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REGULATORY
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Regulatory Law Chambers *is a Calgary-based boutique law firm dedicated to excellence in energy regulatory matters. We have expertise in oil and gas, electricity, including renewable energies and commercial matters, tolls and tariff, compliance and environmental related matters. We frequently represent clients in proceedings before the Alberta Energy Regulator ("AER"), the Alberta Utilities Commission ("AUC"), the National Energy Board ("NEB"), all levels of the Courts, and in energy related arbitrations and mediations.* ***Our advice is practical and strategic. Our advocacy is effective.***

This monthly report summarizes matters under the jurisdiction of the AER, the AUC and the NEB and proceedings resulting from AER, AUC and NEB decisions. For further information, please contact Rosa Twyman at Rosa.Twyman@RLChambers.ca or John Gormley at John.Gormley@RLChambers.ca.

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ALBERTA COURT OF APPEAL

Orphan Well Assn. v Grant Thornton Ltd. (2017 ABCA 124)

Appeal Denied – Paramountcy – Bankruptcy and Insolvency Act - AbitibiBowater Test – Mineral Property – Environmental Claims

In this decision, the ABCA denied the appeals of the AER and the Orphan Well Association (the "OWA") from the Alberta Court of Queen's Bench's ("ABQB") decision in *Grant Thornton Ltd. v Alberta Energy Regulator*, 2016 ABQB 278 (the "ABQB Decision").

ABQB Decision

Redwater Energy Corporation's ("Redwater") trustee and receiver in bankruptcy, Grant Thornton Limited (the "Trustee"), sought to disclaim certain of Redwater's non-producing wells pursuant to section 14.06 of the federally enacted *Bankruptcy and Insolvency Act* (the "*BIA*"). Section 14.06 of the *BIA* permits a trustee in bankruptcy to renounce unprofitable assets without the responsibility for environmental abandonment and remediation work.

The AER and OWA applied to the ABQB, seeking an order to compel the Trustee to fulfill its obligations as a licensee under the *Oil and Gas Conservation Act* ("*OGCA*") and the *Pipeline Act* ("*PA*") in relation to abandonment, reclamation, and remediation of Redwater's licensed properties.

Specifically, the AER and the OWA applied for a declaration from the ABQB that the Trustee's renouncement of well assets was void and unenforceable, due to the environmental remediation work necessitated as a result of the well abandonment.

In the ABQB Decision denying that application, the ABQB found that compliance with both the provincial legislation (i.e. the *PA* and the *OGCA*) and the federal *BIA* was impossible. Therefore, the ABQB held that the doctrine of federal paramountcy was triggered. The ABQB declared the definitions of licensee under the *PA* and *OGCA* to be inoperable to the extent that those definitions frustrated the purpose of the *BIA.* It followed that the ABQB denied the remedies sought by the AER and OWA.

The Appeal

The AER and the OWA appealed the ABQB Decision to the Alberta Court of Appeal ("ABCA"). The ABCA, in a 2-1 split decision, dismissed the appeal and upheld the ABQB Decision.

The Majority ABCA Decision

Justice Frans Slater provided the ABCA majority's (referred to simply as the ABCA herein) reasons for dismissing the appeal. The ABCA found that the issues on appeal were the priority of environmental claims, and whether a receiver or trustee in bankruptcy must satisfy the contingent liability inherent in the remediation of the worthless wells in priority to the claims of secured creditors.

The Constitutional Context

The ABCA noted that all parties agreed that:

(a) The *BIA* is valid federal legislation;

(b) The *OGCA* and the *PA* are valid provincial legislation; and

(c) In case of conflict, the federal legislation prevails.

Paramountcy Doctrine

The ABCA explained that the paramountcy doctrine will be engaged if:

(a) There is an operational conflict between the federal and the provincial legislation because it is impossible to comply with both laws; or

(b) The provincial legislation fundamentally frustrates the objectives of the federal legislation.

The ABCA further explained, that under the principle of cooperative federalism, the court will first attempt to interpret and apply the federal and provincial provisions harmoniously, and only if that fails, will paramountcy be invoked.

Ownership of Mineral Property in Alberta

The ABCA noted that Redwater owned a number of *profits à prendre* relating to oil and gas deposits in Alberta. The ABCA found that such *profits à prendre* gave a proprietary right to exploit minerals in Alberta and constituted both "property" and "real property," for the purposes of the *BIA*.

In contrast, the ABCA found that AER licences are permissive in nature. The ABCA explained that without an AER licence, one is not legally allowed to exploit oil and gas properties. However, unlike a *profit a prendre*, the ABCA found that an AER licence gave no right to exploit mineral resources unless the holder also had proprietary rights in the minerals themselves.

