **Item 23 – File Intervenor pre-filed evidence** - This was identified by CAC/MSOS as the most problematic part of the MH/NCN schedule (it provided 7 calendar days after interrogatory responses for filing of intervenor evidence). CAC/MSOS proposed 20 working days for this step.

During this time period, CAC/MSOS also proposed provisions to deal with motions to request further disclosure/clarification regarding the MH responses – and to provide for further MH responses, if required. In effect, intervenor submissions would be filed under the CAC/MSOS proposal by about Friday October 10 (compared to Tuesday September 16 under the MH/NCN proposal – a difference of about 3.5 weeks).

- **New steps – Information Requests/Responses on Intervenor Evidence** – CAC/MSOS also proposed to include 10 working days for an interrogatory step to test intervenor evidence before the hearing starts; rebuttal evidence is then filed 5 working days thereafter.
- **Item 25 – Further Motions** - Motions are proposed to be heard during the period when intervenor evidence is being prepared (see Item 23 above) rather than after all evidence has been filed.

b) Other funded participants provided specific comments on their pre-hearing schedule requirements (beyond general comments about needing more time) as follows:

- **CNF** stated that the first activity by them in the schedule (i.e., preparation of information requests to MH/NCN) should not commence until CNF is able to retain their experts (they expect to retain 6 experts related to both EIS and NFAAT submissions), which has not yet occurred and is not expected to occur before the end of August; thereafter, CNF stated that they would need 3 weeks to prepare their information requests, and 4.5 months from start of the information requests until the start of the hearing (suggestions included a second round of information requests therein to MH/NCN).
- **Manitoba Metis Federation (MMF)** stated that they would need a minimum of 90 days after August to carry out two rounds of consultations with their members related to the EIS submissions as set out in their participant assistance funding application; accordingly, MMF could file its evidence by about the end of November (which implies a likely hearing start in early January).
- **Community Association of South Indian Lake (CASIL)** stated that they needed 100 days to carry out the traditional knowledge and other consultations and analysis set out in their participant assistance funding application related to the EIS submissions; accordingly, the earliest that they could file their evidence would appear to be around mid to late October (if work started when funding decisions were announced) with a hearing start sometime in November. CASIL also noted concern about accommodating the CEC process concurrently with Section 35 consultations.
- **Time to Respect Earth's Eco Systems/Resource Conservation Manitoba (TREE/RCM)** stated that they would need to mid-December to file their NFAAT evidence on demand side management (DSM) assessments, assuming that they get the new MH DSM report by the end of August (this implies a hearing start in January 2004). TREE/RCM also

proposed delay in the due date for NFAAT information requests until three weeks after the MH DSM report is filed, i.e., until late September. TREE/RCM appeared to suggest possible segmenting of the hearing process whereby EIS matters could be accelerated and NFAAT could be delayed. They also indicated willingness for MH/NCN to present its evidence in the hearing and be cross examined prior to filing of participant submissions.

- c) **Pimicikamak** submitted that the Commission cannot proceed as a matter of law with setting a pre-hearing schedule before the Pimicikamak Motion filed on July 25 is determined.

The Commission must determine whether the delays proposed in these submissions are required for a credible and rigorous public hearing to proceed in accordance with the terms of reference provided by the Minister.

In accordance with at least some intervenor submissions, it is reasonable to consider this question separately for CEC review of the EIS submissions versus CEC review of the NFAAT submissions. Accordingly, this question is considered below in the context of three separate issues:

- (1) Requirements for CEC review of the EISs.
- (2) Requirements for CEC review of the NFAAT submissions.
- (3) Pimicikamak's initial position on the CEC hearing schedule.

### **Requirements for CEC Review of the EISs**

The MH/NCN draft schedule provides clear justification for a Commission hearing start before the end of September based on CEC practice, subject to the satisfactory completion of the current PAT/Manitoba Conservation adequacy review.

There would appear to be no reasonable basis to justify delay in the CEC hearings to allow for more consultation and/or adequacy review of the EIS filings.

- The aboriginal community most directly affected by the Wuskwatim Generation Project (NCN) participated jointly with MH in the preparation of both EISs, and MH/NCN are proceeding in accordance with an AIP which provides for completion and ratification of a Project Development Agreement as a precondition to this development proceeding at this time.
- MH has documented consultations with each aboriginal and other community beyond NCN that could be potentially affected by the Wuskwatim Transmission Projects, and to date no disputes have been brought to the attention of the CEC from any of these communities with respect to the selection of the preferred transmission line routes.

