REGULATORY LAW CHAMBERS

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

Balancing Pool v. ENMAX Energy Corporation, 2018 ABCA 143

Permission to Appeal – Application to Add Parties

In this decision, the Alberta Court of Appeal ("ABCA") considered applications by the Balancing Pool and TransAlta Corporation ("TransAlta") to be added as parties (or as intervenors) to the applications for permission to appeal portions of AUC Proceeding 790, Module C (Decision 790-D06-2017 (the "Permission to Appeal Applications").

The Permission to Appeal Applications were brought by ENMAX Energy Corporation, Capital Power Corporation and TransCanada Energy Ltd. (the "Proposed Appellants").

The named respondents to the Permission to Appeal Applications were Milner Power Inc., ATCO Power Canada Ltd., and the AUC.

Background

In the Line Loss Module C decision (AUC Decision 790-D06-2017), the AUC directed the AESO to reissue invoices for line loss charges or credits to those parties that held Supply Transmission Service ("STS") contracts when the charges or credits were first incurred (referred to as the Invoicing Issue).

The Proposed Appellants were all predecessor STS contract holders who actively participated in the Module C hearing.

The ABCA summarized the Proposed Appellants' argument in support of the Permission to Appeal Applications as it relates to the Invoicing Issue as follows:

(a) that s 15(2) of the ISO tariff, the assignment and novation provision, had been misinterpreted and misapplied; and

(b) the clear language of that clause requires the AESO to bill current STS contract holders for past line losses, not those who held the contracts when the losses were occasioned, regardless of whether the rates were lawful or unlawful.

Test

The ABCA can grant an application to add parties to an appeal where it finds that it is in the interests of justice to do so. The ABCA previously set out the applicable test in *Carbon Development Partnership v. Alberta (Energy & Utilities Board)*, 2007 ABCA 231, [2007] A.J. No. 727 (Alta. C.A. [In Chambers]) ("*Carbon*") at para 9, as follows:

> This court has inherent power to add parties to an appeal, especially if an applicant's interests are not represented: ... The joinder test is whether or not the applicant has a legal interest in the outcome of the proceeding. If so, there are two different sub-tests. The first is whether it is just and convenient to add the applicant. The second is whether or not the applicant's interest would only be adequately protected if it were granted party status.

The ABCA noted, however, that it strongly discourages adding parties or allowing intervenors at the early permission to appeal stage. In the absence of permission to appeal being granted, there is no appeal and as such no interest, legal or economic impact, that can be directly affected by the application (at least immediately). If the application to appeal is granted, parties are at liberty to apply for status at the hearing of the appeal. If the application is dismissed, there is no appeal. Unless and until permission is granted, proposed parties are not generally at risk. Usually, the issues on a permission application are narrow and are focused on the statutory requirements. In other words, the inquiry at that stage is usually a narrow one and rarely assisted by representations from multiple parties.

For these reasons, the ABCA has held that adding parties or intervenors should be discouraged at the permission to appeal stage of the proceedings, absent "extraordinary circumstances."

Balancing Pool Added as Party

The ABCA granted the Balancing Pool's application to be added as a respondent.

The ABCA found that with respect to the Balancing Pool, extraordinary circumstances within the meaning of *Carbon* had been demonstrated in this case, because:

(a) the Balancing Pool is currently a holder of a large number of STS contracts and as such is specifically and directly interested in the matter at issue;

(b) the Balancing Pool acquired these contracts through the operation of statute rather than by commercial negotiation, which affords the Balancing Pool a distinct legal and commercial perspective relative to the other parties; and

(c) the Balancing Pool is a statutory entity funded by Alberta's energy consumers and represents distinct and broad interests compared to the named parties.

The ABCA accordingly found that:

(a) the Balancing Pool is positioned to provide a unique perspective to the ABCA in the Permission to Appeal Applications; and

(b) the Balancing Pool's contributions to the Permission to Appeal Applications would not cause undue delay or inconvenience, as it had agreed to be bound by the timelines and page constraints already in place.

TransAlta not Added as Party

The ABCA denied TransAlta's application to be added as a party on a without prejudice basis, should leave be granted.

The ABCA found that TransAlta's application did not meet the threshold as set out in *Carbon.* Although TransAlta might be affected by the ultimate outcome of the prospective appeal, the Court was not persuaded that TransAlta's perspective would be of assistance in determining whether permission to appeal should be granted or on what questions.

However, if and when permission to appeal was to be granted, TransAlta may reapply for consideration to be added as a respondent or intervenor on the appeal proper. At that stage, in the ABCA's view, it would become clear as to what interests might be affected, whether TransAlta had rights that might be directly affected and/or a unique perspective on the issues raised on appeal.

Decision

For the reasons set out above, the ABCA granted the Balancing Pool's application to be added as a respondent to the Permission to Appeal Applications. However, the ABCA dismissed TransAlta's application, with leave to apply if permission to appeal were to be ultimately granted.

ALBERTA COURT OF QUEEN'S BENCH

Athabasca Chipewyan First Nation v. Alberta, 2018 ABQB 262

Aboriginal Consultation – Judicial Review – Aboriginal Consultation Office (ACO) – ACO Policies and Procedures - Use of Maps for Determining Consultation Requirements

In this decision, the Alberta Court of Queen's Bench ("ABQB") considered an application for judicial review of a decision of the Aboriginal Consultation Office ("ACO"), dated July 17, 2014 (the "ACO Decision"). The ACO Decision found that a duty to consult with the Athabasca Chipewyan First Nation ("ACFN") was not triggered in relation to a pipeline project. The pipeline project, entitled Grand Rapids, (the "Project"), was proposed in Treaty 8 territory, and the ACFN is a Treaty 8 First Nation. The Project was proposed by TransCanada Pipelines Limited and Phoenix Energy Holdings Limited ("TransCanada").