The ABCA concluded that a "licence" or "agreement" giving a proprietary right to exploit minerals in Alberta (e.g. a *profits à prendre*) is both "property" and "real property". A permissive AER licence is neither "property" nor "real property". The ABCA found that the economic value, at least for bankruptcy purposes, rests in the mines and minerals property itself, and not in the AER licence.

Federal Bankruptcy Regime under the *BIA*

The ABCA summarized the purposes of the *BIA*, in general terms, as follows:

(a) To provide for the orderly liquidation and winding up of the insolvent debtor, at the minimum expense (the "single proceeding" model);

(b) To distribute the realizable assets fairly among the creditors, having regard to the legal priority of various types of debts; and

(c) To provide the bankrupt with a "fresh start", free of the burden of crushing debt.

The ABCA also noted that a central concept in the bankruptcy regime is "claims provable in bankruptcy" (*BIA,* s. 121).

The ABCA summarized the priority of distribution to creditors set out in s. 136 of the *BIA*, in descending order, as follows:

(a) Secured creditors (ss. 71, 75, 136(1));

(b) Administrative costs (s. 136(1)(b));

(c) Various "preferred creditors" listed in s. 136; and

(d) Unsecured creditors, sharing rateably if there are insufficient funds.

The ABCA explained that the notion of “fresh start” can only apply to entities that continue to exist following bankruptcy. In the case of a corporation, after a bankrupt corporation is liquidated, it is usually wound up or struck off and ceases to exist. Any regulatory or environmental obligations that were not provable in bankruptcy may exist in theory, but there may be no entity against which they could be enforced.

Environmental Claims under *BIA* Section 14.06

The ABCA summarized the effect of section 14.06 of the *BIA* on the liability of a trustee and the bankrupt estate, respectively, as follows:

(a) A trustee in bankruptcy is not personally liable for:

   (i) Pre-bankruptcy environmental "conditions" or damage (*BIA,* s. 14.06(2)(a));

   (ii) Post-bankruptcy environmental "conditions" or damage, absent specified misconduct ("gross negligence or wilful misconduct") (*BIA,* s. 14.06(2)(b)); or

   (iii) Compliance with post-bankruptcy "orders", "notwithstanding anything in any federal or provincial law", so long as the trustee abandons or releases any interest in the "real property" that is "affected by the condition or damage" within the time specified (*BIA,* s. 14.06(4)(a)).

(b) The bankrupt estate remains liable for environmental damage, including:

   (i) Remediation costs for abandoned property do not rank in priority as "costs of administration" (*BIA,* s. 14.06(6)); and

   (ii) Claims by Canada or a province for "remedying any environmental condition or environmental damage" are a secured charge on the real property or any "contiguous" property "related to the activity" that caused the environmental damage (*BIA,* s. 14.06(7)).

An environment claim is considered a deemed secured charge against the bankrupt estate, and ranks prior to any other claim or security against the property (*BIA*, s. 14.06(7)(b)).

The ABCA noted that environmental claims are now provable in bankruptcy under *BIA*, section 14.06(8), if sufficiently expressed in monetary terms.

The *AbitibiBowater* Test regarding a “Provable Claim”

The ABCA cited the Supreme Court of Canada’s (“SCC”) decision in *AbitibiBowater Inc., Re*, 2012 SCC 67 (“*AbitibiBowater*”), which set out the test to determine whether an environmental obligation is a “provable claim” under section 14.06 of the *BIA*. In *AbitibiBowater,* the SCC held that if the environmental obligation is framed in monetary terms, it will qualify as a provable claim. If it is not framed in monetary terms, it must be examined to see whether it will "ripen into a financial liability," having regard to the "factual matrix and the applicable statutory framework."

To determine whether an obligation not framed in monetary terms is a provable claim, the SCC set out the following three-part test:

(a) There must be a debt, liability or obligation to a creditor. When a regulatory body exercises its enforcement powers against a debtor, it is a "creditor" in insolvency proceedings;

(b) The debt, liability or obligation must be incurred at the relevant time in relation to the insolvency. For environmental claims, this can be before or after the insolvency proceedings have begun; and

(c) It must be possible to attach a monetary value to the debt, liability or obligation. The claim may be contingent, as long as it is not too remote or speculative to be included with the other claims,

(the “*AbitibiBowater* Test”).

The ABCA explained that the third part of the *AbitibiBowater* Test depends on whether there is "sufficient certainty" that the regulatory body will ultimately perform remediation and crystallize the claim. In assessing the certainty of the claim,

the court can examine the entire factual context, including whether the debtor is in control of the property, whether it has the means to comply with the order, whether there are other parties responsible for the remediation, as well as the effect that compliance with the order would have on the insolvency process.

Application of *AbitibiBowater* Test to Redwater Obligation

The ABCA stated that the "essential question" in this appeal was whether Redwater's environmental obligations met the test for a provable claim under section 14.06 of the *BIA*, as interpreted by the SCC in *AbitibiBowater*. The ABCA noted that there was no dispute that the first two parts of the *AbitibiBowater* Test was met, namely, that an obligation existed to the AER as a creditor, and the obligation had arose prior to the conclusion of the insolvency.