- The MH/NCN Draft Pre-Hearing Schedule sets out extensive pre-hearing document distribution, public access activity, and consultation and review already carried out since the filing as related to the EIS submissions (Items # 1 through #14).
- The EISs also document the extensive pre-filing consultations with regard to the EISs beyond the public comment and review that took place during the February 2002 CEC public meetings on the Wuskwatim EIS Guidelines.
- The Commission was informed on June 30, 2003, during the review of participant assistance applications, of EIS-related consultation work plans that have been or are being separately funded by MH with certain aboriginal communities beyond NCN in the project region, including South Indian Lake, York Factory First Nation, Tataskweyak Cree Nation, Opaskwayak Cree Nation, and Pimicikamak.
- Provisions for initial public comment and TAC adequacy review have been fully carried out, and extensive comments have been provided that MH/NCN are responding to at this time.
- Special technical workshops have been carried out separately with TAC and funded participants for the CEC hearing, each including two days dedicated to review of the EIS submissions.
- The Commission is aware that Manitoba and Canada are currently carrying out “Section 35” consultations with aboriginal people whose treaty and aboriginal rights may be affected by the Wuskwatim Projects. These consultations are a consideration for governments (separate from the CEC process) as they make their determinations on the granting of approvals.

Based on CEC and Manitoba Conservation practice, MH/NCN submit that there is no reasonable basis for formal interrogatory processes now to be implemented with respect to the EIS submissions – let alone for consideration to be given to two rounds of new interrogatories as CNF appeared to suggest. Under CEC practice and Guidelines, provision exists to address additional written questions – and MH/NCN submit that this is fully sufficient with respect to the EIS submissions.

The Commission has heard that timely completion of federal and provincial environmental licensing, permits and approval processes is in each instance dependent upon prior completion of the CEC public hearing review of the EIS submissions. In this regard, addressing the EIS matters may merit some priority as to timing within the CEC review relative to addressing NFAAT matters, to the extent that this may be accommodated within the overall CEC review process for Wuskwatim. (Such segmentation would not assist the overall Wuskwatim schedule, however, unless the full CEC hearing and report process is completed within the time specified by the Minister.)

There is, in summary, ample reason to proceed with CEC hearing review of the EIS submissions as soon as may be practical in the context of the current adequacy review and other matters addressed in Attachment A. There is also no reasonable basis for concern that proceeding in this manner at this time would fail to provide for a credible and rigorous public hearing with respect to the EIS submissions in accordance with the terms of reference provided by the Minister.

The funded participant submissions on EIS issues summarized above seek to delay CEC review for the EIS submissions beyond late September until November 2003 or January 2004 in order that certain intervenors may carry out their own additional studies and/or consultations with their members (MMF and CASIL) and in order that CNF may retain experts (who have not yet been hired) to look at certain topics. Based on the Minister's terms of reference and sound practice for the conduct of CEC public hearing reviews, and other major implications related to the likely effects of such delays, MH/NCN submit that these rationales do not provide a reasonable justification today for delay of the Commission's hearings with regard to the EIS submissions of MH/NCN.

### **Requirements for CEC Review of the NFAAT Submissions**

Adding the NFAAT review into the Wuskwatim CEC hearing has led to consideration of PUB practices. The MH/NCN draft schedule has been proposed based on a blending of CEC and PUB practices for the NFAAT review as explained above. Based on similar rationales, CAC/MSOS has raised specific proposals and concerns related to this schedule for review of the NFAAT submissions. MH/NCN provide the following comments on the CAC/MSOS proposals:

- (1) **Item 18 - Filing of interrogatories/information requests** – The issue here is 11 versus 14 calendar days (7 versus 10 working days) being provided for filing. Based on PUB practice, either option could be justified. MH/NCN would like to protect, without undue risk of serious problems, the ultimate date for providing responses as of Tuesday September 9<sup>th</sup>. Accordingly, MH/NCN would propose that the CEC and funded participants file as many NFAAT information requests as possible by August 19 (including all requests related to MH NFAAT submissions that are available to them on or before August 5). Subject to these provisions, it is proposed that additional NFAAT information requests from the CEC and funded participants be allowed to be filed up to noon 10 working days after any specific NFAAT supplemental MH NFAAT filings provided on or before August 8.
- (2) **Item 23 – File Intervenor pre-filed evidence** - The issue here is 7 versus 28 calendar days (5 versus 20 working days) being provided to file intervenor evidence after completion of MH responses to NFAAT information requests. As reviewed in Attachment B, PUB practice fully supports provision of one calendar week for this step – and there is no reasonable PUB-based precedent, or other reasonable basis, offered to justify delay of the hearing by 3 additional weeks to await CAC/MSOS intervenor evidence on these matters. This being said, MH is prepared to examine any reasonable steps that might be suggested within the context of the MH/NCN draft schedule dates to facilitate funded participant and CEC understanding and assessment of the NFAAT submissions. For example, an added NFAAT technical workshop after filing of information requests dealing with specific NFAAT CEC and NFAAT funded participant issues might serve to reduce, refine and/or clarify information requests needs for written responses and thereby assist all parties.