The ABQB noted that this judicial review was novel. ACFN sought to quash the ACO Decision that the duty to consult was not triggered, but did not ask for the matter to be returned to the ACO for reconsideration, nor did it challenge the decision of the AER to approve the Project.

Rather, ACFN was dissatisfied with the ACO's policies and procedures in determining whether a duty to consult is triggered, and in particular its use of maps in making that determination. Accordingly, ACFN sought the following declarations:

(a) the ACO had no authority to make the decision whether the duty to consult was triggered;

(b) the ACO's decision that there was no duty to consult was incorrect; and

(c) the manner in which the ACO made its decision that there was no duty to consult was procedurally unfair and in violation of the honour of the Crown.

The ABQB declined to exercise its discretion to make a bare declaration with respect to whether the duty to consult the ACFN was triggered or what evidence was needed to trigger it.

The ABQB did grant the following declarations:

- The ACO has the authority to decide whether the duty to consult is triggered.
- The mere act of taking up of land by the Crown in a treaty area is not adverse conduct sufficient to trigger the duty to consult.
- Procedural fairness is engaged in the determination of whether a duty to consult is triggered.

Preliminary Issue - Mootness

The ABQB found that given the nature of the declarative relief requested, this judicial review raised the issue of mootness and whether the Court should exercise its discretion to give "bare declarations," with the parties taking opposing positions on this point.

The ACFN did not seek any determination with respect to the content of a duty to consult nor whether the consultation that did take place was adequate. Rather, ACFN took issue with the ACO's process and policies in deciding whether a duty to consult was triggered and was especially concerned with the ACO's reliance on a map to make this determination.

The ABQB found that this was not a case where the Court should exercise its discretion to make a bare declaration. While a declaration would add to the body of law with respect to when a duty is triggered, a declaration based on the facts of this case would not avoid future litigation. Whether a duty was triggered in future cases will depend on their own specific facts and the application of well-established legal principles.

In coming to this conclusion, the ABQB set out the following principles guiding the Court's discretion to grant declarations:

- A court may exercise its discretion to make a declaration if there is a real, not a fictitious, academic or theoretical issue raised by a party with an interest in raising it and someone with a true interest to oppose the declaration sought (*Solosky v The Queen*, [1980] 1 SCR 821 ("*Solosky*")).
- A declaration regarding the future must be approached with considerable reservation (*Solosky*).
- The practical utility that will support granting a declaration was illustrated by *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 ("*Daniels*"), where the Court held that a declaration deciding which government had jurisdiction would end a "jurisdictional tug of war" and would guarantee certainty and accountability (*Daniels* at para 15).

With respect to mootness, as a general policy or practice, a court may decline to decide a case that raises merely a hypothetical or abstract question (citing *Borowski v Canada*

(Attorney General), [1989] 1 SCR 342 ("*Borowski*")). The three rationales set out in *Borowski* that a court should consider when deciding whether to exercise its discretion to hear a moot matter are as follows:

(a) the adversarial nature of the case;

(b) the concern for judicial economy; and

(c) the need for the court to be sensitive to its adjudicative role and not intrude on the legislative branch of government.

Questions Warranting Consideration

Even though the ABQB declined to make bare declarations on the specific (and now moot) facts of this case, the ABQB found that the following questions relating to the duty to consult warranted consideration, as they were live controversies that could benefit from the Court's guidance:

(a) Does the ACO have the authority to determine whether the Crown's duty to consult is triggered?

(b) Is the Crown's taking up of land in a treaty area adverse conduct sufficient to trigger the duty to consult?

(c) Is the Crown allowed to exclusively rely on the Government of Alberta's GeoData Maps in determining whether a duty to consult is triggered?

(d) Is procedural fairness engaged in the determination of whether a duty to consult arises?

Issue 1 - Does the ACO have the authority to determine whether the Crown's duty to consult is triggered?

The ABQB found that the question of whether the ACO had the authority to make the decision that consultation with the ACFN was not triggered raised an issue of true jurisdiction. The issue was therefore reviewable on a standard of correctness.

The ABQB found that the ACO does have authority to make the determination whether there is a duty to consult. In coming to that conclusion, the ABQB found that:

(a) the Government of Alberta is the Crown and acts through its ministers and their departments;

(b) the Crown's duty to consult arises from the treaties and section 35(1) of the *Constitution Act, 1982* and the ultimate responsibility for consultation rests with the Crown;

(c) the ACO is a Crown servant or agent and acts for the Crown in discharging the Crown's obligations to consult with First Nations; and

(d) the ACO does not need a statute formally empowering it to discharge the Crown's duty to consult. The legislative branch is entitled to proceed "on the basis that its enactments 'will be applied constitutionally' by the public service" (*Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 71).

Issue 2 — When is a duty to consult triggered?

ACFN posed two questions relating to the triggering of the duty to consult:

(a) whether the duty is triggered once there is a taking up of land in the treaty area; and

(b) whether the Crown can rely exclusively on government consultation maps when determining whether the duty is triggered.

The ABQB found that ACFN was incorrect in asserting that a duty to consult arises solely because of the taking up of land in the treaty area. Specifically, the ABQB found as follows:

(a) the signatories to Treaty 8 contemplated that portions of the surrendered land would be "taken up" by the Crown resulting in the First Nations no longer having treaty rights to hunt, fish, and trap on portions of the lands; and

(b) when the "taking up" process occurs, such as with a pipeline development, the question is whether the taking up may adversely impact a First Nation's exercise of its treaty rights in that particular area:

(i) If so, a duty to consult will arise; or

(ii) If there is no potential impact, the duty to consult is not engaged.

The ABQB, therefore, concluded that there is no "at large duty to consult" whenever development is proposed in treaty territory.

The ABQB did agree with the ACFN, however, on their second submission that a consultation map would not necessarily be determinative of whether a duty to consult was triggered.