The ABCA found that it was therefore only necessary to address the third branch of the test.

The ABCA found that Redwater's obligation to remediate the wells arises directly from a cleanup order, or indirectly from a directive which imposes financial consequences on the transfer of assets. In either case, the ABCA found that the AER's policy on transfers essentially strips away from a bankrupt estate enough value to meet the outstanding environmental obligations. The ABCA found that the AER was a "creditor" with a provable claim within the meaning of the *BIA.* Further, the ABCA found that, if security is taken, as is the case under the AER and OWA's scheme, the environmental obligation is reduced to monetary terms.

The ABCA found that the AER's claim under the provincial legislation interfered with the priority of distribution in the bankrupt estate.

The ABCA held that the proper interpretation of the *BIA* does not entitle the AER to proceeds from the bankrupt Redwater's estate in satisfaction of the environmental claims in priority to the claims of the secured creditor. The ABCA held that to the extent that the interpretation of the provincial legislation leads to a different result, the paramountcy doctrine renders the provincial legislation of no force or effect.

Dissent of Sheilah Martin J.A.

Justice Martin, in a dissenting opinion, would have allowed the appeal.

In Justice Martin's view, the ABQB's framing of the issue was premised on the assumptions that licence obligations are debts not public duties, and that there is a conflict between the legislative schemes. Justice Martin found that such assumptions failed to consider the real issue, which Justice Martin described as follows: "Given Alberta's exclusive jurisdiction to regulate its oil and gas resources, do the licence obligations created by provincial legislation conflict with or frustrate the scheme of priorities set out in the BIA?"

Justice Martin concluded that there was no such conflict or frustration; and that both schemes could continue to co-exist.

Co-operative Federalism

Justice Martin referenced the SCC decision in *Lemare Logging* (2015 SCC 53) at paras 20-21, where the SCC emphasized the principle of cooperative federalism and stated:

> [21] Given the guiding principle of cooperative federalism, paramountcy must be narrowly construed. Whether under the operational conflict or the frustration of federal purpose branches of the paramountcy analysis, courts must take a 'restrained approach', and harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility.

Justice Martin found that a "mere effect" on bankruptcy generally, such as an effect on the amount that is available for distribution under the bankruptcy regime, does not frustrate the purpose of the *BIA*, and does not render a provincial law inapplicable in bankruptcy.

Abandonment Obligations not a Monetary Claim

Justice Martin found that abandonment work obligations under a licence is not a claim by the AER.

Specifically, Justice Martin found that there was not sufficient certainty that the work would be done, either by the AER or the OWA, or that a claim for reimbursement would be made. Justice Martin concluded that there was therefore no monetary claim that could be compromised in bankruptcy proceedings. Rather, Justice Martin stated that "what we are dealing with are public duties and regulatory obligations that survive the bankruptcy."

Justice Martin found that the cost of abandonment and reclamation for licensed wells is an ongoing regulatory obligation, well known and understood by the debtor licensee and the licensee's lenders. The end of life obligations associated with licensed assets, being compliance costs to generally applicable laws, are factored in to the lender's risk assessment and its decision to lend.

Justice Martin concluded that the continued application of the regulatory regime following bankruptcy does not frustrate the purpose of the *BIA* by determining or reordering priorities among creditors. Rather, if the result is that there is less value available for distribution to the creditors, that is part of the bankruptcy scheme and the risk that the creditor takes when lending on the basis of the debtor's assets, with their associated obligations.

ALBERTA UTILITIES COMMISSION

Doell Noise Complaint re ENMAX Power Corporation Substation No. 8 (Decision 20948-D01-2017)
Noise Complaint – Rule 012

On September 28, 2015, Mr. Allan Doell ("Mr. Doell") submitted a complaint to the AUC concerning the noise emissions from the ENMAX Substation No. 8 (the "Substation"), owned by ENMAX Power Corporation ("ENMAX"). The Substation was initially constructed in 1981 and the permit and licence was last amended in 2009. As part of its last amendment application, the sound level from the Substation was predicted to be 56 dBA L_{eq} nighttime in compliance with the permissible sound level specified in AUC Rule 012: *Noise Control* ("*Rule 012*").

Mr. Doell resided in unit 703 of a condominium building (the "Doell Residence"). The condominium board president also submitted a letter on the record of the proceeding that stated: "Our association understands that this complaint goes beyond that of a single tenant." … and … "This noise issue affects all tenants owning condominiums on the north side of the building."

In support of the complaint, Mr. Doell filed a sound level survey conducted by a noise expert, which concluded that the noise from the Substation exceeded the permissible sound level at the Doell Residence.

