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DECISIONS

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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FEDERAL COURT OF APPEAL

Tsleil-Waututh Nation v. Canada (Attorney General) (2017 FCA 174)

Motion to Intervene – Motion Granted on Terms

In this decision, the Federal Court of Appeal ("FCA") considered a motion by the Attorney General of British Columbia ("British Columbia") to intervene in the consolidated proceedings between applicant aboriginal groups and respondent federal government and energy company.

In a decision the FCA described as a "close call," it granted British Columbia leave to intervene on terms, for the reasons summarized below.

The Consolidated Judicial Review Proceedings

British Columbia's motion was considered within the context of the FCA's consideration of fifteen consolidated applications for judicial review, seeking to quash certain administrative decisions approving the Trans Mountain Expansion Project (the "Project"). The administrative decisions subject to judicial review by the FCA are:

(a) the NEB decision report dated May 19, 2016 (the "NEB Report"); and

(b) the Order in Council, PC 2016-1069, dated November 29, 2016, made by the Governor in Council (the "GIC").

The FCA explained that the $7.4 billion Project adds new pipeline, in part through new rights of way, expanding the existing 1,150-kilometre pipeline running from Edmonton, Alberta to Burnaby, British Columbia. The Project is expected to increase the existing pipeline's capacity from 300,000 barrels per day to 890,000 barrels per day following the expansion.

The applicants challenged the administrative approvals on a number of grounds, including administrative law principles, statutory law, and section 35 of the *Constitution Act, 1982* regarding Aboriginal rights and Canada's duty to consult.

British Columbia Motion

In a previous order, dated March 9, 2017, the FCA set a filing deadline of April 13, 2017, for parties to file motions to intervene. The FCA noted that British Columbia did not move to intervene by the April deadline and did not make its motion until August 22, 2017.

Later circumstances in British Columbia

The FCA explained that on April 11, 2017, two days before the April filing deadline for intervener motions, writs of election were issued in British Columbia. The election was held on May 9, 2017, and a new government for the province of British Columbia assumed office on July 18, 2017. Five weeks later, on August 22, 2017, British Columbia brought its motion.

Aspect of British Columbia Motion Unsatisfactory

The FCA noted serious concerns regarding the British Colombia motion, including:

(a) it taking five weeks for British Columbia to bring the motion, which the FCA considered a very long time in a closely-managed, expedited proceeding such as this;

(b) the seven-paragraph affidavit offered in support of the motion not providing any explanation for the five-week delay; and

(c) British Columbia's motion saying little on the scope or details of its requested intervention.

Test for Intervention

As explained in *Tsleil-Waututh Nation*, 2017 FCA 102 ("*Tsleil-Waututh Nation*"), Rule 110 of the *Federal Courts Rules*, SOR/98-106 (the "Rule(s)") is a special rule allowing the Attorneys General of Canada and the provinces to move to intervene. Rule 110 recognizes that Attorneys General who represent broader interests are responsible on behalf of the Crown for advancing and protecting the public interest.

The test under Rule 110 requires that there be "a question of general importance raised in the proceeding." The question must be one that affects the interests of the government or the population in the relevant jurisdiction in a general way: The "question of general importance" requirement can also be met where "serious questions are raised in proceedings that themselves are of general importance" (citing *Tsleil-Waututh Nation* at para 18).

Should British Columbia be allowed to intervene?

The FCA stated that its decision on the motion was a "close call," but decided to allow British Columbia to intervene on terms.

The FCA held that British Columbia had met the "question of general importance" requirement, finding that there was a strong nexus between the issues raised in the proceedings on the one hand and the interests of the Government of British Columbia and the population it serves on the other.

The FCA accepted that British Columbia was one of the two provinces most directly affected by the proceedings, the other being Alberta. The FCA noted that the public interest of Alberta had been given a voice by the Alberta AG's participation as an intervener. The FCA stated that the public interest of British Columbia deserved a voice too. The FCA noted that Alberta appeared to be mainly on the side of the respondents while British Columbia appeared to be mainly on the side of the applicants. Given Alberta's participation, the FCA found that British Columbia should also be in the proceedings.

Leave to Participate and Conditions

The FCA granted British Columbia leave to intervene, subject to conditions regarding the scope of its participation.

The FCA cautioned that while British Columbia may have been "blasé" in approaching its motion to intervene, it must be vigilant in complying with the conditions. The FCA warned that if any were breached, the FCA panel hearing the appeal could revoke British Columbia's status as an intervener.

ALBERTA COURT OF APPEAL

Alberta Energy Regulator v. Grant Thornton Limited (2017 ABCA 278)
Orphan Wells Association – Stay Application – Doctrine of Precedence

In this decision, the Alberta Court of Appeal ("ABCA") considered an application by the AER and the Orphan Well Association (the "OWA"), seeking a stay of the enforcement of the majority decision in *Orphan Well Assn. v. Grant Thornton Ltd.* (the "*ABCA Orphan Well Decision*") pending appeal to the Supreme Court of Canada (the "SCC").

The ABCA denied the stay, for the reasons summarized below.

The ABCA characterized the three main questions before it as follows:

(a) Does a single ABCA judge have jurisdiction to grant a stay after a party has applied for leave to appeal to the SCC?

(b) If a single judge of the ABCA does have to grant a stay after such an application to the SCC, does that single judge have jurisdiction to issue an order that affects the acts of other receivers and bankruptcy trustees in other proceedings? and

(c) If so, do the applicants meet the three-part test for stays?