The ABQB found that:

(a) whether or not the duty to consult is triggered depends on the legal test identified in *Haida Nation* and *Rio Tinto* applied to the facts in each case, not on what the Government's internal maps indicate;

(b) the Government of Alberta is permitted to create policies for consultation so long as they are carried out in a manner consistent with the Constitution;

(c) consultation maps are an advisory tool to assist the Government in discharging its duty to consult; and

(d) reliance solely on the map without consideration of the specific circumstances of a given project and its potential effects would be inappropriate, especially once the Government of Alberta has been notified that a First Nation believes there is a duty to consult.

In this case, the ABQB found that the ACO did not rely exclusively on the consultation map in making its ultimate decision. In addition to mapping, the ACO considered the Statements of Concern and the ACFN's hearing materials and submissions to the AER in coming to its decision.

Ultimately, because the ACFN and the Government of Alberta agreed that the map was only one tool to be used in determining if there is a duty to consult, the ABQB found that a declaration on the matter was unnecessary. In the ABQB's view, a declaration could thwart the years of work on the mapping project. The ABQB noted that the mapping project was an attempt by the Government to be pro-active in addressing its consultation obligations and represented a step toward reconciliation. The project was going through various phases meant to improve the accuracy of the mapping with First Nations' input. It was a project aimed at assisting both the Government and the First Nations with what could be onerous requirements relating to consultation.

As discussed below, however, the ABQB held that when the use of the map results in a dispute between the Government and a First Nation over the duty to consult on a project, then the ACO must engage the First Nation to assess its claim independently of the map.

Issue 3 - Is procedural fairness engaged?

The ABQB found that, as with the declaration concerning whether the duty to consult was triggered, a declaration about the way in which the Crown made its decision would not affect the Project. For that reason, the ABQB declined to consider whether a duty of procedural fairness was breached in this case.

Despite this, the ABQB acknowledged that the broader question of whether such a duty exists was an area of disagreement between the parties which would benefit from some clarity to help in future similar cases.

The ABQB found that the duty of procedural fairness is engaged when a branch of the Crown, such as the ACO, determines if a duty to consult is triggered.

In the context of the ACO deciding whether the duty to consult is triggered, the duty of procedural fairness requires the following:

- Communication must occur between the ACO and the First Nation when a contested triggering decision arises. A contested triggering decision will arise when it is apparent that the ACO and a First Nation disagree over whether the duty to consult is triggered. The ACO will then be required to make a determinative decision on whether the duty is triggered.
- The ACO must outline what procedure it would undertake in making its determination, what evidence is required to meet the trigger test, as well as to convey the deadlines applying to the ACO's procedure.
- Finally, once the ACO has made its decision, the ACO would be expected to provide reasons for its decision that show it fully and fairly considered the information and evidence submitted by the First Nation.

Conclusion

In conclusion, the ABQB declined to exercise its discretion to make a bare declaration with respect to whether the duty to consult the ACFN was triggered or what evidence was needed to trigger it.

The ABQB granted the following declarations:

> 1. The Aboriginal Consultation Office (ACO) has the authority to decide whether the duty to consult is triggered.
>
> 2. The mere act of taking up of land by the Crown in a treaty area is not adverse conduct sufficient to trigger the duty to consult.
>
> 3. Procedural fairness is engaged in the determination of whether a duty to consult is triggered.

ALBERTA ENERGY REGULATOR

Request for Regulatory Appeal by Fort McKay First Nation of AER Decision 20171218A Approving Canadian Natural Resources Ltd. Tailings Management Plan (Regulatory Appeal No. 1905407)
Regulatory Appeal – Eligible Person - Tailings Management Plan Request – Request Dismissed

In this decision, the AER considered Fort McKay First Nation's ("FMFN") request under section 38 of the *Responsible Energy Development Act* ("*REDA*") for a regulatory appeal of the AER's decision approving CNRL's tailings management plan ("TMP") application for the Horizon Oil Sands Processing Plant and Mine (the "Horizon Mine") under its *Oil Sands Conservation Act*, RSA 2000, c. O-7 ("*OSCA*") Commercial Scheme Approval No. 9752E (the "Horizon Approval"). The Decision was an amendment to the existing Horizon Approval (the "Decision").

The AER found that FMFN was not eligible to request a regulatory appeal and, therefore, the AER denied the regulatory appeal request.

Legislation

REDA section 38 regarding regulatory appeals states:

> 38(1) An eligible person may request a regulatory appeal of an appealable decision by filing a request for regulatory appeal with the Regulator in accordance with the rules.

The term "eligible person" is defined in section 36(b)(ii) of *REDA* to include:

> a person who is directly and adversely affected by a decision [made under an energy resource enactment]…

Reasons for Decision

The AER denied the regulatory appeal request based on its finding that the FMFN failed to identify any specific direct and adverse impacts to it resulting from the Decision.

The AER explained that the Decision dealt with how tailings are managed on the existing approved mine site footprint. The AER found that:

(a) the scope of the amendment application was limited to terms and conditions relating to the TMP submitted by CNRL; and

(b) therefore, the question for the purposes of section 36(b)(ii) of *REDA* was what effect, if any, did the amendments to the Horizon Approval (and the resulting consequential changes to CNRL's activities) have on FMFN.

The AER further found that:

(a) the Decision dealt with the existing Horizon Mine and no new lands outside of CNRL's lease would be used or impacted as a result of the TMP amendments;

(b) the potential impacts to air, land and water etc. were previously assessed as part of the review of the original oil sands mine application by the joint review panel;

(c) the use of CNRL's main technologies was either already approved or contemplated prior to the TMP amendments;

(d) the TMP amendments confirmed that CNRL could continue already approved activities; and

(e) there were no discernible changes to the 'already assessed and approved' risks or impacts of Horizon arising from the approval of CNRL's TMP.