<u>ENMAX Response</u>

The AUC directed that ENMAX respond to the noise complaint before the AUC determined whether additional process steps would be necessary.

Pursuant to that direction, ENMAX submitted a report on March 16, 2016, prepared by Innova, which concluded that the sound levels from the Substation did not comply with the nighttime permissible sound level of 56 dBA L_{eq}. Innova recommended that ENMAX implement specific mitigation measures, including:

(a) Maintenance to address noisy fans; and

(b) Fabrication and installation of acoustic louvres, silencers, and new fans.

<u>Post-Remediation Sound Survey</u>

Following the conclusion of those mitigation measures, ENMAX completed a post-remediation noise study.

ENMAX submitted that the existing nighttime ambient sound level exceeded the assumed nighttime ambient level of 51 dBA L_{eq} specified in *Rule 012* and that it consequently used an adjusted permissible sound level based on a Class A2 ambient monitoring adjustment, resulting in a nighttime permissible sound level of 63 dBA.

On November 7, 2016 ENMAX provided a further update, stating that the complainant, Mr. Doell, had sold his condominium unit and left the building. ENMAX also stated that it would work with the condominium board to complete a post-remediation noise study.

The AUC explained that a Class A2 ambient monitoring adjustment is an adjustment to the basic sound level for nighttime and is applicable if the measured ambient sound level is not representative of the assumed ambient sound environment.

The AUC noted that an application must be submitted to the AUC for approval before a Class A2 adjustment is allowed.

<u>AUC Disposition of Complaint</u>

The AUC found that since Mr. Doell no longer resided at the residence subject of the complaint, the only outstanding complaint was that of the condominium board.

The AUC found that at the time of the initial noise study, the nighttime noise emissions from the Substation exceeded the nighttime permissible sound level of 56 dBA Leq at receptor location R1 (the Doell Residence, Unit 703).

The AUC accepted that the noise remediation efforts undertaken by ENMAX resulted in a sound emissions reduction of 4.5 dBA at receptor R1.

The AUC found that because the condominium board was satisfied with the noise reductions from the Substation, no outstanding complaint existed. The AUC concluded that the complaint had been resolved and closed the proceeding.

Because ENMAX had not made a formal application to adjust the permissible sound level (Class A2 adjustment), the AUC held that the previously-approved daytime and nighttime permissible sound levels would remain in place.

ATCO Electric Ltd. 2015 Performance-Based Regulation Capital Tracker True-Up (Decision 21805-D01-2017)
PBR – Capital Tracker True-up – K-Factor

In this decision, the AUC considered ATCO Electric Ltd.'s ("ATCO Electric") 2015 capital tracker true-up application (the "Application").

Capital Tracker and K-Factor Overview

In Decision 2012-237 (the "*2012 PBR Decision*"), the AUC set out the first generation Performance-Based Regulation ("PBR") framework and approved PBR plans for certain distribution utilities, including Fortis. In that decision, the AUC approved a flow-through rate adjustment mechanism to fund certain capital-related costs, referred to as a "capital tracker."

Programs or projects approved for capital tracker treatment are included in a utility's annual revenue requirement adjustments, as determined by the applicable PBR plan formula. The revenue requirement associated with approved capital tracker projects is collected from ratepayers by way of a flow-through "K factor" adjustment.

The *2012 PBR Decision* also set out the three criteria a program or project must meet to be eligible for capital tracker treatment, namely:

(a) The project must be outside the normal course of on-going operations ("Criterion 1");

(b) Ordinarily the project must be for replacement of existing capital assets or undertaking the project must be required by an external party ("Criterion 2"); and

(c) The project must have a material effect on the company's finances ("Criterion 3").

Criterion 1 requires a two-stage assessment of each project or program for which capital tracker treatment is requested.

At the first stage (project assessment), an applicant must demonstrate that:

(a) The project/program is required to provide utility service at adequate levels; and

(b) The scope, level and timing of the project/program are prudent, and the forecast or actual costs of the project/program are reasonable.

At the second stage, an applicant must demonstrate the absence of double-counting (the "Accounting Test"). The Accounting Test requires an applicant to demonstrate that the associated revenue provided by the PBR formula will be insufficient to recover the entire revenue requirement associated with the prudent capital expenditures for the program or project in question.

With respect to Criterion 2, a growth-related project will generally qualify where an applicant demonstrates that customer contributions and incremental revenues are insufficient to offset the project's cost.

The materiality threshold in Criterion 3 requires that each individual project affect the revenue requirement by four basis points. On an aggregate level, all proposed capital trackers must have a total impact on revenue requirement of 40 basis points.