ABCA Decision: *Orphan Well Assn. v. Grant Thornton Ltd.*

In the *ABCA Orphan Well Decision*, in a 2-1 split decision, the majority of the ABCA held that a receiver and trustee in bankruptcy appointed under the *Bankruptcy and Insolvency Act* must use the sale-of assets proceeds to pay a bankrupt's secured creditors before it pays the AER amounts required to discharge the bankrupt's obligation to shut-in abandoned wells.

Jurisdictional Basis

Section 65.1(1) of the *Supreme Court of Canada Act* grants jurisdiction to a single judge of this Court to "order that proceedings be stayed with respect to the judgment from which leave to appeal [to the SCC] is being sought".

The ABCA found that invoking the jurisdiction of the SCC by filing and serving a notice of application for leave to appeal does not deny the jurisdiction of the ABCA or a single judge of the ABCA to grant a stay of proceedings.

Definition of Stay

The ABCA explained that:

(a) A stay is a court order that abridges for a defined period the effect of a previous court order;

(b) A stay may direct a party or a third party whose acts affect the interests a party seeks to protect in the proceedings to refrain from undertaking some act authorized by the previous court order in the proceedings that are the subject of the stay; and

(c) By applying for a stay, the applicant asks the court to grant it relief that advances its interests within the confines of the proceedings and is consistent with the positions it advanced in the court below.

The Court Cannot Stay the Precedential Effect of *Orphan Well Assn. v. Grant Thornton Ltd.*

Regarding the doctrine of precedence, the ABCA explained that, in common law jurisdictions, courts resolve disputes in accordance with principles set out in binding precedents from previous decisions. The fundamental rule is that a court is bound by a decision of a court above it in the judicial hierarchy. The doctrine of precedent promotes consistency, predictability and stability in the law. The basis for resolution provides a principle that governs all future similar disputes.

The ABCA held that it cannot stay the precedential effect of one of its own decisions and create a new legal regime that affects other receivers and trustees in bankruptcy and other secured creditors who pursue their rights in other debt enforcement proceedings.

The ABCA noted that the judgment of the Court of Appeal that the AER and the OWA were seeking leave to appeal to the SCC simply stated that "[t]he Appeals of the Applicants are dismissed". The ABCA found that the Court of Appeal judgment under appeal only dismissed the appeal. It did not authorize or order Grant Thornton Limited in its capacity as a receiver and bankruptcy trustee to do anything.

The ABCA found that there was nothing for it to stay. Only the SCC, in the short term, could change the law as set by the *ABCA Orphan Well Decision*.

Decision

For the reasons summarized above, the ABCA dismissed the application for a stay.

ALBERTA ENERGY REGULATOR

West Isle Energy Inc. – Request for Regulatory Appeal, Reconsideration and Stay of Closure and Abandonment Order (Request for Regulatory Appeal No. 1887883)
Request for Regulatory Appeal – Closure and Abandonment Order

In this decision, the AER considered West Isle Energy Inc.'s ("West Isle") request for regulatory appeal, reconsideration and stay of Closure and Abandonment Order dated April 17, 2017 (the "Order").

The AER granted West Isle's request to extend the time for filing a request for a regulatory appeal of the Order. The AER granted West Isle's request for a regulatory appeal, finding that West Isle was an eligible person as defined by the *Responsible Energy Development Act.*

The AER determined that a hearing into the regulatory appeal requested by West Isle would be held.

Prosper Petroleum Ltd. Rigel Project – Fort McKay First Nation Request for Suspension of Hearing Process
Request for Suspension of Hearing Process – Aboriginal Matters – Notice of Question of Constitutional Law

On August 4, 2017, the AER denied the request of the Fort McKay First Nation ("FMFN") to suspend the hearing process for Prosper Petroleum Ltd.'s ("Prosper") applications under the *Oil Sands Conservation Act* ("*OSCA*"), the *Water Act* and the *Alberta Environmental Protection and Enhancement Act* ("*EPEA*") for its Rigel Project.

The AER allowed FMFN to file an amended Notice of Question of Constitutional Law.

Background

FMFN filed a Notice of Question of Constitutional Law on June 22, 2017 (the "NQCL"). On July 26, 2017, the Supreme Court of Canada (the "SCC") rendered decisions in two cases: *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.,* 2017 SCC 40 (*"Clyde* River") and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 ("*Chippewas of the Thames*"). The AER considered the decisions to be relevant to the NQCL and asked the parties to provide their views about the relevance and impact of the decisions on the NQCL and the NQCL process.

In its submissions, FMFN asked the AER to suspend the hearing process for Prosper's applications or, in the alternative, to give reasons for declining to suspend the hearing process and to provide a new schedule to allow FMFN to file an amended NQCL. FMFN submitted that it needed to incorporate its interpretation and application of the *Clyde River* and *Chippewas of the Thames* cases into its submissions on its NQCL.

The AER found that:

(a) the bulk of FMFN's submissions were directed to the implications of the *Clyde River* and *Chippewas of the Thames* decisions for its NQCL; and

(b) this was not the appropriate time to address FMFN's arguments about consultation and accommodation or the application of those decisions to the circumstances of this proceeding.