The AER rejected FMFN's assertion that it was directly and adversely affected by the failure of the TMP to require a reclamation plan. The AER found that:

(a) Directive 085: *Fluid Tailings Management for Oil Sands Mining Projects* sets out the application requirements for tailings management plans and does not require reclamation plans;

(b) the Decision was confined to amendments to the Horizon Approval, which was issued under the *OSCA*; and

(c) reclamation plans were out of scope of the TMP application, as reclamation plans are administered separately under the *Environmental Protection and Enhancement Act*.

Decision

Based on the above, the AER concluded FMFN failed to establish that it had been directly and adversely impacted by the Decision. As a result, the AER dismissed the request for Regulatory Appeal.

ALBERTA UTILITIES COMMISSION

Town of Devon – Appeal of Water Rates by Imperial Enterprises Inc. (Decision 22785-D01-2018)
Appeal Water Utility Rates – Municipal Government ActWater Utility – Complaint Application

In this decision, the AUC considered a complaint by Imperial Enterprises Inc. ("Imperial") regarding an increase in water rates by the Town of Devon ("Devon").

The AUC found that the Devon improperly imposed the increased water rates and, therefore disallowed those increased rates.

Background and Details of Appeal

Devon provides water utility services to residents and businesses within its municipal boundaries. The Devon town council sets water rates.

Imperial sells bulk water to its customers. Imperial sources its bulk water supplies from water supplied by Devon.

Devon raised the bulk water commodity rates charged to Imperial to $\$3.25/m^3$ from $\$1.47/m^3$ for the first 5,000 m^3 of water and to $\$4.50/m^3$ for all volumes over 5,000 m^3.

On July 4, 2017, Imperial filed a formal complaint with the AUC appealing the increase in water rates charged to Imperial by Devon (the "Appeal").

The Appeal asserted that:

(a) Devon raised the bulk water commodity rates without notice to or consultation with Imperial;

(b) in doing so, Devon put into effect a new, specific rate structure that affected Imperial and no other similar business; and

(c) by putting "two classes of rates" in effect, Devon made Imperial's business of selling bulk water uncompetitive and more difficult in terms of setting competitive and consistent rates for its customers.

The AUC found that the principal arguments raised by Imperial in the Appeal could generally be characterized as alleging that:

(a) the increased rates were improperly imposed; and

(b) the increased rates are discriminatory because Devon has, in essence, created "two classes of rates" and/or "a two-tiered system of rates to similar users" without justification.

Legislative Scheme

The AUC's authority to consider an appeal of water rates imposed by a municipality is set out in Section 43 of the *Municipal Government Act* (the "*MGA*"):

> Appeal
>
> 43(1) A person who uses, receives or pays for a municipal utility service may appeal a service charge, rate or toll made in respect of it to the Alberta Utilities Commission, but may not challenge the public utility rate structure itself.
>
> (2) If the Alberta Utilities Commission is satisfied that the person's service charge, rate or toll
>
> (a) does not conform to the public utility rate structure established by the municipality,
>
> (b) has been improperly imposed, or
>
> (c) is discriminatory,
>
> the Commission may order the charge, rate or toll to be wholly or partly varied, adjusted or disallowed.

Section 7(g) of the *MGA* provides that

> 7 A council may pass bylaws for municipal purposes respecting the following matters:
>
> …
>
> (g) public utilities;
>
> …

Section 180 of the *MGA*, which the AUC found applies to matters dealing with public utilities, states:

> 180(1) A council may act only by resolution or bylaw.
>
> (2) Where a council or municipality is required or authorized under this or any other enactment or bylaw to do something by bylaw, it may only be done by bylaw.
>
> (3) Where a council is required or authorized under this or any other enactment or bylaw to do something by resolution or to do something without specifying that it be done by bylaw or resolution, it may be done by bylaw or resolution.

Section 191(2) of the *MGA* states:

> (2) The amendment or repeal must be made in the same way as the original bylaw and is subject to the same consents or conditions or advertising requirements that apply to the passing of the original bylaw, unless this or any other enactment provides otherwise.

Rates Improperly Imposed by Resolution (and not by bylaw)

The AUC held that because the increased rates were established by resolution and not by bylaw as required, the increased rates were improperly imposed.

Devon confirmed in its response to the AUC's questions that the impugned rate change was not made by bylaw but rather, was made by Resolution 065/2017.

The AUC found that:

(a) section 7(g) of the *MGA* provides that a municipality may pass bylaws for municipal purposes respecting public utilities and that this may only be done by bylaw;

(b) given that section 7(g) of the *MGA* authorizes Devon to provide water service and charge rates for it by bylaw, it was section 180(2) of the *MGA* that applied to matters dealing with public utilities;

(c) under *MGA* section 191, an amendment to a bylaw respecting water utility charges must be made in the same way as the original bylaw, unless the *MGA* or any other enactment provides otherwise; and

(d) when read together, the effect of sections 7(g), 180(2) and 191 of the *MGA* was to require that any amendment to rates charged for public utility service, including water rates, be made by bylaw.

In this case, the AUC found that in purporting to increase water rates by resolution, Devon's actions were inconsistent with the statutory framework under the *MGA*. If a municipality were permitted to simply include a provision within a bylaw giving it the authority to amend the bylaw by resolution, the municipality would be indirectly doing what the legislation has stated that it cannot do.

Relief

Section 43 of the *MGA* provides that if the AUC finds that a person's service charge, rate or toll has been improperly imposed, it may order the charge, rate or toll to be wholly or partly varied, adjusted or disallowed. In this case, the AUC disallowed the amount of the rate increase billed to Imperial by Devon.