Summary of AUC Findings

In this decision, the AUC found that:

(a) ATCO's proposed grouping of projects into programs was reasonable, subject to the AUC's directions applicable to the grouping of the Office Furniture program and the Buildings, Structures and Leasehold Improvements program;

(b) The actual scope, level, timing and actual costs of each of the projects or programs included in the Application were prudent, subject to the removal of certain project capital additions and AUC directions applicable to the Information Technology Related program;

(c) The previously approved capital tracker projects or programs included in the 2015 true-up continued to meet the requirements of Criterion 2; and

(d) Because of the removal of certain project capital additions and AUC directions applicable to the Information Technology Related program, a reassessment of whether the capital tracker projects or programs included in the 2015 true-up satisfy the two-tiered materiality test requirement of Criterion 3 is required.

Cost of Debt

The AUC stated that it had verified ATCO Electric's weighted average costs of capital ("WACC"), I-X and Q factor, and found that ATCO Electric used the correct values.

Specifically, the AUC found:

(a) ATCO Electric's 2015 actual embedded cost of debt of 5.08 per cent, from previously approved 2015 *Rule 005* filing, to be reasonable for purposes of the second component of the accounting test;

(b) ATCO Electric's 2015 actual WACC rate of 6.29 per cent used in the second component of its accounting test, based on the 2015 actual WACC of 5.08 per cent, as well as the approved equity thickness of 38 per cent and the approved ROE of 8.3 per cent from Decision 2191-D01-2015, to be reasonable; and

(c) ATCO Electric's accounting test model sufficiently demonstrated that all of the actual expenditures for a capital project are, or a portion

is, outside the normal course of the company's ongoing operations, as required to satisfy the accounting test component of Criterion 1.

Measurement Compliance Project

With respect to the Measurement Compliance project (the "MC Project"), the AUC found that it was required by a third-party.

However, the AUC found that ATCO Electric had not provided a sufficient explanation for variances between actual versus forecasted costs for the MC Project for 2015. The AUC found that it was not clear whether ATCO Electric had applied its change control processes and practices to manage the authorization of changes to project scope, schedule, and cost throughout the project.

Specifically, the AUC found that:

(a) ATCO Electric did not provide sufficient details regarding how the $5.284 million in capital additions regarding the MC Project was spent;

(b) ATCO Electric failed to establish the reasonableness of its expenditures and that the project was done in a timely fashion, within scope and that the costs were prudently incurred; and

(c) ATCO Electric failed to establish that the scope did not include some work completed for efficiency purposes only, and therefore would not qualify for capital tracker treatment.

The AUC found that given the lack of all the necessary supporting information addressing these criteria, the AUC was not able to find that the project was justified.

The AUC therefore denied ATCO Electric's requested capital tracker treatment for $5.284 million in capital additions in 2015 for the MC Project.

AUC Conclusions on Criterion 1

The AUC approved the need, scope, level, timing, and the prudence of actual capital additions for each project or program that ATCO Electric included in the 2015 true-up, with the exception of the MC Project. Because of this exception, the AUC found that it could not make a determination as to whether all of ATCO Electric's programs or projects included in the 2015 true-up satisfy the project assessment requirement of Criterion 1.

The AUC directed ATCO Electric, in a compliance filing, to revise its accounting test for 2015 and reassess whether the capital tracker projects or programs included in the 2015 true-up satisfy the accounting test requirement of Criterion 1.

AUC Conclusions on Criterion 2

The AUC found that, because the drivers (e.g., replacement of existing assets, external party, growth) had not changed since such projects/programs were previously approved as capital tracker projects in Decision 3218-D01-2015, there was no need to undertake a reassessment of these programs or projects against the Criterion 2 requirements.

AUC Conclusions on Criterion 3

The AUC found that ATCO Electric generally interpreted and applied the Criterion 3 two-tiered materiality test properly for the purposes of its 2015 capital tracker true-up. Accordingly, the AUC approved the 2015 threshold amounts as calculated by ATCO Electric.

Because ATCO Electric's accounting test for 2015 needed to be revised, the AUC found that it could not determine whether all of ATCO Electric's programs or projects included in the 2015 true-up, satisfied the materiality test requirement of Criterion 3.

The AUC therefore directed ATCO Electric, in its compliance filing, to reassess whether its programs or projects included in the 2015 true-up, satisfy the two-tiered materiality test requirement of Criterion 3.

AESO NID Application and AltaLink Management Ltd. Facility Applications re Wainwright Transmission Reinforcement (Decision 21857-D01-2017)

NID Application – Facility Application

In this decision, the AUC approved a needs identification document application from the Alberta Electric System Operator ("AESO") (the "NID Application") and associated facility applications from AltaLink Management Ltd. ("AltaLink") to construct and operate a new single-circuit 138-kilovolt (kV) transmission line and to alter the Wainwright 51S Substation (the "Facility Applications").

The AUC found that the AESO's assessment of the need to be correct and that approval of the transmission project along AltaLink's preferred route to be in the public interest having regard to the social, economic, and other effects of the project, including its effect on the environment.

