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DECISIONS

REGULATORY LAW CHAMBERS


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*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.*

**IN THIS ISSUE:**

## FEDERAL COURT OF APPEAL

***Tsleil-Waututh Nation v Canada (Attorney General) (2017 FCA 128)***
***Judicial Review – Admissibility of Evidence –Canada Evidence Act***

In this decision, the Federal Court of Appeal (the "FCA") considered the following two motions:

(a) a motion by one of the applicants, the Tsleil-Waututh Nation, seeking production of relevant documents from Canada; and

(b) a motion by the Attorney General of Canada ("Canada"), seeking leave to file a supplementary affidavit to correct errors and omissions in an earlier affidavit.

The FCA granted Canada's motion but denied the Tsleil-Waututh Nation's motion, for the reasons summarized below.

The Consolidated Judicial Review Proceedings

The motions were considered by the FCA within the context of the FCA's consideration of fifteen consolidated applications for judicial review. The applicants for review are 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 Decision"); 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.

Canada's Motion

In its motion, Canada sought leave from the FCA to file a supplementary affidavit to correct dates in a previous affidavit and supply missing records. Canada submitted that the errors and omissions were inadvertent.

The FCA noted that the authority for allowing a party to file an additional affidavit on judicial review is provided under Rule 312 of the *Federal Courts Rules*, SOR/98-106 (the "*Rules*"). The FCA explained that case law under Rule 312 has established that additional affidavits are permitted where it is "in the interests of justice," having regard to whether:

- the evidence will assist the court (in particular, its relevance and sufficient probative value);
- admitting the evidence will cause substantial or serious prejudice to the other side; and
- the evidence was available when the party filed its affidavits or it could have been discovered with the exercise of due diligence.

*FCA Finding re Canada Motion*

The FCA noted that the applicants offered no evidence of prejudice and did not oppose Canada's motion. The FCA found that, on balance, the above factors weighed in favour of admitting Canada's supplementary affidavit and therefore granted Canada leave to file its supplementary affidavit.

Tsleil-Waututh Motion

The Tsleil-Waututh Nation's motion sought an order from the FCA to address what it submitted were "serious deficiencies in the evidentiary record."

Specifically, the Tsleil-Waututh Nation asserted that:

(a) a request to Canada for disclosure under Rule 317 of the *Rules* had gone unfulfilled;

(b) the materials that the GIC relied upon in making its decision to approve the Project were not all before the FCA; and

(c) more evidence was in the possession of Canada that should be produced.

Certificate under Section 39 of the *Canadian Evidence Act*

The FCA noted that Canada had issued a certificate under section 39 of the *Canada Evidence Act* ("*CEA*") with respect to two of the documents sought. The FCA explained that *CEA* section 39 allowed Canada to assert that certain information considered by the GIC could not be disclosed.

The certificate covered the following two documents:

1. a letter to the President of the Treasury Board, in November 2016 from the Minister of Natural Resources, regarding the scheduling of consideration of a proposed Order in Council concerning the Project ("Document #1"); and
2. a submission to the GIC from the Minister of Natural Resources, regarding a proposed Order in Council concerning the Project, including signed Ministerial recommendation, summary and accompanying materials ("Document #2").

Section 39(1) of the *CEA* provides as follows:

> 39 (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

The FCA referred to *Babcock v. Canada*, 2002 SCC 57 ("*Babcock*"), where the SCC explained that *CEA* section 39 "is Canada's response to the need to provide a mechanism for the responsible exercise of the power to claim Cabinet confidentiality in the context of judicial and quasi-judicial proceedings." The FCA noted that its role in reviewing a section 39 certificate is limited and that it must refuse disclosure of the information covered by a certificate "without examination or hearing of the information" (citing *Babcock* at para 38). The FCA explained that its review was limited to ensuring that the decision to make the certificate and the certificate itself "flow from statutory authority clearly granted and properly exercised" (citing *Babcock* at para 39).

The FCA explained that its review of a section 39 certificate involved considering whether:

(a) the information for which immunity was claimed fell within the categories listed in subsection 39(2) of the *CEA*; or

(a) whether the Clerk or Minister had improperly exercised the discretion conferred by subsection 39(2).