Capital Power Generation Services Inc. – Halkirk 2 Wind Power Project (Decision 22563-D01-2018)

Wind Power Project – Impacts on Aerial Spraying Operations

In this decision, the AUC considered applications filed by Capital Power Generation Services Inc. ("Capital Power") for the construction and operation of the Halkirk 2 Wind Power Project (the "Project"), pursuant to sections 11, 14 and 15 of the *Hydro and Electric Energy Act* ("*HEEA*").

The AUC found that approval of the Project was in the public interest having regard to the social, economic and environmental effects of the Project, because:

(a) the applications met the informational and other requirements set out in Rule 007;

(b) Capital Power's Participant Involvement Program ("PIP") and consultation met the regulatory requirements of AUC Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations and Hydro Developments* ("Rule 007");

(c) the construction and operation of the Project would not affect the health of nearby residents and livestock;

(d) with regard to potential land use impacts, agricultural impacts, ground and surface water impacts, property value impacts and safety concerns, the AUC was not convinced that the project would result in the adverse impacts advanced by the interveners; and

(e) Capital Power's estimated daytime and nighttime predicted cumulative sound levels for the Project met the requirements of AUC Rule 012: *Noise Control* ("Rule 012").

Background

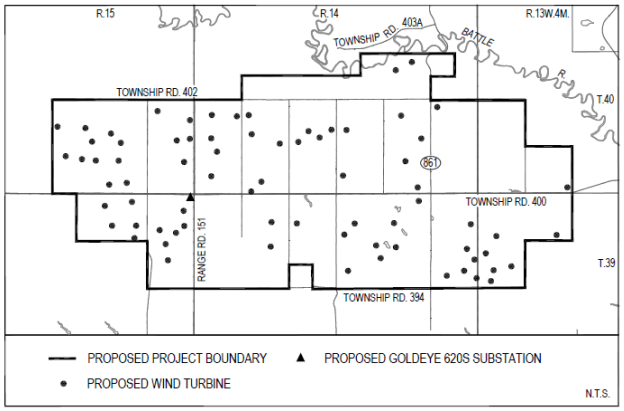
The Project would be located five kilometres north of the existing Halkirk Wind Power Facility ("Halkirk 1") and approximately 12 kilometres north of the town of Halkirk, in the County of Paintearth.

The Project would consist of the following components:

- seventy-four 2.0-megawatt (MW) wind turbines, each with a hub height of 95 metres and a rotor diameter of 110 metres, with a total capability of 148 MW;
- a 34.5-kilovolt (kV) collector system, consisting of underground power lines; and

- a new substation (the "Substation"), for future connection of the Project to the Alberta Interconnected Electric System.

The location of the Project is shown in the following map:



The primary participants in the hearing were the proponent, Capital Power, and an intervener group identifying itself as the Battle River Group ("BRG"). The BRG consisted of 16 individuals and families located within two kilometres of the project and the Circle Square Ranch (a corporation) located approximately six kilometres from the Project.

Legislative Scheme

Section 11 of the *HEEA* states that no person may construct or operate a power plant without prior approval from the AUC. In addition, sections 14 and 15 of the *HEEA* require AUC approval prior to constructing or operating a substation or a transmission line.

When considering an application for a power plant and associated infrastructure, the AUC is guided by sections 2 and 3 of the *HEEA*, and Section 17 of the *Alberta Utilities Commission Act* (the "*AUCA*").

Section 2 of the *HEEA* sets out the purposes of that act:

- to provide for the economic, orderly and efficient development and operation, in the public interest, of the generation of electric energy in Alberta;
- to secure the observance of safe and efficient practices in the public interest in the generation of electric energy in Alberta; and
- to assist the Government in controlling pollution and ensuring environment conservation in the generation of electric energy in Alberta.

Section 3 of the *HEEA* requires the AUC to have regard for the purposes of the *Electric Utilities Act* ("*EUA*") when considering whether an applied-for power plant is in the public interest under Section 17 of the *AUCA*. The purposes of the *EUA* include providing for the development of an efficient electric industry structure and the development of an electric generation sector guided by competitive market forces. Section 3 of the *HEEA* expressly directs that the AUC shall not have regard to whether the proposed power plant "… is an economical source of electric energy in Alberta or to whether there is a need for the electric energy to be produced by such a facility in meeting the requirements for electric energy in Alberta or outside of Alberta." Accordingly, the AUC does not consider the potential need and cost of an applied-for power plant, such as the Project.

The AUC explained that determination of whether a project is in the public interest requires the AUC to assess and balance the negative and beneficial impacts of the specific project before it. The public interest will be largely met if applications are shown to be in compliance with existing provincial health, environmental and other regulatory standards in addition to the public benefits outweighing negative impacts.

Rule 007 applies to an application for the construction and operation of power plants, substations and transmission lines. An application must meet the informational and other requirements set out in Rule 007. Specifically, an applicant must provide technical and functional specifications, information on public consultation, environmental and land use information including a noise impact assessment ("NIA"). The NIA submitted with an application must also meet the requirements set out in Rule 012.

Consultation and Participant Involvement Program

With respect to the adequacy of consultation and PIP, the AUC found that:

(a) the applications met the informational and other requirements set out in Rule 007; and

(b) Capital Power's PIP and consultation met the regulatory requirements of Rule 007.

The AUC found that Capital Power presented accurate Project information and that landowners were given an opportunity to have their concerns heard.

The AUC found that Capital Power's PIP could have been improved with respect to providing information about the Project's impacts on human health. The AUC noted that Capital Power's initial PIP information packages contained little information on health-related concerns, notwithstanding that early stakeholder feedback included such concerns regarding human health. The AUC considered that Capital Power's PIP would have been more robust if it had initially included access to third-party, independent and credible scientific sources of information on the impacts of wind power projects to human health.

Agriculture and Impacts to Aerial Spraying Operations

The AUC noted that many BRG members farmed as either mixed grain operations or grain and cow/calf operations.