AESO NID Application

The AESO submitted that FortisAlberta Inc., the distribution facility owner for the Wainwright area, requested system access service to improve distribution reliability in the area.

The AESO proposed that the request could be met by converting the existing Wainwright 51S Substation connection from a T-tap to an in-and-out configuration, and would require:

(a) Adding a 138-kV transmission circuit that would connect Wainwright 51S Substation to the existing transmission line 704L; and

(b) Adding two 138-kV circuit breakers to the Wainwright 51S Substation.

AUC Findings re NID Application

The AUC found that the NID Application contained all the information required by the *Electric Utilities Act*, the *Transmission Regulation* and *Rule 007*.

The AUC found that no interested party demonstrated that the AESO's assessment of the need was technically deficient or that approval of the NID Application was not in the public interest. Therefore, the AUC considered the AESO's assessment of the need to be correct, and in accordance with Subsection 38(e) of the *Transmission Regulation*, the AUC approved the AESO's NID application.

Facility Applications

AltaLink applied to:

(a) Alter Wainwright 51S Substation by adding two 138-kV circuit breakers and expanding the fenceline of the substation approximately 15 metres to the north and two metres to the west (the "Substation Alteration"); and

(b) Construct approximately 26 kilometres of single-circuit 138-kV transmission line that would connect Wainwright 51S Substation to existing transmission line 704L (the "New Transmission Line"),

(collectively, the "Project").

For the New Transmission Line, AltaLink proposed a Preferred Route, an Alternate Route, as well as a Preferred Variant Route and an Alternate Variant Route for the New Transmission Line.

Participation Involvement Program

The AUC noted that AltaLink conducted a participant involvement program (the "PIP"). As part of the PIP, AltaLink notified more than 525 stakeholders including landowners, residents, encumbrance holders, Crown leaseholders, agencies and industry. In addition, AltaLink consulted with parties that were directly adjacent or within 100 metres of the substation or right-of-way boundaries.

The AUC noted that landowner, Mr. Johnston, expressed dissatisfaction with the consultation process. Mr. Johnston submitted that he felt that AltaLink was indifferent towards his concerns and that there was no way that AltaLink would change its decision on the selection of the Preferred Route, stating that: "the only opinion that mattered was the one that AltaLink wanted" and that "AltaLink was only out to talk to us because they were forced to."

The AUC found that AltaLink's inclusion of the Alternate Variant Route at the Johnstons' request and its attempt to mitigate visual impacts in front of the Johnstons' home showed that AltaLink took the Johnstons' concerns seriously and made a real and meaningful attempt to mitigate those concerns.

The AUC found that the PIP undertaken by AltaLink:

(a) Met the requirements of *Rule 007*;

(b) Was sufficient to communicate to potentially affected parties the nature and details of the project and some of the potential impacts of the project; and

(c) Provided potentially affected parties the opportunity to ask questions and express their concerns.

The AUC found that the Facility Applications were consistent with and met the need identified in the NID Application.

Route Selection

The AUC found that the Preferred Route would have the least overall impacts on area residents and the landscape, and that siting the New Transmission Line in the alignment of the existing transmission line 61L would mitigate the impacts of the transmission line more effectively than along the Alternate Variant Route.

The AUC also found that the Preferred Route, which had the lowest estimated cost, also had the least environmental impacts of the routes.

With respect to the Johnstons' concerns, the AUC found that AltaLink had proposed effective steps to mitigate those impacts to the extent possible with the use of larger structures and a commitment to locate the poles where they would minimize visual impact in front of the Johnston residence.

Approval

Given the considerations discussed above, the AUC found the project and its Preferred Route, to be in the

public interest pursuant to Section 17 of the *Alberta Utilities Commission Act*.

ENMAX Energy Corporation Regulated Rate Option Tariff Terms and Conditions Amendment Application (Decision 22054-D01-2017)
Amendment Application – Terms and Conditions

In this decision, the AUC considered ENMAX Energy Corporation's ("ENMAX") application requesting approval to amend the regulated rate option ("RRO") tariff terms and conditions of service (T&Cs), effective January 1, 2017.

ENMAX submitted that the proposed amendments were intended to strengthen its ability to manage bad debt expense. The proposed amendments to the T&Cs included:

(a) Defining the term "Credit Agency";

(b) Allowing ENMAX to hold the owner of premises responsible for payments where a tenant fails to meet any of the requirements set out in the T&Cs;

(c) Permitting ENMAX to make a report to a credit agency when a customer fails to pay billed amounts on time;

(d) Clarifying that notice of disconnection may only be given by mail, hand delivery or facsimile; and

(e) Permitting ENMAX to provide notices to customers by email and text message.

Owner Responsible for Tenant Default

The AUC found it reasonable that ENMAX should have the ability to make owners liable in the event of a tenant default. However, the AUC directed ENMAX to make a number of amendments to its proposed amended T&Cs, including requiring that before ENMAX could seek payment from an owner:

(a) ENMAX give notice to a tenant of the specific circumstances, other than non-payment of bills, which have resulted in the tenant default; and

(b) ENMAX grant a tenant a grace period of five business days from the notice date to remedy the tenant default.