Form of Motion

The AER explained that Sections 46 and 44 of the *Alberta Energy Regulator Rules of Practice* (the "AER Rules") provide that a party may file a written notice of motion asking for an adjournment of a hearing. A notice of motion is to be supported by affidavit evidence. The AER found that FMFN failed to make its request in the prescribed form and filed no affidavit evidence in support of its request. Prosper and Alberta did not raise any concerns about this. The AER found that since the request was clear and the hearing date was still more than two months away, no prejudice arose from the form of the request.

Request for Suspension of Hearing Process

FMFN submitted that:

(a) subsection 10(3) (c) of the *OSCA* gives the AER the authority to suspend the proceeding;

(b) subsection 7(3) of the *Lower Athabasca Regional Plan Regulatory Details Plan* (the "Regulatory Details Plan") provides that if there are circumstances in addition to or other than those identified in paragraphs (a) and (b) of that subsection, then the AER may adjourn (or in this case suspend) the proceedings;

(c) to carry on the hearing process would impair the ability of the promise of Moose Lake Access Management Plan ("MLAMP") to be fulfilled, which the FMFN characterized as a "constitutional promise" and as "accommodation"; and

(d) continuing with the hearing process might result in non-compensable damage.

The AER noted that subsection 7(3) of the Regulatory Details Plan required the AER to "not adjourn, defer, deny, refuse or reject any application, proceeding or decision-making process before it by reason only of the incompletion of a sub-regional plan, such as MLAMP."

The AER found that FMFN failed to establish that there were circumstances other than or in addition to the incomplete status of the MLAMP that would warrant a suspension of the hearing process.

The AER noted that the *Clyde River* and *Chippewas of the Thames* SCC decisions reaffirmed a number of key principles. The AER found that principles relevant to FMFN's request that the hearing process be suspended were as follows:

(a) a hearing process may form part of the Crown's consultation process if the Crown has clearly communicated its intention to the relevant First Nation; and

(b) First Nations must engage in the consultation process.

The AER further found that:

(a) section 21 of the *REDA* prevented the AER from assessing the adequacy of Crown consultation; and

(b) FMFN had not persuaded the panel that it should interfere in the consultation process by suspending the AER hearing process.

With respect to FMFN's submission that continuing with the hearing process might cause non-compensable damages, the AER found:

(a) if approved, Prosper's applications under the *Water Act* and *EPEA* would only be operationalized if its application under the *OSCA* was approved;

(b) after hearing and considering the evidence and submissions of the parties, the AER may decide to refuse or to grant the *OSCA* approval;

(c) if the decision is to grant the *OSCA* approval, it is too early to know what conditions would be attached beyond any standard terms and conditions; and

(d) in any event, according to subsection 10(3) of the *OSCA*, if the AER finds it in the public interest to do so, it may only grant Prosper's application for approval of an oil sands recovery scheme with the prior authorization of the Lieutenant Governor in Council.

The AER concluded that FMFN's submissions about possible harm that may result from the hearing proceeding were purely speculative and premature at this point. For these reasons, the AER decided not to exercise its discretion to suspend the hearing process.

NQCL Amendment

Prosper objected to FMFN's request to amend its NQCL. Prosper argued that it would be "unfair, inefficient and prejudicial to Prosper". Prosper submitted that since FMFN had seen its submissions and those of Alberta, FMFN would have an unfair advantage. Prosper also stated that an amended NQCL would result in extra time and resources being directed to the NQCL.

In allowing FMFN's request to amend its NQCL, the AER found that:

(a) the rules and regulations that explicitly deal with notices of questions of constitutional law in AER proceedings are silent on whether a notice of question of constitutional law, once filed, may be amended;

(b) with respect to Prosper's concerns about fairness, efficiency and prejudice, Prosper and Alberta would have the opportunity to respond fully to whatever amendments and accompanying submissions FMFN might make;

(c) concerns about efficiency and impact on the hearing process were factors that could be taken into account in an application for costs; and

(d) the timeline established did not result in a delay of the oral hearing.

ALBERTA UTILITIES COMMISSION

ATCO Utilities – Application for Review and Variance of the AUC July 20, 2017 Ruling (20514-D01-2017)

Review and Variance – Interlocutory Decisions – Application for Review

In this decision, the AUC considered an application by ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd. the ("ATCO Utilities") requesting a review of the AUC ruling dated July 20, 2017, in Proceeding 20514 (the "Ruling"). The Ruling directed the ATCO Utilities to file certain information on the record in Proceeding 20514.

The AUC dismissed the review application on the grounds that the Ruling was an interlocutory decision and the ATCO Utilities had not demonstrated special circumstances that would warrant granting review.

The AUC further found that, in any event, the review application was moot, given the AUC's subsequent decision to relieve the ATCO Utilities from the obligation to provide the directed information.

AUC Findings

The AUC considered whether the Ruling was a final or interlocutory decision. The AUC explained that if the ruling was an interlocutory decision, the courts have established guidelines for when a review application will be considered.

The AUC cited the Federal Court of Appeal ("FCA") decision *Simpson Strong-Tie Company, Inc. v. Peak Innovations Inc.*, 2008 FCA 235 at para 6, where the FCA defined "interlocutory judgement or order" as follows:

> An "interlocutory judgment or order" is one that does not determine in whole or in part any substantive right of any of the parties.

The AUC also referred to the FCA decision *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, where the FCA emphasised that, absent special or exceptional circumstances, parties should not be allowed to bypass an administrative appeal process "as long as that process allows the issues to be raised and an effective remedy to be granted."