**(3) New steps – Information Requests/Responses on Intervenor Evidence –**

The issue here is an added 14 calendar days (10 working days) to accommodate these added steps. PUB practice fully supports provision of these added steps over a two week period. MH/NCN proposed waiving these added steps, which would in large part be there for the benefit of MH/NCN, in order to expedite start of the hearing at the earliest possible date. If the Commission and funded participants want to provide for these steps, it is suggested that options be considered that do not delay start of the hearing, e.g., carry out these steps concurrently with items #24 through #26 (dealing with filing rebuttal submission, hearing further motions, and start of the hearings) in the MH/NCN Draft schedule, and/or provide for filing of responses after the start of the hearing but well before the intervenors testify at the hearing.

**(4) Item 19 – Motions on confidentiality** - The issue here is proposed delay in motions dealing with confidentiality until all MH responses are provided. MH/NCN's proposal is to expedite dealing with such special issues that are anticipated to arise with respect to NFAAT submissions by setting out in the July 25 filing its requirements with respect to confidentiality so that motions could be heard in August if any participants objected to this approach. As an alternate approach, further discussion on this matter would also likely identify effective ways whereby MH can review information requests shortly after they are filed in order to provide on an expedited basis (well before all MH responses are provided) written confirmations as to information that will not be provided based on confidentiality requirements. These approaches facilitate early consideration in August of any motions that parties may wish to have heard on this matter. In any event, MH/NCN do not support the CAC/MSOS proposal to create an extended motions process during the period when intervenor evidence is being prepared. As noted above, the established PUB process provides for far more efficient timing related to both intervenor evidence and the hearing of motions after all evidence is filed.

In summary, based on the above comments, MH/NCN submit that modifications can be made to the Draft Schedule which protect a September 29<sup>th</sup> start date for the hearing while also accommodating many of the CAC/MSOS proposals. However, there is no reasonable justification for a precedent to accommodate the most problematic element of the CAC/MSOS proposals (the proposal for 15 extra working days to prepare expert testimony).<sup>1</sup>

---

<sup>1</sup> In the event that the Commission is willing to consider segmenting the hearing in order to deal first with the EIS and then with the NFAAT submissions, other options may also be available that allow a week or so added time for filing NFAAT intervenor submissions while still being able to protect forwarding the overall CEC report by December 1. Such options have not been examined in detail to date, given the Commission's direction to provide a specific date for pre-filing of all hearing submissions and documentation by all parties and participants.

In addition to the CAC/MSOS submission, CNF proposed delays to allow for retaining experts and carrying out studies and TREE/RCM stated that they would need until mid-December to file their NFAAT evidence on DSM assessments, assuming that they get the new MH DSM report by the end of August (this implies a hearing start in January 2004). TREE/RCM also proposed delay in the due date for NFAAT information requests until three weeks after the MH DSM report is filed, i.e., until late September. Based on the Minister's terms of reference and sound practice for the conduct of CEC and/or PUB public hearing reviews, and other major implications related to the likely effects of such delays, MH/NCN submit that these rationales do not provide a reasonable justification today for delay of the Commission's hearings with regard to the NFAAT submissions of MH. On the specific matter of the four-month DSM study, MH also submits that the results of the TREE/RCM study are not likely to suggest DSM scenarios beyond those considered in sensitivity assessments already included in the NFAAT filing and to be addressed further in the NFAAT supplemental submissions. Furthermore, TREE/RCM can more appropriately review the MH study in detail and present their own study at the next PUB hearing where such matters have been directed to be examined. Finally, the TREE/RCM suggestion for having participants file their evidence after the start of the hearing is neither fair nor reasonable.

### **Pimicikamak's Initial Position on the CEC Hearing Schedule**

Pimicikamak submitted that the Commission cannot proceed as a matter of law with setting a pre-hearing schedule before the Pimicikamak Motion filed on July 25 is determined. Pimicikamak's position was to the effect:

- a) its Motion is "foundational";
- b) no scheduling can be done until its Motion has been finally determined; and
- c) if the CEC adopts or even proposes a schedule before Pimicikamak's Motion is addressed, such action will be a sign of pre-disposition and bias by the Commission against Pimicikamak's position.