The FCA explained that the second element required the Clerk or minister to provide a description of the information sufficient to establish, on its face, that the information was a Cabinet confidence, falling within the categories listed in section 39(2) of the *CEA*.

*FCA Findings re Document #1 and Document #2*

The FCA found that the description of Document #2 met that test. Specifically, the FCA found that the description identifying the document as a submission from a Minister to the entire GIC during the month of its meeting qualified for protection under paragraph 39(2)(a) ("a memorandum the purpose of which is to present proposals or recommendations to Council") and paragraph 39(2)(d) ("a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy").

The FCA found that the description of Document #1 did not lead the Court to conclude that it fell under subsection 39(2), as the description provided only a discussion of the timing of a meeting.

Although the description of Document #1 was not sufficient for the FCA to find it falling under subsection 39(2), the FCA found that it would nevertheless deny the Tsleil-Waututh Nation any relief. Document #1 concerned only timing and nothing in the consolidated applications turned on the timing of Cabinet's consideration of the matter. The FCA therefore found that Document #1 was irrelevant and, therefore, not admissible.

The FCA went on to consider whether Rule 317 of the *Rules* required Canada to produce more material to the Tsleil-Waututh Nation.

Production Under Rule 317

The FCA explained that under Rule 317 of the *Rules*, applicants can request from an administrative decision-maker material relevant to an application that is in the possession of the decision-maker and not in the possession of the applicants by serving on the decision-maker and filing a written request, identifying the material requested.

The FCA noted that Rule 317 is only a mechanism by which applicants can obtain the record before the administrative decision-maker. It is not a means by which the record is placed before the reviewing court.

*Admissible Evidence on Judicial Review*

The FCA noted that, as a general rule, on judicial review only the evidentiary record that was before the administrative decision-maker is admissible before the reviewing court.

The FCA noted, however, that there are three judicially recognized categories exceptions. Namely, the FCA may receive an affidavit that:

(a) provides general background in circumstances where that information might assist the reviewing court in understanding the issues relevant to the judicial review;

(b) is necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can

engage in meaningful review for procedural unfairness; and

(c) an affidavit may be received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding.

The FCA found that, in this case, there was no admissible exceptional evidence that would not be available by way of cross-examination on affidavits already filed in the consolidated proceedings. The FCA noted that Canada filed affidavit evidence related to its consultative activities both before and after the Order in Council was made. The Indigenous applicants had also filed evidence about their consultative activities and Canada's consideration or non-consideration of things put to it and its responses or non-responses.

Although the FCA did not grant the production requested by the Tsleil-Waututh Nation, the FCA warned that: "if there are gaps in the evidence Canada may suffer for that if, on the law and the state of the imperfect evidentiary record, it deserves to."

The FCA explained that the Court can draw adverse inferences from missing evidence. (see, e.g., *Pfizer Canada Inc. v Teva Canada Limited*, 2016 FCA 161). If the Tsleil-Waututh Nation put something important to Canada and it turned out there was a gap in the evidence concerning what Canada did in reaction to it, the FCA noted that Canada may have to explain such a gap. Absent evidence of Canada's reaction, the FCA stated that it may be driven to find that Canada did not react.

## ALBERTA ENERGY REGULATOR

***Ernst & Young Inc. – Court-appointed Receiver of Spyglass Resources Corp. – Regulatory Appeal Request***
***Regulatory Appeal Request – Appeal No. 1862824 – Receiver in Bankruptcy –Dismissed***

In this decision, the AER considered Ernst & Young Inc.'s ("E&Y") request under section 38 of the *Responsible Energy Development Act* ("*REDA*") for a regulatory appeal of AER order, ACO 2016-01 (the "Order").

E&Y was the court-appointed receiver of Spyglass Resources Corp. ("Spyglass"). The Order was an abandonment cost order requiring Spyglass to pay abandonment costs of $755,006.50 plus a penalty of $188,751.63. E&Y requested a regulatory appeal of the penalty of $188,751.63.

The AER found that E&Y was not an "eligible person" under *REDA* section 36(b)(ii) and therefore not eligible to request a regulatory appeal. The AER therefore dismissed E&Y's regulatory appeal request.