A significant concern raised by the BRG was the Project's impact on aerial spraying for farming operations. In particular, the BRG expressed concerns regarding the following:

- Wind Turbine T051 would potentially prevent an aerial operator (Mr, Fetaze) from taking off and landing his aircraft;
- the short notice that spraying operators were usually given before commencing aerial spraying operations;
- the lack of communication between Capital Power and all aerial spraying operators in the area; and
- Capital Power's lack of knowledge of the safe distance between wind turbines and landing and take-off of aircraft.

The AUC found that there was potential for Wind Turbine T051 to obstruct the Fetazes' airstrip. The AUC noted that PP14 of Rule 007 allows an applicant to locate a wind turbine within 50 metres of the applied-for coordinates without having to reapply unless there is an adverse impact on the permissible sound level or wildlife setback distance. In light of the foregoing, the AUC found that the following condition of approval was warranted:

> Capital Power shall engage with the Fetazes to locate Wind Turbine T051 in a manner which minimizes the effects of the wind turbine on the safe operation of the airstrip, to the extent possible within 50 metres of the applied-for coordinates. Prior to construction, and no later than two years from the date of this decision, Capital Power will advise the Commission of the results. The Commission will then decide if further process is necessary.

The AUC noted:

- Capital Power's commitment to work with pilots operating near the Project to minimize impacts to aerial spraying operations; and
- Capital Power's statement that if spraying were anticipated within 150 metres of a wind turbine, the wind turbine might be suspended from operating during that period.

Given the potential safety risks of flying next to a wind turbine and taking into account the benefits of aerial spraying to agricultural operations, the AUC stated that it expected Capital Power to not only consult with pilots but also to shut down wind turbines at the pilots' request during aerial spraying.

Hydrogeology

The AUC considered the potential impacts of Project construction and operation on groundwater resources in the area, and whether the commitments proposed by Capital Power would be sufficient to mitigate those potential impacts.

The AUC found that the probability of harm to groundwater from the possible vibration during construction or operation would be extremely low. The AUC also found that:

- Capital Power's commitment to test groundwater quality and level at all residential and stock wells within 500 metres of a wind turbine location was sufficient in the circumstances; and
- should impacts to groundwater wells arise due to the construction or operation of the Project, Capital Power had committed to working with impacted landowners to implement appropriate mitigation on a case-by-case basis.

Residential Area, Visual Impact and Property Values

The AUC found that Capital Power adequately sited the Project given the constraints.

The AUC found that the Project's visual impacts had been mitigated as much as possible, including by:

(a) locating the collector lines underground;

(b) minimizing the number of lights required on the wind turbines; and

(c) using the minimum number of synchronized flashes per minute and flash duration.

Noise

The AUC accepted that the noise from the Project, with the implementation of the planned operating scheme, was expected to meet the daytime and nighttime permissible sound levels ("PSL") and all requirements of Rule 012.

In making its finding on noise, the AUC accepted Capital Power's commitment that the wind turbines would only operate in accordance with the operating scheme described in its NIA, namely during the daytime period all 74 wind turbines were planned to operate in the unrestricted Mode 0 STE and during the nighttime period two wind turbines would operate in Mode 0 STE, 70 wind turbines would operate in Mode 1 STE and two wind turbines would operate in Mode 2 STE (the "Operating Scheme").

The AUC found that Capital Power's NIA met the requirements of Rule 012, including with respect to the equipment used to conduct the field noise measurements, along with the three calibration dates of this equipment.

The AUC noted Capital Power's commitment to rerun the NIA model to include a new residence, proposed by Mr. Felzien, in the northeast quarter of Section 6, Township 40, Range 14, west of the Fourth Meridian (the "New Felzien Residence"), if the residence is constructed prior to construction of the Project.

The AUC directed that the New Felzien Residence be treated as a dwelling given that Mr. Felzien had a building permit for it. The AUC held that as long as Mr. Felzien holds a building permit for the New Felzien Residence, the NIA model must be rerun with the new residence included as a receptor and the results shared with Mr. Felzien.

The AUC placed the following conditions on the Project's approval:

- Capital Power would operate the Project in accordance with the Operating Plan.
- Capital Power would conduct post-construction comprehensive noise studies and evaluations of low-frequency noise at certain receptors and file all studies and reports relating to the post-construction noise survey and low-frequency noise evaluation with the Commission within one year of connecting the Project to the Alberta Interconnected Electric System.

Health

The AUC noted BRG's argument that the Project could cause negative health impacts, exacerbate existing health conditions and result in annoyance which could negatively impact health. The BRG submitted articles that they claimed supported their views but did not retain the authors of these reports or anyone with expertise in human health.

Understanding and interpreting the numerous studies and literature that have considered the health effects of wind turbines requires considerable knowledge, skill and expertise. The AUC afforded little weight to opinion evidence about the health effects of noise or shadow flicker from lay witnesses on these complex topics.

The AUC found that there was no persuasive evidence that the Project, operating as proposed in the application, was likely to result in adverse health effects for nearby residents.

Decision

The AUC issued the power plant and substation approvals for the Project, subject to the conditions summarized above.

The AUC found that approval of the Project was in the public interest having regard to the social, economic and environmental effects of the Project.

Burnco Rock Products Ltd. – Complaint Application re FortisAlberta Inc. Fees (Decision 22872-D01-2018)
Electricity Distribution – Terms and Conditions – Permanent Disconnection Provisions – Complaint Application

Decisions Summary

In this decision, the AUC considered a complaint filed by Burnco Rock Products Ltd. ("Burnco") against FortisAlberta Inc. In its complaint, Burnco asked the AUC for relief from certain provisions in Fortis' Customer Terms and Conditions of Electric Distribution Service ("T&Cs"), including a declaration that Burnco is not obligated to pay the Distribution Customer Exit Charge, an order requiring Fortis to repay the overcharges made by Burnco immediately, and that Fortis be required to salvage Site ID 0040592553255 ("Site 1") and Site ID 0040667097191 (Site 2) (collectively, the "Sites") without further delay.