MH/NCN submit that continuing to carry out normal procedural steps in an efficient and timely fashion in accordance with the Process Guidelines does not indicate any bias or pre-disposition on the part of the Commission with respect to the substance of this Motion or any other matters that may come before the Commission. To the contrary, if the Commission were to stop all activities until the Pimicikamak Motion is considered and finally determined it could be perceived as a bias in favour of the position of Pimicikamak and would certainly be prejudicial to MH/NCN.

As a practical matter, any schedule prepared by the Commission is at all times within the Commission's discretion to amend, as need dictates, but delay in performing routine procedural steps may result in potentially significant loss to MH/NCN. It could also result in inconvenience for other participants and perhaps the Commission itself.

The continuation of a process, as opposed to reaching final conclusions, does not indicate bias or pre-judgment<sup>2</sup> and MH/NCN submit that the Commission should proceed with its normal functions, including routine scheduling.

With respect to the schedule for addressing the Pimicikamak Motion, Pimicikamak should be required to file its materials no later than August 11<sup>th</sup>. Unless there is something unanticipated in those materials, MH/NCN are confident that they will be able to respond fully by August 15<sup>th</sup> and arguments on the Motion could be heard on August 18<sup>th</sup> or as soon thereafter as the Commission can meet.

MH/NCN's position is that the issue is not properly before the Commission and is not relevant to the current responsibilities of the Commission. Nonetheless, Manitoba Hydro wants to advise the Commission that Pimicikamak's major allegations in its Motion are wrong, both factually and at law. The existing system does not comprise an "ongoing illegal operation" and there was no failure to fulfill the environmental assessment requirements applicable to the CRD/LWR at the time that the project was developed in the 1970s.

MH/NCN respectfully submit that the CEC is not the proper forum to hear allegations about compliance or about the legality or illegality of Manitoba Hydro's operations in any event. The CEC is not a decision-making body, but a recommending body. Questions about the legality or illegality of the actions of Manitoba Hydro or the Province of Manitoba are properly referable to the Courts, not to the CEC.

The CEC operates within terms of reference set by the Minister and within its jurisdiction under *The Environment Act*. Under that legislation the proponent defines the scope of the Development for which it is seeking a license and the Minister determines the scope of the environmental impact statement, which is required for that Development, in accordance with sections 7(1), 11 and 12 (5) (a), (b) and (c) of the Act. The request by Pimicikamak to re-define the Development to include existing and potential future development is not an issue that the CEC is mandated or equipped to address.

The suggestion by Pimicikamak that the environmental effects of Wuskwatim cannot be properly addressed unless the Commission accedes to their request is not sustainable and is contrary to normal environmental practice. Issues about the effects of Wuskwatim on Manitoba Hydro's existing operations are certainly relevant and are, or will be, fully addressed in the EIS and EIS supplementary filings. Issues about the potential cumulative effects of Wuskwatim both in relation to past developments and potential future developments are also addressed in the EIS and there is no need to redefine the Development, as suggested by Pimicikamak, in order for the CEC to "do the job".

---

<sup>2</sup> *Swampy Cree Tribal Council v. Clean Environment Commission* case. That case concerned matters similar to the ones at issue in the Pimicikamak Motion. In the *Swampy Cree* case, the applicant sought from the Court of Queen's Bench a prerogative writ that would have prohibited the Commission from holding its public hearing. The Court heard the arguments of the parties and then reserved judgment. Justice Hirschfield specifically authorized the Commission to carry on with the public hearing (but not to provide its advice and recommendations) while he was considering the merits of the application and reaching his decision.

With respect to Pimicikamak's position that the MH/NCN filings are inadequate MH/NCN point out that:

1. The filings were prepared in accordance with the Guidelines for the Environmental Impact Statement and other information requirements which were set by the Minister within his statutory jurisdiction and in accordance with section 12 of *The Environment Act*; and
2. The Motion raises matters at this preliminary stage, before the hearing even starts, that comprise the substance of what is to be addressed and considered by the participants and the Commission in the interrogatories and the hearing itself.

Issues and arguments with respect to inadequacy of the justification for the development, alleged un-assessed system-wide impacts, the efficacy of Manitoba Hydro's reliance on future export markets, etc, all are properly the subject of the CEC hearing itself, not of a pre-hearing motion.