E&Y Not an Eligible Person under *REDA*

Section 38, 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]…

The AER rejected E&Y's submissions that it was an eligible person by virtue of the Order being a claim in receivership, which reduced the proceeds for unsecured creditors and therefore directly and adversely affected E&Y.

The AER found that although the Order might directly and adversely affect certain creditors, it did not translate into a direct and adverse effect upon E&Y. The AER found that E&Y would still have certain obligations under the receivership order and that the Order did not prevent E&Y from fulfilling its obligations.

The AER concluded that E&Y was not an eligible person and therefore dismissed its regulatory appeal request.

***Tidewater Midstream and Infrastructure Ltd. Approvals – Regulatory Appeal Request by Sorenson***
***Regulatory Appeal Request – Appeal No. 1849419, 1880296 & 1881743 – Gas Injection and Storage- Dismissed***

In this decision, the AER considered Heather and Dale Sorenson's request for a regulatory appeal of a number of licences and approvals (the "Approvals") issued to Tidewater Midstream and Infrastructure Ltd. ("Tidewater") related to gas injection and storage facilities.

The AER determined that the Sorensons were not directly and adversely affected by the Approvals and therefore were not eligible to request a regulatory appeal. The AER therefore dismissed the regulatory appeal requests.

The Sorensons' primary concerns were with safety in the event of an incident relating to Tidewater's gas injection and storage operations.

The AER noted that the concerns the Sorensons raised were the same or similar to those raised previously in statements of concern with respect to the initial facility and pipeline applications filed by Tidewater. The AER noted that it had considered those concerns and found that the Sorensons would not be directly and adversely affected by the Approvals.

In addition, the AER found that:

- given the nature and depth of the reservoir into which injection would occur, and the AER's numerous requirements which are protective of groundwater sources, it was unlikely that the Sorenson's well water would be impacted; and
- concerns about odours and noise were raised and addressed by the AER with respect to the Sorenson's' previous statements of concern.

The AER held that the Sorensons had not demonstrated that they may be directly and adversely impacted by the Approvals and were therefore not an "eligible person" under *REDA* section 38.

***Tidewater Midstream and Infrastructure Ltd. Approvals - Regulatory Appeal Request by Partsch***
***Regulatory Appeal Request – Appeal No. 1849417, 1859627, 1879309, etc. – Dismissed***

In this decision, the AER considered a request for regulatory appeal by Mike and Faye Partsch (the "Partschs") of a number of licences and approvals (the "Approvals") issued to Tidewater Midstream and

Infrastructure Ltd. ("Tidewater") related to gas injection and storage facilities.

The AER found that the Partschs were not directly and adversely affected by a decision made under an energy resource enactment and were therefore not eligible to request a regulatory appeal. The AER therefore dismissed the requests for a regulatory appeal of the Approvals.

Reasons for Decision

The AER found that the primary concerns raised by the Partschs regarding the pipeline related to safety in the event of an incident. In coming to its decision, the AER noted that it considered the following:

(a) Tidewater was obligated to comply with a number of operational requirements and technical specifications in the design, construction, and operation of its pipeline;

(b) Tidewater would also use Supervisory Control and Data Acquisition equipment to provide 24 hour a day monitoring of the pipeline for possible leaks or ruptures;

(c) the pipeline would have emergency shutdown valves and pressure control devices which would activate in the event of a change in pressure; and

(d) the distance of the nearest boundary of the Partschs' land to the pipeline was approximately 450 meters.

Given the above, and the fact that the pipeline would transport sweet natural gas, the AER found the Partschs' had not demonstrated that they were or might be directly and adversely affected by the Approvals.

With respect to the gas storage and injection facilities, the AER noted that the following concerns raised by the Partschs:

- the potential for a leak or explosion and the Partschs had cited examples of gas leaks and fires that occurred at facilities in other jurisdictions;
- gas injection into the reservoir could cause earthquakes which could break the well casings used to inject natural gas; and
- other concerns related to drinking water, odours, and noise.