Report to Credit Agency

ENMAX proposed to amend Section 7.6 of its T&Cs, entitled "Remedies for Non-Payment," to include the ability to make a report to a credit agency when a customer fails to pay billed amounts in full and on time.

The AUC found it reasonable to allow ENMAX to make a report to a credit agency as a remedy for non-payment.

The AUC directed that prior to making a report to a credit agency, ENMAX is required to give notice to the customer and provide the customer five business days to remedy their delinquency.

Mistaken Report to Credit Agency

The AUC found that a report to a credit agency in error should be included as an independent compensable error in the T&Cs. The AUC directed ENMAX to revise the T&Cs to reflect this finding.

Compliance Filing Directed

The AUC directed ENMAX to submit, in a compliance filing, a copy of the T&Cs reflecting the findings and directions in this decision, as well as a blacklined version of the T&Cs.

ATCO Pipelines Request for Review and Variance of Decision 21515-D01-2016 (Decision 22166-D01-2017)
Review and Variance – Compliance – Rule 023

In this decision, the AUC denied ATCO Gas and Pipelines Ltd.'s ("AP") application (the "Review Application"), requesting a review and variance of AUC Decision 21515-D01-2016 (the "Original Decision").

The Original Decision addressed AP's compliance with AUC directions set out in Decision 3577-D01-2016, which approved AP's 2015-2016 revenue requirements.

In the Review Application, AP submitted that the AUC committed an error of fact, law or jurisdiction in the Original Decision by awarding carrying charges on IT costs calculated using the weighted average cost of capital ("WACC"), rather than calculating carrying costs under AUC *Rule 023: Rules Respecting Payment of Interest* ("*Rule 023*").

AP alleged that the Commission erred in fact, law or jurisdiction by:

(a) Fettering its discretion and taking into consideration irrelevant factors in applying WACC to O&M amounts for IT by incorrectly or unreasonably relying on the absence of a review and variance of the Evergreen II compliance decision;

(b) Failing to consider relevant factors, and the only evidence on the issue, in concluding that there was insufficient evidence regarding carrying charges and the application of *Rule 023*;

(c) Basing its decision not to apply *Rule 023*, in part, on the mistaken fact that ATCO Pipelines had earned a return on projects incorporating Master

Service Agreement (MSA) pricing prior to their approval or adjustment in Decision 2014-169 (Errata); and

(d) Deviating from Rule 023 and past practice without providing adequate or any reasons for doing so, contrary to ATCO Pipelines' reasonable expectations.

The review panel found that ATCO Pipelines had not shown, either on a balance of probabilities or apparent on the face of the Original Decision, that an error in fact, law or jurisdiction had occurred on the basis of the above noted grounds that could lead the AUC to materially vary or rescind the Original Decision.

NATIONAL ENERGY BOARD

Trans Mountain Pipeline ULC Complaint by U.S. Oil & Refining Co. re Allocation of Capacity Among Uncommitted Shippers Nominating to Barges (File OF-Tolls-Group1-T260-2016-02)
Complaint – Allocation of Capacity

On October 11, 2016, U.S. Oil & Refining Co. ("U.S. Oil") filed a complaint, pursuant to Parts I and IV of the *National Energy Board Act* (the "*NEB Act*"), regarding the procedure being used by Trans Mountain Pipeline ULC ("Trans Mountain") to allocate capacity among uncommitted shippers nominating to barges at the Westridge Dock (the "Complaint").

The Complaint requested that the NEB:

(a) Investigate the procedure being used by Trans Mountain to allocate capacity among uncommitted shippers nominating to barges at the Westridge Dock;

(b) Require Trans Mountain to produce information respecting the nominations and bid prices that have been submitted by uncommitted shippers and the capacity allocations that have been made by Trans Mountain, subject to such confidentiality protection as the Board deems appropriate; and

(c) Require Trans Mountain to address what U.S. Oil viewed as the inequity and unjust discrimination among shippers respecting the capacity allocation procedure being used by Trans Mountain in the barge subcategory.

The NEB held that Trans Mountain's tariff requires amendments to the capacity allocation procedure used in the barge subcategory.

Excess Demand in Barge Subcategory

The NEB found that the demand for capacity in the barge subcategory exceeded the available supply. The NEB also noted its recent decisions, that have highlighted the chronic apportionment issues on the Trans Mountain pipeline system.

The NEB held that, in these circumstances, two key objectives of economic regulation are: (i) allocating pipeline capacity or services to those who value them most; and (ii) encouraging full use of all capacity available in all destination categories.