If it has concerns about the sufficiency of the materials filed by MH/NCN, Pimicikamak should use the process and methods provided by the Act and the Commission for the provision of further information by MH/NCN, not try to usurp the process through a pre-hearing motion.

Pimicikamak has indicated that it expects to file extensive material and that it will do so by August 11, 2003. It is expected that the substance of the MH/NCN's response to the Pimicikamak Motion will consist largely of facts which are a matter of public record and matters of law. It is suggested that Pimicikamak, MH/NCN and each of the participants who desire to make submissions be given an opportunity to file material and put forward brief oral argument, during which the Commission may inquire as to any matters which require further argument.

MH/NCN suggest therefore that the Pimicikamak Motion be heard as follows:

1. August 11, 2003 - Pimicikamak to file and serve material
2. August 15, 2003 – MH/NCN and any other participants to file and serve material
3. August 18, 2003 (or as soon thereafter as the Commission can meet) - Motion is heard:
  - (a) Pimicikamak - oral argument to last no more than 60 minutes;
  - (b) Other interested persons (in the Commission's discretion) - oral argument to last no more than 15 minutes per person;
  - (c) MH/NCN - oral argument to last no more than 60 minutes;

(d) The Crown - if the Crown wishes to be heard (time in the Commission's discretion);

(e) Pimicikamak reply – 10 minutes.

### **Concluding Comment on Pre-Hearing Schedule Issues**

It is clear from the July 28<sup>th</sup> CEC Pre-Hearing Conference that if the CEC accepts the pre-hearing schedules proposed by any party other than MH/NCN it would not be possible for the Commission to forward its report to the Minister by the date specified by the Minister (i.e., December 1, 2003).

There are major implications at stake here, including elimination of any possibility for a 2009 in-service date for Wuskwatim. MH/NCN suggest that the ultimate test for the Commission to apply in this instance is whether or not material delays are required to the schedule proposed by MH/NCN, based on the evidence and the normal practices of the CEC and the PUB, for a credible and rigorous public hearing to proceed in accordance with the terms of reference provided by the Minister.

MH/NCN submit the following:

#### **1. Requirements for CEC review of the EISs –**

- There is ample reason to proceed with CEC hearing review of the EIS submissions by the end of September; this schedule is reasonable for the EIS Submission in the context of the current adequacy review and normal CEC practice as addressed in Attachment A.
- There is no reasonable basis for concern that proceeding in this manner at this time would fail to provide for a credible and rigorous public hearing with respect to the EIS submissions in accordance with the terms of reference provided by the Minister.
- Based on the Minister's terms of reference and sound practice for the conduct of CEC public hearing reviews, and other major implications related to the likely effects of such delays, MH/NCN submit that the rationales offered in other submissions do not provide a reasonable justification today for delay of the Commission's hearings with regard to the EIS submissions of MH/NCN.

#### **2. Requirements for CEC review of the NFAAT submission -**

- Based on the detailed review of the CAC/MSOS submission relating to NFAAT review, MH/NCN submit that modifications can be made to the Draft Schedule which protect a September 29<sup>th</sup> start date for the hearing while also accommodating many of the CAC/MSOS proposals. Further, there is no reasonable justification for a precedent to accommodate the most problematic element of the CAC/MSOS proposals (the proposal for 15 extra working days to prepare expert testimony).
- Based on the Minister's terms of reference and sound practice for the conduct of CEC and/or PUB public hearing reviews, and other major implications

related to the likely effects of such delays, MH/NCN submit that the rationales offered by CNF and TREE/RCM do not provide a reasonable justification today for delay of the Commission's hearings with regard to the NFAAT submissions of MH.

- On the specific matter of the four-month DSM study, MH also submits that the results of the TREE/RCM study are not likely to suggest DSM scenarios beyond those considered in sensitivity assessments included in the NFAAT filing and to be addressed further in the NFAAT supplemental submissions. Furthermore, TREE/RCM can more appropriately review the MH study in detail and present their own study at the next PUB hearing where such matters have been directed to be examined.