For the reasons summarized below, the AUC determined that:

(a) Fortis' T&Cs, and more specifically, those requiring the provision of notice or the payment of charges for permanent disconnection (the "Permanent Disconnection Provisions"), applied to Burnco.

(b) The Permanent Disconnection Provisions were applied to Burnco in a manner consistent with the Commission's original approval of the T&Cs.

(c) There had been substantive compliance with the Permanent Disconnection Provisions, and their associated objectives of revenue certainty and rate stability had been satisfied:

  (i) By June 28, 2016, Burnco had provided clear and unequivocal notice to Fortis of its intention to leave the distribution system and its desire to have Fortis' equipment at the Sites salvaged. It was from that date that the notice periods prescribed by the T&Cs for each of the Sites began.

  (ii) The most current evidence on the record indicated that Burnco had paid all the amounts charged by Fortis to the retailer for each of the Sites, up to and including October 31, 2017.

(d) Any distribution tariff payments received by Fortis for the Sites after the expiration of their respective notice periods were overcharges.

Fortis was directed to refund any such overcharges in accordance with Article 11.8 of the T&Cs.

(e) There was no need to address salvage because both of the Sites were salvaged by Fortis on January 14, 2018.

Fortis' Terms and Conditions Apply to Burnco

The AUC found that the T&Cs, including the Permanent Disconnection Provisions, did apply to Burnco.

Burnco submitted that the terms of the individual Electric Service Agreements (the "ESAs") between Burnco and Fortis' predecessor governed the relationship between Burnco and Fortis. Because the requirement for notice or the disputed charges for permanent disconnection set out in the T&Cs were not part of and did not accord with the terms of the ESAs, Burnco argued that it was not bound by them.

The AUC noted its previous holdings that the terms and conditions between a public utility and its customers are not voluntary contracts, but legally imposed regulations that bind the utility to provide a service at just and reasonable rates to all who require and demand them.

Burnco had been a customer of Fortis (or its predecessor) since 1993 when Burnco commenced taking electric service at Site 1. The relationship between Fortis and Burnco was not a purely contractual or consensual one. Rather, that relationship was bound by legislative regulation and consequently, in part, by Fortis' approved T&Cs. Explicit consent by a customer, such as Burnco, to changes in those approved T&Cs were not required to make them binding on such a customer.

While not determinative, the AUC noted that the paramountcy of the T&Cs was also expressly or implicitly recognized in the language of the ESAs between Fortis and Burnco.

Application of Permanent Disconnection Provision

Having found that the T&Cs, including the Permanent Disconnection Provisions, applied to Burnco, the AUC went on to consider Burnco's arguments that the AUC should overrule the T&Cs because they were unjust or unreasonable or, in the alternative, that the Commission should find that the T&Cs were being applied in a manner that was not contemplated in its original approval of the T&Cs.

The AUC was not persuaded that the Permanent Disconnection Provisions were applied in a manner not contemplated by the Commission's original approval.

The AUC noted that:

(a) Fortis' current notice obligation and payment in lieu of notice ("PILON") provisions were approved as part of Fortis' T&Cs in Fortis' last Phase II distribution tariff proceeding.

(b) The Commission had consistently held in previous decisions that:

(i) the formal regulatory process of approving the tariff, which includes the T&Cs, allows affected parties sufficient opportunity to test the T&Cs. Once approved, it is therefore no longer open to a party such as Burnco to seek to have the Commission "overrule" the approved T&Cs.

(ii) it would not consider the application of the approved T&Cs as "unfair, unreasonable or unforeseen" unless there it was established that they were applied in a manner "not contemplated in the Commission's original approval."

The AUC found that the argument by Burnco was not consistent with previous decisions of the Commission or its predecessor on the purpose of notice or a PILON charge, and was otherwise not supported by the evidence.

When it initially approved the PILON charges in Fortis' T&Cs, the Board (the AUC's predecessor) expressly distinguished between the concepts of the PILON charge and a utility's recovery of its initial investment:

- The purpose of notice or a PILON is to provide a level of revenue certainty and rates stability for the distribution wires company and its customers in circumstances of a request to reduce load or terminate service.

- PILON is not directly associated with recovery of the initial investment, which recovery is more directly dealt with by the investment policy and associated customer contribution, electric service agreement and buy-down policy.

The AUC found that once it received Burnco's signed salvage request forms on June 28, 2016, Fortis knew or reasonably ought to have known, that the Sites would no longer be providing revenue. The AUC found that Burnco's repeated requests for permanent disconnection and salvage of the Sites were clear, consistent and unequivocal. Most significantly, on June 28, 2016, Fortis received a signed confirmation of Burnco's intention to salvage and request to de-energize. This was in direct response to Fortis' express confirmation that the salvage request forms were the "right" forms and that upon their receipt, Fortis would "proceed."

The AUC found that this knowledge, coupled with Fortis' continued receipt of distribution tariff payments for the Sites during the notice periods prescribed by the T&Cs, provided Fortis with an appropriate level of revenue certainty and rates stability for it and its remaining customers.

Notice Period for the Sites

With respect to Site 2, the AUC found that:

(a) pursuant to the T&Cs, Burnco was required to provide nine months' notice for the permanent disconnection;

(b) such notice was effective on June 28, 2016, and it was therefore from that date that the notice period began;

(c) amounts billed on a monthly basis to the retailer for the Sites had all been paid to Fortis by the retailer, at least up to October 31, 2017, and that those amounts were equivalent, on a monthly basis, to the amounts payable during the notice period for each site;

(d) as such, Fortis had already received the full amounts payable during the notice period for Site 2; and

(e) all distribution tariff payments received for Site 2 beyond the expiration of the nine-month notice period were, therefore, overcharges and Fortis was directed to refund any such overcharges in accordance its T&Cs.