Based on the above, the AUC found that the Ruling was an interlocutory decision, as the ATCO Utilities had effective remedies following the issuance of a final decision in Proceeding 20514. The AUC found that the ATCO Utilities would still have the right to challenge the final decision to the extent any of the directed information were to be relied upon by the hearing panel in its reasons.

The AUC found that ATCO Utilities had not shown the existence of special circumstances that would warrant granting the review of the interlocutory Ruling and therefore denied the ATCO Utilities' request for review of the Ruling.

For these reasons, the AUC dismissed the review application.

AltaLink Management Ltd. – 2017-2018 General Tariff Application – Negotiated Settlement Agreement (21341-D01-2017)

General Tariff Application – Negotiated Settlement Agreement

In this decision, the AUC considered AltaLink Management Ltd.'s ("AltaLink") application for approval of a negotiated settlement agreement (the "NSA") regarding its 2017-2018 general tariff application ("GTA").

The AUC approved the NSA as filed with the quantum for the refund of surplus accumulated depreciation set at $31.4 million.

Background and NSA Application

On September 8, 2016, AltaLink requested approval to commence a negotiated settlement process ("NSP") for its 2017-2018 GTA. The Industrial Power Consumers Association of Alberta ("IPCAA"), Alberta Direct Connect Consumers Association ("ADC") and the Office of the Utilities Consumer Advocate ("UCA") (the "NSA Signatories") filed letters in support of entering into the NSP.

AltaLink filed its NSA with the AUC on February 8, 2017. The NSA encompassed all aspects of AltaLink's 2017-2018 GTA, except for the quantum of the refund of the accumulated depreciation surplus. The AUC noted that although the parties agreed in principle on a refund of the accumulated depreciation surplus, there were differences related to the quantum. The parties' provided a range between $31.4 million, as advocated by the CCA, and $130.3 million, as advocated by the other signatories to the NSA, including AltaLink.

Legislative Scheme

AltaLink requested approval of the NSA pursuant to *AUC Rule 018: Rules on Negotiated Settlements* ("*Rule 018*") and sections 134 and 135 of the *Electric Utilities Act* (the "*EUA*").

Sections 134 and 135 of the *EUA* provide the AUC with authority to approve a negotiated settlement. Section 135 of the *EUA* limits the AUC's discretion with respect to negotiated settlements, providing that if parties negotiated a settlement contingent on the AUC accepting the entire settlement, the AUC "must either approve the entire settlement or refuse it."

The AUC noted that the terms of the subject NSA were negotiated as a package and contingent on the AUC accepting the entire settlement, with the provision that the AUC would determine the amount of the accumulated depreciation surplus to be refunded, within the range agreed to by the parties. Therefore, the AUC found that AltaLink requested that the AUC approve the NSA as filed, in its entirety, in accordance with Section 135 of the *EUA*.

The AUC noted that section 8 of *Rule 018* deals with unanimous or unopposed negotiated settlements and requires that the AUC assess the settlement on the basis of two elements, namely whether:

(a) the settlement will result in rates and terms and conditions that are just and reasonable; and

(b) the settlement is patently against the public interest or contrary to law.

Given the statutory requirements, *Rule 018*, and the relevant case law, the AUC summarized the following factors it considered in making its determination on whether the NSA should be accepted or rejected in its entirety:

(a) **Fairness of the negotiated settlement process**: assessing whether there was procedural fairness, concerning both the adequacy of notice and the conduct of the fairness of the negotiation process itself;

(b) **Just and reasonable rates**: considering the reasonableness of the NSA. The AUC considers the reasonableness of the individual elements that make up the application to the extent they have been set out in the NSA; and

(c) **Patently against the public interest or contrary to law**: conducting a review of each of the material provisions of the NSA in order for the AUC to determine whether any provisions appear contrary to accepted regulatory practices or could result in undue rate and service effects on customers or are clearly contrary to law.

Fairness of NSP

With respect to the fairness of the NSP, the AUC found that:

(a) the parties to the NSA had sufficient information at the time negotiations commenced to allow them to participate as informed parties;

(b) the parties were provided sufficient notice, adequate information, and the opportunity to participate meaningfully, such that the negotiations were conducted in an open and fair manner; and

(c) the parties represented a reasonable cross-section of affected customers.

Based on the above, the AUC concluded that the NSP met the requirements for fairness set out in Section 6(3) of *Rule 018*.

Just and Reasonable Rates & Public Interest

With respect to the NSA being in the public interest, the AUC explained that its assessment was guided by the *EUA* and *Rule 018*, particularly section 8(2), which requires the AUC to intervene if it determines that a unanimous settlement agreement is patently against the public interest or contrary to law.

The AUC found that the NSA represented a unanimous agreement amongst signatories representing a constituent of Albertans that have historically participated in the testing of AltaLink's GTAs. The AUC found that this supported finding the NSA to be in the public interest.

The AUC found that the NSA was not "patently against the public interest or contrary to law" and should result in "rates and terms and conditions that are just and reasonable" as required by Section 8 of *Rule 018*.

The AUC therefore approved the NSA as filed.

Quantum of Refund of Surplus Accumulated Depreciation

As noted above, the NSA Signatories were unable to agree on the quantum of the refund of surplus accumulated depreciation. The CCA submitted that the refund should be $31.4 million while the remaining signatories proposed that the refund be $130.3 million.