### 3. **Pimicikamak's initial position on the CEC hearing schedule –**

- Pimicikamak's submission that the Commission cannot proceed with setting a pre-hearing schedule before the Pimicikamak Motion is determined is without foundation. The continuation of a process, as opposed to reaching final conclusions, does not indicate bias or pre-judgment and MH/NCN submit that the Commission should proceed with its normal functions, including routine scheduling.
- To do what Pimicikamak proposes could be perceived as a bias in favour of that party and certainly would be prejudicial to MH/NCN.
- The CEC is not the proper forum to hear allegations about compliance or about legality or illegality of Manitoba Hydro's operations in any event.
- The request by Pimicikamak to re-define the Development to include existing and potential future development is not an issue that the CEC is mandated or equipped to address.
- The suggestion by Pimicikamak that the environmental effects of Wuskwatim cannot be properly addressed unless the Commission accedes to their request is not sustainable and is contrary to normal environmental practice.
- Issues and arguments with respect to inadequacy of the justification for the development, alleged un-assessed system-wide impacts, the efficacy of Manitoba Hydro's reliance on future export markets, etc, all are properly the subject of the CEC hearing itself, not of a pre-hearing motion.
- MH/NCN propose a schedule and process to address the Pimicikamak Motion.
- There is, in summary, no reasonable basis to delay the CEC review of Wuskwatim based on the Pimicikamak submission.

MH/NCN's submission focuses on an effective pre-hearing schedule consistent with the Minister's reference to the CEC. In the event that the Commission decides that it is not possible to forward its report to the Minister by the specified date of December 1<sup>st</sup>, MH/NCN suggest that a new draft schedule be provided for review and comment by all parties. Under such a material change in assumptions, MH/NCN would want to review all of its schedule proposals which were prepared without regard to any major delay in the hearing process. Any such change that delays Wuskwatim in-service by a year would not, however, require any material change to either the EIS or NFAAT submissions.

Furthermore, MH/NCN strongly believe that even with such a materially modified schedule it is very important to pursue a timely and efficient pre-hearing and hearing process in the best interests of the public and MH/NCN.

In conclusion, MH/NCN respectfully submit that the schedule they have proposed, as modified herein to accommodate many of the CAC/MSOS comments can provide a credible and rigorous public hearing that starts by October and proceeds in accordance with the normal practices of the CEC and the PUB as well as with the terms of reference by the Minister. In this context the requested delays are not required for the participants to be fully and fairly heard within this process.

## **ATTACHMENT A: Environmental assessments review based on CEC practices**

Based on past CEC and Manitoba Conservation practices for environmental assessments and EIS reviews, the Wuskwatim CEC hearing could reasonably start by about September 22. This estimate reflects pre-hearing provisions for normal Manitoba Conservation and CEC environmental review practices, including the pre-hearing adequacy review process, written questions from CEC participants, filing of all submissions for CEC hearing review, and filing of replies (if any) to submissions.

Under CEC/Manitoba Conservation practices, there would be no formal pre-hearing CEC interrogatory process – instead, the following normal Manitoba Conservation and CEC environmental review practices could be anticipated to apply to the Wuskwatim EIS submissions:

- a) **Pre-Hearing Adequacy review** - Manitoba Conservation normally reviews adequacy of environmental filings for Class 3 developments such as the Wuskwatim Generation Project through public registry access to documents and a 60-day Technical Advisory Committee (TAC) and public comment review followed by supplemental information requests to the proponent. These activities have already been carried out. MH/NCN's draft schedule includes reasonable provisions to conclude this process:
  - **EIS and NFAAT submissions both have already been subjected to this process;** MH/NCN has now received TAC and public comments, and MH/NCN has proposed to file responses on these to Manitoba Conservation on or before August 8. [In the course of the current process, the main EIS and NFAAT documents were filed April 30 and then placed on the Manitoba Conservation public registry at many locations throughout Manitoba; special additional measures were taken by MH/NCN to provide copies of EIS submissions between early May and June 6 directly to all parties seeking participant funding related to the CEC review of the EIS submissions; copies of the main documents were also made available on the MH web site; a Newsletter was also made available in May on the MH web site, to community leaders in the project region, and to other interested participants setting out an overview of the Wuskwatim submissions, how they could be accessed, and the general process for regulatory review.]
  - **The MH/NCN draft schedule addresses completion of this adequacy review process** – This schedule assumes that there could be an adequacy recommendation (as to document readiness to proceed to the CEC hearing) from the provincial/federal Project Administration Team (PAT) within 2 weeks (by August 22) after the supplemental filing by MH/NCN - in principle this could allow for a CEC hearing to start by Sept 22 (allowing for 30-day advertising starting August 23).