Current Bid Premium Methodology

The NEB explained that Trans Mountain uses a bid premium methodology to allocate uncommitted capacity among barge shippers at the Westridge Dock. The bid premium methodology accounts for the price a shipper is willing to pay for the capacity. In addition, the bid premium methodology includes a volume component into the capacity allocation procedure.

The NEB clarified that when it approved that methodology, it understood that by accounting for volumes, the bid premium methodology encourages increased use of all available facilities relative to a bid price approach. For example, the methodology may reduce the likelihood that shippers demanding larger volumes will back out of the nomination process due to insufficient capacity remaining after allocations to smaller lot sizes.

However, in light of concerns raised in the Complaint, the NEB found that while the bid premium methodology encourages increased use of the available capacity, there is potential for improvements in the way that volumes are accounted for in the methodology.

Current Allocation Rule Unjustly Discriminatory

The NEB noted that under the existing rules of Trans Mountain's tariff, a shipper is allowed to make a nomination for a lot size up to and including that which it can accommodate in one loading window. Although loading fewer larger vessels than many smaller vessels may be more efficient, the NEB founds that the current rules are unnecessarily restrictive on barge shippers and, in some instances, may be unjustly discriminatory toward smaller barges.

Specifically, the NEB noted that there are circumstances in which a small-barge shipper will not be allocated capacity, despite being willing to pay a higher total bid value, in aggregate, than a large-barge shipper for the same capacity.

NEB Directed Tariff Amendments

The NEB found that the relevant volume should not be the size of a shipper's barge, but rather, the shipper's demand for and ability to utilize the limited capacity in the subcategory. For this reason, the NEB found that the number of loading windows allowed per nomination should be relaxed, within reason, to allow the bid premium methodology to better reflect shippers' demand for the capacity available in the barge subcategory.

The NEB stated that such amendments mitigate the unjust discrimination in the current capacity allocation procedure, since shippers are less likely to be disadvantaged solely on the basis of barge size. The NEB found that such an approach would better allocate available capacity to those barge shippers who value it most.

The NEB found that the benefits from allowing more than one loading window per nomination outweigh any known loading inefficiencies caused by such change.

Order

The NEB directed Trans Mountain to file draft tariff revisions with the Board, for approval, reflecting the views set out by the NEB, summarized above. Specifically, the NEB directed that the tariff revisions should increase the number of loading windows allowed for each nomination in the barge subcategory.

Woodfibre LNG Export Pte. Ltd. Application for a 40-Year Licence to Export Natural Gas in the form of Liquefied Natural Gas (File OF-EI-Gas-GL-W157-2016-01 01)
Licence to Export - LNG

On October 27, 2016, Woodfibre applied to the NEB pursuant to section 117 of the *National Energy Board Act* (the "*NEB Act*") for a licence to export natural gas (the "Application"), in the form of liquified natural gas ("LNG").

In the Application, Woodfibre requested:

(a) A 40-year Licence, starting on the date of first export;

(b) An early expiration clause where, unless otherwise authorized by the Board, the Licence will expire ten years after the date of Governor in Council (GIC) approval of the Licence, unless exports have commenced on or before that date;

(c) A maximum annual export quantity of 3.34 billion cubic metres ($109m^3$) of natural gas, including a 15 per cent annual tolerance;

(d) A maximum quantity of 133.6 $109m^3$ of natural gas over the term of the Licence;

(e) As a tolerance, the amount of LNG that may be exported in any consecutive twelve month period may exceed the annual volume by up to 15%. In addition, any unutilized portion of the annual volume of 2.9 $109m^3$ in any year may be utilized in the subsequent 5 years; and

(f) The point of export of LNG from Canada shall be at the outlet of the loading arm of the LNG facility located near Squamish, British Columbia.

In considering the Application to export LNG under section 118 of the *NEB Act*, the NEB assessed whether the natural gas proposed to be exported exceeded the surplus remaining after allowance has been made for the reasonably foreseeable requirements for use in Canada.

The NEB noted that in determining Canada's domestic requirements, it considers natural gas exports and imports effect on natural gas supply or natural gas demand.

The NEB also noted that in aggregate, the LNG export licence applications submitted to the NEB to date represented a significant volume of LNG exports from Canada. However, the NEB considered the fact that LNG ventures are competing for a limited global market and face numerous development and construction challenges. The NEB noted its belief that not all LNG export licences issued will be used to the full allowance.

NEB Decision to Issue Licence

The NEB determined that the quantity of natural gas proposed to be exported by Woodfibre, for a term of 40 years, is surplus to Canadian needs. The NEB found that the natural gas resource base in Canada, as well as North America overall, is large and can accommodate reasonably foreseeable Canadian demand, including the exports proposed in the Application, and a plausible potential increase in demand.

The NEB decided to issue a 40-year Licence to Woodfibre, subject to Governor in Council approval, to export natural gas subject to the terms and conditions, included as an appendix to the decision.