The AUC noted that the parties were clear that if the AUC were to determine a refund outside that range, the NSA could not be approved because it was presented on the basis that it must be accepted in its entirety.

Surplus Accumulated Depreciation

The AUC explained that depreciation rates used for mass property accounts were predicated on historical retirement patterns continuing into the future. However,

the actual mortality of plant assets was only known with certainty after the asset has lived its useful life and the costs associated with the retirement had been incurred. Thus, the estimations for assets' average service lives and net salvage costs, as compared to what actually occurs, would invariably be different.

To determine the appropriate refund amount within the range of the $31.4 to $130.3 million amount, the AUC considered:

(a) the discount rate to be used by the AUC in its assessment of the appropriate refund amount;

(b) principles of gradualism and moderation;

(c) intergenerational equity issues; and

(d) capacity utilization.

Appropriate Discount Rate

The AUC explained that its determination of the amount of the accumulated depreciation surplus to be returned to current ratepayers was an intertemporal decision. The determination involved a cost/benefit analysis considering the value of refunds to ratepayers today compared to the value of refunding surplus amounts in the future. The AUC explained that intertemporal decision-making necessarily involves choosing a discount rate that allows the decision maker to account for the difference between future welfare and current consumption.

AltaLink argued that the AUC should use market interest rates for its inter-temporal decision making, which reflect the market costs of borrowing or the return from investing in private investments for a variety of market participants. AltaLink submitted that market-determined rates reflect the correct preferences for time discounting.

The AUC noted concerns regarding the use of market interest rates for inter-temporal decision making, including:

(a) those in the future cannot participate in current market decision making and may regret the decisions made by current market participants;

(b) market interest rates do not account for those who cannot signal their time value of money, as a result of being excluded from markets (e.g. young people, who are future ratepayers, but do not have the means to participate in currently operating credit markets); and

(c) market interest for the economy are uncertain and can vary considerably over time. Uncertainty regarding future market interest rates and growth rates means that declining discount rates should be used.

Based on the above, the AUC found that:

(a) Market interest rates should not be used in assessing the inter-temporal cost-benefit analysis regarding the refunding of the surplus.

(b) It was preferable to use discount rates that are lower than market rates; and

(c) considering the effects of declining discount rates had merit, and declining discount rates would suggest moving toward reducing the amount of the accumulated depreciation surplus to be returned to current ratepayers.

Intergeneration Equity and the Public Interest

Given the finding that market rates in general are likely too high to be used when considering inter-temporal decision making, the AUC considered that if market interest rates had been used in the past to inform inter-temporal decision making, then it was likely that current ratepayers were paying rates that were too high, everything else equal. The AUC found that this supported using lower discount rates, since it made it more likely that the current rates already reflected intergenerational inequity.

The AUC found that the public interest would be served by using lower discount rates when employing inter-temporal cost-benefit analysis, which suggested refunding smaller amounts of the accumulated depreciation surplus over two years, everything else equal.

Gradualism and Moderation

Lower depreciation rates result in a larger rate base at each point in time, which, in turn, means a higher return at each point in time, everything else equal.

The AUC explained that AltaLink's proposal to refund surplus amounts over two years represented a departure from the accepted method through which accumulated depreciation differences are returned to customers using an amortization of reserve differences true-up methodology (the "Status Quo Method"). Under the Status Quo Method, in the case of a surplus, the depreciation rate is lowered by a small amount for the remaining years of an asset's life to refund the surplus. The sum of all of the reductions to depreciation expense, as a result of the composite depreciation rate reductions, would equal the value of the accumulated depreciation surplus.

Conclusion

Based on its weighing of the above factors, the AUC found that a refund of the accumulated depreciation surplus in the amount of $31.4 million was reasonable and in the public interest.

The AUC found that the rest of the surplus should be returned to customers using the currently established amortization of reserve differences methodology.

AltaLink Management Ltd. – 2015-2016 General Tariff Application Second Compliance Filing (22378-D01-2017)

General Tariff Application – Compliance Filing

In this decision, the AUC considered AltaLink Management Ltd.'s ("AltaLink") compliance with the AUC's directions set out in:

(a) Decision 3524-D01-2016, which determined AltaLink's 2015-2016 general tariff application ("GTA"); and

(b) Decision 21827-D01-2016, regarding AltaLink's proposed refund of previously collected construction work in progress ("CWIP")-in-rate base amounts.

For the reasons summarized below, the AUC:

(a) denied AltaLink's proposal to recapitalize allowance for funds used during construction ("AFUDC") in the amount of $7.1 million related to cancelled transmission projects;

(b) directed AltaLink to refund:

  (i) $267.1 million related to the amount of return it collected from customers on its CWIP-in-rate base balances over the years 2011-2014;

  (ii) $22.7 million related to the return earned on the accumulated CWIP-in-rate base returns in the years 2011-2014; and

  (iii) $22.4 million related to the return earned on the accumulated CWIP-in-rate base returns in the years 2015-2016;

  and

(c) directed AltaLink to submit direct-assigned capital deferral account ("DACDA") schedules for the years 2011 to 2014 to calculate the refund of over-collected revenue requirement resulting from the tax adjustments.