- b) **Pre-Hearing Written questions on environmental assessments (EISs)** - CEC Process Guidelines (Guideline #10(4)) allow that written questions received before the hearing will be answered in writing “if the questions have been submitted sufficiently early to permit time for written response”. MH/NCN’s draft schedule fully incorporates this practice with respect to the EIS submissions, reflecting the extensive pre- and post-filing consultations and reviews carried out with respect to the EIS. (As explained separately, a PUB-based pre-hearing written questions process is proposed for the “Need For and Alternatives To” (NFAAT) submissions where consultation and review to date has more closely reflected PUB practices.)
- **Normal CEC process for EISs** - The MH/NCN draft schedule proposes retention of this normal CEC process (rather than formal interrogatories) for written questions on EISs. This proposal reflects the fact that, in accordance with normal procedures and special consultation measures by MH/NCN, the environmental assessments have already been involved in far more public and regulatory consultation and commentary than the NFAAT submission. If desired, the CEC could still set a final date for EIS related questions to be submitted before the hearing (the current CEC approach appears in this regard to offer greater flexibility than setting one added round under a more formal interrogatory process).
- c) **Pre-Hearing Motions** – CEC Process Guidelines (Guideline #11) set out the conditions under which the Commission will accept motions respecting procedural matters from any registered hearing participant – including where possible preparing and serving Notice of Motions prior to the opening of a hearing session. The proposed schedule fully incorporates this Guideline, while providing specific time periods and dates when motions may be considered.
- d) **Pre-Hearing Submissions and Replies** - Participants also can file pre-hearing submissions with the CEC under the current Process Guidelines (Guideline #10(1)) up to 14 days before the start of the hearing, and “replies” to such submissions can be filed within 7 days of receipt of a submission (Guideline #9).
- **Normal CEC process for EISs and NFAAt submissions:** The draft schedule prepared by MH/NCN respects these CEC Guidelines for filing of submissions (including intervenor evidence) and filing of rebuttals or replies

## **ATTACHMENT B: NFAAT review incorporates PUB practices –**

Based on PUB experience for MH matters (e.g., the 1990 Conawapa Major Capital hearing which was similar in scope to the NFAAT submission, and the 2002/03 MH Status Update hearing which recently reviewed MH rates) and at least one further information exchange for NFAAT submissions as directed through a formal interrogatory round, MH/NCN estimated that the Wuskwatim CEC hearing could reasonably start by September 29 as proposed in the MH/NCN draft pre-hearing schedule.

Under the PUB practice, reliance is normally placed on a pre-hearing interrogatory process involving the PUB and registered intervenors, with no other pre-hearing adequacy review process similar to that carried out by TAC and with no provision for pre-hearing public comment or wide spread public registry access similar to that provided by Manitoba Conservation. The Conawapa 1990 PUB process provides one example, although it involved more complex information than Wuskwatim as regards the NFAAT issues for MH; another example is the hearing schedule established by the PUB at the outset of the recent MH 2002/2003 Status Update hearing, which involved extensive evidence due to the absence of rate reviews since 1996. The MH/NCN draft pre-hearing schedule with a hearing start at Sept. 29 [a week later than otherwise estimated in Attachment A based on the normal CEC practice], is compatible in its key elements with timing allowed for the Conawapa process and the Status Update process (see below):

- a) **Filing of NFAAT information requests/interrogatories** - Intervenors proceed under the PUB practice to prepare and file information requests or interrogatories on a timely basis once documents are available. The MH/NCN draft schedule provision for a final round of interrogatories is fully consistent with PUB practice. The MH/NCN draft schedule describes the round of questions and information exchange already carried out (which is in most key respects achieving the same outcomes as the PUB “round one” interrogatory process) and provides for a final round of NFAAT information requests fully consistent with PUB practice. In the Wuskwatim CEC process, funded participants focusing on NFAAT issues (who are equivalent to “intervenors” in the PUB process) are therefore now entering into what is equivalent to a round 2 type PUB interrogatory process. Looking at PUB practice in this regard for time allowed between receipt of round one responses and filing of round 2 questions, the Conawapa PUB hearing allowed 2 weeks and the recent 2002/03 Status Update allowed 9 calendar days. The proposed MH/NCN draft schedule, which allows 11 calendar days if NFAAT responses are filed on August 8, is fully consistent with PUB practice.
  - **PUB process for Conawapa and 2002/2003 Update** - In the 1990 Major Capital hearing on Conawapa, Round One Interrogatories were filed within 5 weeks of the initial filing by MH with PUB (the 2002/03 Update assumed about 7.5 weeks over the Christmas/New Year season). The PUB process does not involve granting intervenor funding at the outset of the hearing process, i.e., awards are made after

the hearing is concluded, although the PUB does formally grant intervenor status to specific participants after review of applications.