As for Site 1, the AUC found that:

(a) pursuant to the T&Cs, Burnco was required to provide a notice period of 20 months;

(b) amounts billed on a monthly basis to the retailer for Site 1 had all been paid to Fortis by the retailer, at least up to October 31, 2017;

(c) it was unclear for how long after October 31, 2017:

(i) Fortis had been overpaid for the notice period if Fortis continued to receive distribution tariff payments for Site 1 beyond the expiration of the 20 month notice period; or

(ii) Fortis was entitled to recover those amounts if Fortis had not received the distribution tariff payments for Site 1 between October 31, 2017 and the expiry of the notice period for that site.

Order

Based on the AUC's findings summarized above, the AUC ordered Fortis to:

- Calculate the total invoice amount for a notice period of 20 months for Site 1 based on a notice period commencement date of June 28, 2016, and, in accordance with Article 11.8 of Fortis' Customer Terms and Conditions of Electric Distribution Service, refund any payments made for Site 1 beyond the expiration of the 20 month notice period by no later than May 23, 2018.

- Calculate the total invoice amount for a notice period of nine months for Site 2 based on a notice period commencement date of June 28, 2016, and, in accordance with Article 11.8 of Fortis' Customer Terms and Conditions of Electric Distribution Service, refund any payments made for Site 2 beyond the expiration of the nine-month notice period by no later than May 23, 2018.

NATIONAL ENERGY BOARD

Group 1 Companies Filings re Abandonment Cost Estimate Review 2016 (NEB Decision and Next Steps)

Abandonment Cost Estimate Review 2016 – Group 1 Companies

The NEB initiated the Abandonment Cost Estimate ("ACE") Review 2016 by way of its February 8, 2016 letter. The letter directed Group 1 companies to file updated ACEs and supporting filings by 30 September 2016. Specifically, the letter directed all Group 1 companies to file:

(a) pipeline-specific land use studies (or updates to previously filed land use studies), to include, at a minimum:

(i) the scope of the land use study;

(ii) the methodology used to complete the land use study, including information sources, land use categories, definitions, and basis for the definitions, and assumptions regarding abandonment methods;

(iii) identification of locations or areas wherever pipeline is expected to be abandoned-in-place, removed, or abandoned-in-place with special treatment; and

(iv) results and analysis of the land use study;

(b) changes to land use categories based on consultation with landowners (or their associations) and other interested persons;

(c) changes to the physical assumptions in Table A-2 resulting from a) and b), and as informed by the four completed projects by the Pipeline Abandonment Research Steering Committee facilitated by the Petroleum Technology Alliance Canada, or any other relevant literature and studies;

(d) revisions to the abandonment costs associated with changes as provided in a), b), and c);

(e) updated information on the methodology used to estimate contingency costs, including the supporting assumptions and a description of items included under these costs and how these were determined. The costs must consider the necessity of taxes and insurance;

(f) report(s) on consultation activities with landowners (or their associations) since the MH-001-2012 Decision and plans for future consultations; and

(g) a report outlining plans for any decommissioning and/or abandonment of facilities during the next five year period, and an estimate of these costs.

The NEB found that each Group 1 company used a methodology to develop its ACE based on its pipeline system's characteristics. Although the NEB recognized the need to account for company or pipeline-specific characteristics, it found that it was important for Group 1 companies to follow a consistent and standardized approach to provide greater clarity, consistency, and transparency in their ACEs, and to allow the NEB to better evaluate the reasonableness of each company's ACE. To achieve greater consistency, transparency and accuracy for future ACE reviews, the NEB stated that it intends to initiate a process for the next steps for future reviews.

The NEB stated that it would issue a draft Technical Conference Report for comment in due course, followed by the final report. The report will include the next steps.

NEB Review of ACE Filings

In assessing the reasonableness of the Group 1 ACE Review 2016 Filings, the NEB considered whether the Group 1 companies, in developing their ACE:

- used the Board's Revised Base Case; and/or
- relied on the Board's direction provided in the MH-001-2012 Reasons for Decision; and/or
- provided sufficient information and supporting rationale in their ACE filings or in response to the Board's information requests regarding various matters, including:
  - the scope and methodology of land use studies;
  - changes to land use categories and abandonment method assumptions resulting from consultation activities and abandonment research conducted over the past five years;

- cost estimate methodology, including contingency costs, and taxes and insurance;
- consultation activities with landowners or their associations; and
- plans for any decommissioning and/or abandonment of facilities during the next five year period, including an estimate of these costs.

Steps Taken to Consider Assessing Development of Future Reviews

- In August 2017, NEB staff developed Discussion Papers and a proposed Refined ACE Framework.
- The intent of the Discussion Papers and the proposed framework to refine and advance the Board's current abandonment framework established during 2008-2010.
- NEB staff Technical Conference from 21-24 November 2017, during which Group 1 and 2 company representatives, landowner associations and NEB staff exchanged ideas about how to refine and advance the current abandonment framework. One of the objectives of the Technical Conference was to work toward developing requirements and guidance to achieve consistency, transparency and accuracy for future ACE reviews.

The following topics were explored at the Technical Conference:

- Land Use:
  - (i) Land Use Categories; and
  - (ii) Land Use Studies;
- Abandonment Method Assumptions;
- Consultation Activities;
- Cost Categories I;
- Cost Categories II:
  - (i) Contingency, including taxes and insurance;
  - (ii) Inflation rate;
  - (iii) Salvage Value; and
  - (iv) Carrying Charges.

Next Steps

The NEB stated that it would issue a draft Technical Conference Report for comment in due course, followed by the final report. The report will include the next steps.