Refund of the return on CWIP-in-rate base balances that were paid to AltaLink

AltaLink stated that it had collected $268.5 million of returns on the CWIP-in-rate base balances between 2011 and 2014. Of the $268.5 million collected, $1.4 million was to be excluded as it was related to projects that were approved as final and were therefore not eligible to be refunded. This resulted in a net amount eligible to be refunded of $267.1 million.

AltaLink proposed to refund $246.4 million, of which $229.7 million was related to the return calculated on CWIP. AltaLink explained that the $229.7 million was the amount of AFUDC it calculated to be attributed to the actual project costs for the years 2011-2014.

The difference between the amount that AltaLink had collected in its GTA-approved forecast and the amount AltaLink proposed to refund in this application was $37.4 million. AltaLink stated it transferred that amount to its deferral account and refunded it in an unspecified DACDA compliance filing.

The AUC found that:

(a) AltaLink incorrectly excluded the $37.4 million as part of the refundable amount; and

(b) the amount collected and, therefore, the amount eligible to be refunded by AltaLink was $267.1 million.

The AUC directed AltaLink to refund the $267.1 million of CWIP-in-rate base return it collected from customers in the years 2011 to 2014.

Refund related to tax adjustments from the removal of CWIP-in-rate base return

The AUC noted that the increase of $2.7 million in taxable income appeared to require an additional $24.9 million in capital cost allowance deductions, yet AltaLink's entire capital cost allowance claim on its whole 2012 DACDA revenue requirement only required a claim of $17.2 million to make the taxable income zero. The AUC found that such an outcome could not be reasonable or correct.

The AUC, therefore, directed AltaLink to refile its compliance with DACDA schedules, for the years 2011 to 2014, as part of AltaLink's third compliance filing. The AUC directed AltaLink to use the same calculation of taxable income that it used in its DACDA applications, as well as adjusting its capital cost allowance claim such that the taxable income was zero, or until the maximum allowable capital cost allowance claim was reached.

Oldman 2 Wind Farm Limited – Spring 2017 Post-Construction Sound Survey (22676-D01-2017)
Post-construction Sound Survey – AUC Rule 012

In this decision, the AUC considered whether Oldman 2 Wind Farm's ("Oldman 2") Spring 2017 Post-Construction Sound Survey at Receptors B, J, and K, complied with permissible sound levels set out in Rule 012: *Noise Control* ("*Rule 012*").

The AUC found that the Post-Construction Sound Survey submitted by Oldman 2 demonstrated compliance with daytime and nighttime permissible sound levels, in accordance with *Rule 012*.

AUC Findings

The AUC found that:

(a) the wind and weather monitoring equipment used satisfied the requirements of *Rule 012* and that the wind and weather monitoring equipment was located within 100 metres of the microphone locations, as also required by *Rule 012*; and

(b) the isolation analysis performed on the representative daytime and nighttime data using audio recordings and observations was reasonable.

Sufficient valid downwind data (three cumulative hours) was not obtained for each nighttime period at receptors J and K. However, a review of historical annual wind data collected between 2003 and 2013 indicated that those dwellings were not located downwind from the predominant wind (data showed that receptors J and K were downwind from the nearest wind turbine less than 1% of the time).

In light of the low occurrence of downwind conditions from the nearest wind turbine for receptors J and K, the AUC exempted Oldman 2 from the collection of sufficient valid downwind data at receptors J and K.

Based on the above findings, the AUC concluded that the comprehensive noise survey at receptors B, J and K was conducted in accordance with *Rule 012*.

ATCO Pipelines – 2017-2018 General Rate Application (22011-D01-2017)
General Rate Application – Depreciation Study – Urban Pipeline Replacement Program

In this decision, the AUC considered ATCO Pipelines ("ATCO") 2017-2018 revenue requirement application (the "Application"). In the Application, ATCO requested the AUC approve its 2017-2018 forecasted revenue requirements, in the amounts shown in the table below:

	2015 Actual	2016 Estimate	2017 Forecast	2018 Forecast
	($000)			
Rate of Return	6.94%	6.84%	6.14%	6.09%
Return on rate base	75,105	86,439	92,469	102,942
Operating costs	59,647	62,388	67,836	70,543
Taxes other than income	14,625	16,355	18,266	18,750
Net depreciation expense	55,680	66,825	89,564	97,316
Income taxes	(798)	1,597	3,657	3,814
Total Revenue Requirement	**204,259**	**233,604**	**271,792**	**293,365**

AUC Findings re ATCO IR Responses

The AUC found that ATCO's level of responsiveness in IR responses to be of concern and that ATCO did not respond to some questions in a manner that fulfilled the AUC's expectations for record development and contributing to a better understanding of the issues.

Rate Base

Forecast Accuracy

With respect to concerns regarding ATCO's forecasting accuracy raised by the UCA, the AUC found that:

(a) including capital subject to deferral account treatment when forecast accuracy artificially inflates the variance between actual and approved while discounting the fact that some capital expenditures, such as UPR costs, are not forecastable and subject to uncertainty; and

(b) ATCO's non-deferral account expenditures exceeded approved amounts in 2015 and 2016, resulting in ATCO earning a lower return on rate base from higher actual forecast expenditure.

Capital Expenditures

ATCO submitted that the forecast improvement and replacement capital expenditures were required for pipeline and facility integrity related initiatives, including in-line inspection ("ILI").