- **Wuskwatim NFAAT review context today relative to PUB process**
  - In the Wuskwatim process today “intervenor” declaring interest in receiving participant funding to review NFAAT have all had NFAAT documents since at least June 6, and many had them earlier in May. These intervenors also had access to the technical workshop on July 7,8 9, and in some instances have had additional information exchange with MH; they also will receive copies of supplemental filings arising from the information exchanges and question/answer processes to date.
    - i. PUB practice with a somewhat similar Conawapa review would suggest that the current proceeding could have planned for initial Interrogatories to be filed by June 30 or mid July, and certainly by Friday August 1 or Tuesday August 5.
    - ii. The Canadian Nature Federation (CNF) filed over 80 pages of comments and questions on the EISs by July 10; CAC/MSOS filed comments on NFAAT by June 30; PCN filed with CEC on June 30 copies of presentations on system effects issues of concern to PCN that MH and PCN representatives had discussed together in May and June.
  - **MH/NCN draft schedule** - The MH/NCN draft schedule proposes filing NFAAT Interrogatories as late as August 19 only to allow for review of MH’s supplemental filings in response to TAC and public comments and questions to date, and thus the funded participants (“intervenor”) in reality are entering into a round 2 type interrogatory process.
  - **MH/NCN proposal consistent with PUB practice** - PUB practice for time allowed between receipt of round one responses and filing of round 2 questions indicates that the Conawapa PUB hearing allowed 2 weeks and the 2002/03 Status Update allowed 9 calendar days. The proposed MH/NCN draft schedule is consistent with PUB practice, allowing 11 calendar days if NFAAT responses are filed as late as August 8.
- b) **MH/NCN response to interrogatories** - PUB practice can allow from two to three weeks for MH responses to be filed. The MH/NCN draft schedule for MH responses is fully consistent with PUB practice.
  - **PUB process for Conawapa and 2002/2003 Update** - The Conawapa process allowed 2 weeks to respond to the second round of interrogatories, which took place in June and July; the Status Update allowed 19 calendar days
  - **MH/NCN proposal consistent with PUB practice** - The MH/NCN draft schedule proposes 3 weeks for the reasons noted.

- c) **Filing of Intervenor evidence** – PUB practice allows about one week for this step after complete filing of all MH interrogatory responses. The MH/NCN draft schedule for filing of NFAAT intervenor evidence, which allows 7 calendar days, is fully consistent with PUB practice.
- **PUB process for Conawapa and 2002/2003 Update** - The Conawapa PUB process allowed one calendar week for filing of Intervenor Pre-Filed testimony after receipt of Round 2 Interrogatory responses from MH. The PUB allowed 9 calendar days for this step in the Status Update Hearing.
  - **MH/NCN proposal consistent with PUB practice** - The MH/NCN draft pre-hearing schedule also allows 7 calendar days for this step.
- d) **Information requests re: Intervenor evidence** – PUB practice allows for interrogatories regarding intervenor evidence to be asked by MH (and intervenors) and answered before the hearing ; this step can take from two to four weeks. MH/NCN proposed to waive this step in the draft schedule in order to expedite an early start to the hearing.
- **PUB process for Conawapa and 2002/2003 Update** - The Conawapa PUB process allowed 2.5 weeks to file Interrogatories and 1.5 weeks for responses (total of 4 weeks from mid-July). The PUB allowed 15 calendar days in total for this step in the Status Update hearing.
  - **MH/NCN proposal differs from PUB practice in order to expedite an early start to the hearing** - MH/NCN’s draft schedule waives any provision for pre-hearing Interrogatories regarding Intervenor pre-filed testimony in order to facilitate start of the hearing as early as possible.
- e) **Pre-hearing Motions and Rebuttal Evidence by MH** – The PUB pre-hearing practice allows for motions and MH rebuttal submissions to be filed during the week before the hearing. The MH/NCN draft schedule for pre-hearing motions and MH rebuttal evidence is consistent with PUB practice; in addition, MH/NCN proposed potential consideration in August of motions if required to address as soon as practical any confidentiality and other information exchange or scoping issues for the hearing.
- **PUB process for Conawapa and 2002/2003 Update** - The Conawapa PUB process allowed a weekend (Monday) to file and hear motions after filing of the last Interrogatory responses (previous Friday); MH rebuttal evidence had to be filed by Thursday of the same week, and the hearing started on the Monday following. The PUB schedule for the Status Update also provided for MH to file rebuttal evidence on the Thursday when the hearing started on the Monday following.
  - **MH/NCN proposal consistent with PUB practice** - The MH/NCN draft schedule allows almost two weeks (12 calendar days) from filing of all submissions to the hearing start , with rebuttal/replies as well as motions being to be heard six calendar days before the hearing starts.