The AUC approved ATCO's forecast ILI capital expenditures because the inspections were a proactive initiative designed to detect areas of the pipeline susceptible to future defects in transmission pipeline.

Discontinuance of NGTL Integration Deferral Account

The NGTL integration deferral account was established to capture the difference between forecast and actual costs associated with integration with NGTL. The AUC noted that the deferral account was originally approved under the criteria for new deferral accounts set out in Decision 2003-100 of materiality, uncertainty in cost forecasts, factors beyond the utility's control and risk to the utility, while ensuring costs and benefits are symmetrically applied to the utility and customers.

ATCO requested to discontinue and settle the NGTL integration deferral account.

The AUC approved the request, based on its finding that:

(a) integration and the associated asset swap was completed in 2016;

(b) the criteria for a deferral account were no longer met; and

(c) ATCO's request to discontinue and settle the NGTL integration deferral account was reasonable and necessary.

Based on its review of the inputs and calculations of the NGTL integration deferral account, the AUC approved ATCO's one-time settlement amount of $7,072,000 as filed.

Operating Costs

The AUC found that the across-the-board reduction recommended by UCA did not have any bearing to what ATCO actually required to safely and reliably operate its system.

The AUC directed adjustments to specific elements of ATCO's O&M forecasts, including:

(a) **Out-of-scope Labour**: The AUC found that an out-of-scope labour escalation rate of 0.5 percent for 2017 and 1.0 percent for 2018 was reflective of the current market and based on the best information available on the record of the proceeding. This reflected a reduction from ATCO's requested escalation rates of 1.0 percent for 2017 and 2.5 percent for 2018;

(b) **Pension Costs:** In Decision 21831-D01-2017, the AUC found that ATCO's applied-for increase in the amount of pension cost of living allowance ("COLA") recoverable in rates was not warranted. Based on its findings in Decision 21831-D01-2017, the AUC denied the placeholders for a COLA adjustment from 50 percent to 100 percent, as requested by ATCO. The AUC directed ATCO to incorporate the findings of Decision 21831-D01-2017 for all pension costs and COLA into its compliance filing to this decision;

(c) **O&M Supplies Expenses**: ATCO forecasted utilities, company vehicles, travel, accommodation, and meals costs to increase at the rate of inflation. ATCO forecasted an increase for materials, equipment and tools costs based on inflation and current market pricing for items affected by commodities. ATCO assumed inflation rates of 2.6 percent and 2.3 percent for supplies in 2017 and 2018, respectively. The forecast inflation rate was based on the Alberta CPI published in May 2016 by the Conference Board of Canada. The AUC noted that ATCO had provided updated CPI forecasts in response to IRs, but that it did not update its application as it considered its forecasts as provided in the application to be reasonable; and

(d) **IT Costs**: The AUC approved ATCO's forecast O&M IT volumes, subject to any adjustments required due to directions elsewhere in this decision. The AUC noted that Proceeding 20514 regarding ATCO IT common matters was ongoing. The AUC found that given the total forecast IT costs were calculated from the forecast IT volumes and the negotiated IT pricing, total IT costs were to be treated as placeholders in this proceeding, pending a determination in Proceeding 20514 with respect to pricing.

Return on Capital

ATCO requested a return on equity ("ROE") of 8.50 percent for 2017 and a capital structure of 37 percent equity and 63 percent debt for 2017, as per the AUC's determinations in the 2016 General Cost of Capital decision.

The AUC found that ATCO prepared its debt rate forecasts using a method consistent with what was approved in Decision 3577-D01-2016. The AUC tested and approved this methodology during ATCO Pipelines' 2015-2016 GRA. Consistent with its findings elsewhere in this decision regarding use of the most recent information, the AUC found that the most current Consensus Forecast data on the record of this proceeding should be used when determining what debt rate to use. Therefore, the AUC approved a forecast debt rate of 4.16 percent for 2017 and 4.46 percent for 2018.

Depreciation

ATCO submitted a new depreciation study in support of its applied-for depreciation expenses (the "Depreciation Study"). The AUC explained that the

application reflected two main departures from ATCO's historical depreciation practices, namely:

(a) determining the average remaining lives of asset accounts based on the equal life group ("ELG") procedure. Historically, the average remaining life calculation had been based on the broad group ("BG") procedure; and

(b) rather than using a traditional net salvage study as the basis for net salvage percent recommendations for ATCO's underground storage asset accounts, the Depreciation Study relied on the results of a decommissioning study prepared by Stantec.

Table: Impact of Proposed Changes

	2017 Forecast	2018 Forecast
	($000)	
Net depreciation expense using approved depreciation parameters	75,093	82,213
Change in average service lives and Iowa curves	(515)	(1,108)
Change in net salvage per cents	10,823	12,048
Change in amortization of reserve differences methodology	4,163	4,163
Total impact of proposed changes	14,471	15,103
Net depreciation expense using proposed depreciation parameters	89,564	97,316

The AUC found that approving ATCO's requested change to ELG for the purposes of the amortization of reserve differences calculation would be inconsistent with the long standing and wide spread use of the BG procedure in Alberta.

The AUC found that the risk of intergenerational inequity becomes greater if the proposed ELG approach were to be implemented. However, the AUC did not agree that a suitable alternative existed, as the UCA suggested, for ATCO to adopt, on a wholesale basis, the BG procedure for all aspects of ATCO depreciation calculations as a way to resolve the ELG-BG mismatch.

The AUC directed ATCO to revert to the use of the BG procedure for the purposes of determining its amortization of reserve differences calculation and amortization of reserve differences true-up amounts in its compliance filing to the decision.

In reviewing the capitalization policy referenced by ATCO, the AUC noted that it could find no reference to any discussion of asset relocations. The AUC found that it would be beneficial for ATCO to establish a written policy with respect to its treatment of contributions from both an accounting and depreciation study perspective.

The AUC therefore directed ATCO to submit this contribution policy at the time of its next general rate application.

Life Curve Parameters

Specific depreciation parameters proposed in the Depreciation Study not accepted by the AUC are summarized in the table below:

	Applied-for Life Curve Parameter	AUC Approved Life Curve Parameter
Underground Storage Plant		
Well Equipment	20-R3	24-R3
Transmission Plant		
Land Rights	80-R5	82-R5
Mains	62-R2.5	67-R2.5

Decommission and Net Salvage

The AUC explained in utility depreciation practices, net salvage refers to the difference between what the company anticipates it will cost to retire its assets from service (cost of removal), and any funds it receives as a result of the asset retirement (gross salvage). The estimate of net salvage is recovered as a component of depreciation expense throughout the life of the assets. A net salvage analysis is undertaken with the objective of ensuring that the net salvage being collected continues to be indicative of future retirement cost expectations.

The AUC noted that, rather than using a traditional net salvage study, ATCO relied on the results of a decommissioning study (the "Decommissioning Study"). The Decommissioning Study did not accompany the Application or Depreciation Study but was provided in response to information requests.

The AUC found that ATCO failed to show the applicability of a Decommissioning Study for determining net salvage percents for its underground storage assets.

Specific net salvage percent parameters proposed in the Decommission Study subject to adjustment by the AUC in this decision are summarized in the table below:

	Previously Approved Decision 2013-430	**Proposed by ATCO Proceeding 22011**	**Approved by AUC Proceeding 22011**
	Net Salvage Percent		
Underground storage plant			
Structures & improvements	-5	-691	-5
Wells	-20	-154	-20
Well equipment	-20	-1	-9
Field lines	-5	-13	-5
Compressor equipment	0	-5	0
Measuring & regulating equipment	-10	-3	-2
Transmission plant			
Land rights	-20	-10	-10
Compressor structures & improvements	-5	-5	
Measuring & regulating structures	-15	-25	-20
Other structures & improvements	-20	-15	-10
Mains	-50	-80	-50
Compressor Equipment	-5	-20	-5
Measuring & Regulating Equipment	-25	-35	-30

The AUC directed ATCO, in its next depreciation study, to revert back to a traditional net salvage study for the purposes of examining net salvage for its underground storage assets.

Order

The AUC directed that ATCO file a compliance filing in accordance with the findings and directions set out in the decision.

NATIONAL ENERGY BOARD

Alliance Pipeline Ltd. – Application for Clairmont Meter Station Decommissioning and Reclamation (Abandonment Hearing MHW-003-2017)
Abandonment

In this letter decision, the NEB considered Alliance Pipeline Ltd.'s ("Alliance") application for final site decommissioning and reclamation of the Clairmont Meter Station and related facilities (the "Facilities").

The NEB granted Alliance leave to abandon the Facilities, subject to conditions.

NEB Findings

The NEB found that:

(a) the project's proposed activities were consistent with the legislative requirements related to abandonment of piping under the *National Energy Board Act* (the "*NEB Act*") and the *National Energy Board Onshore Pipeline Regulations* and that abandoning the facilities by removal was acceptable in the circumstances;

(b) anyone potentially affected by the project was given sufficient notice and had the opportunity to voice their concerns;

(c) the design and implementation of consultation activities were appropriate for the scale and scope of the project;

(d) Alliance had sufficient funds to carry out the proposed abandonment activities; and

(e) given the limited scope and duration of abandonment activities, the project was not likely to cause any significant socio-economic effects.

Regarding environmental matters, the NEB found that:

(a) the proposed activities would occur within a largely fenced area on previously disturbed lands;

(b) the site of the proposed activities was surrounded by agricultural lands, providing limited wildlife habitat;

(c) no watercourses or wetlands were located within 30 metres; and

(d) the proposed timing of the project activities is in the fall, after the migratory bird breeding season.

Order and Conditions

The NEB grated Alliance leave to abandon the Facilities subject to certain conditions, including:

(a) Alliance shall abandon the Facilities in accordance with the specifications, standards, commitments made, and other information referred to in its Application;

(b) Alliance shall implement or cause to be implemented, all of the policies, practices, programs, mitigation measures, recommendations, commitments and procedures for the protection of the environment included in or referred to in its Application;

(c) Alliance shall file with the NEB, at least seven days prior to commencing abandonment activities, an Environmental Protection Plan for the abandonment of the Facilities; and

(d) Unless the NEB otherwise directs prior to August 28, 2018, the abandonment order shall expire on August 28, 2018, unless abandonment activities commenced by that date.

Given the nature and scope of the project, and the implementation of the NEB's conditions, the NEB found that any residual environmental effects would be of limited geographic extent, short-term (in the order of weeks or months), reversible and of low magnitude.

The NEB concluded that the carrying out of the abandonment project was not likely to cause significant adverse environmental effects.

Decision

Based on the foregoing, the NEB granted Alliance leave to abandon the Facilities.