The AER found that the examples of incidents cited by the Partschs were not relevant to the AER's consideration of whether the Partschs might be impacted by Tidewater's storage scheme and related facilities because the cited incidents related to different operators in separate jurisdictions, operating under different requirements.

With respect to induced seismicity, the AER stated that it was not aware of any instances of induced seismic events occurring in the Dimsdale Paddy A reservoir, or that same formation elsewhere in Alberta. The AER noted that the reservoir pressure is very low, and that Tidewater's operations would not result in an exceedance of the initial reservoir pressure. The AER found that it was exceedingly unlikely that gas injection and storage in the Paddy Dimsdale A at or below original reservoir pressure would result in an earthquake.

With respect to other concerns related to drinking water, odours, and noise, the AER found that such concerns had previously been addressed in the AER's decision on the Partschs statement of concern.

The AER found that the Partschs failed to demonstrate that they were or might be directly and adversely affected by the Approvals. The AER therefore concluded that the Partschs were not an eligible person for the purposes of section 38(1) of *REDA* and dismissed the request for a regulatory appeal.

***Lexin Resources Ltd.– Request for Reconsideration of Decision 2013 ABAER 020***
***Request of Reconsideration - Granted***

In this decision, the AER considered an application by Lexin Resources Ltd. ("Lexin") to reconsider decision 2013 ABAER 020 pursuant to section 42 of the *Responsible Energy Development Act* ("*REDA*").

Section 42 of *REDA* provides:

> The regulator may, in its sole discretion, reconsider a decision made by it and may confirm, vary, suspend or revoke the decision.

In the AER's view, *REDA* section 42 is not intended to provide any additional appeal mechanisms beyond those provided in sections 38 and 45 of *REDA*. Given the specific appeal processes available under *REDA*, and the need for finality and certainly in its decisions, the AER stated that it will only exercise its discretion to reconsider a decision under section 42 in the "most extraordinary circumstances" and where it is satisfied that there are exceptional and compelling grounds to do so.

The AER found that there being no viable licensee to take care and custody of the wells and related pipelines constituted extraordinary circumstances and that it was an appropriate case for the AER to exercise its discretion under section 42 of *REDA* to reconsider Decision 2013 ABAER 020.

The AER decided to conduct the reconsideration without holding a hearing.

***Tourmaline Oil Corp. and Exshaw Oil Corp. Applications – Statements of Concern from Richard Trucking Ltd.***
***Statement of Concern – SOC No. 30573, 30627 & 30628) – No Hearing***

Richard Trucking Ltd. ("RTL") filed statements of concern ("SOC") (No. 30573, 30627, and 30628) respecting Tourmaline Oil Corp. and Exshaw Oil Corp. Applications No. 1877798, 1881658 and 1881660.

The AER determined that a hearing was not required under an enactment, or necessary, to consider the concerns outlined in RTL's SOC.

In its review of RTL's concerns, the AER found that:

(a) the proposed well was to be located on an existing multi well pad lease site, which was already fully bermed. Therefore, there should not be any issues with drainage of surface water;

(b) the concerns regarding windblown debris were operational concerns and that RTL could contact Tourmaline Oil Corp. or Exshaw Oil Corp., and the local AER field centre, with any complaints; and

(c) with respect to traffic concerns, the AER noted that the access road to and from the existing wellsite at 8-21-78-7W6M was not located on RTL's lands and the traffic would not impede or trespass on RTL's lands.

The AER found that other concerns indicated in RTL's SOC had been addressed by Tourmaline Oil Corp. and Exshaw Oil Corp.

***Keyera Energy Ltd. Application - Statement of Concern from OMERS Energy Inc.***
***Statement of Concern – SOC No. 30729 – No Hearing***

In this decision, the AER considered a statement of concern ("SOC") (No. 30729) from OMERS Energy Inc. ("OMERS") regarding Keyera Energy Ltd. ("Keyera") Application No. 1886243.

The AER determined that a hearing was not required under an enactment, or necessary, to consider the concerns outlined in the SOC.

In its SOC, OMERS requested that "engagement with OMERS be completed, or there be no reference to discharge or transfer to the OMERS reservoir in the renewed Approval" regarding the issue of transferring industrial runoff to the OMERS reservoir.

The AER noted that on June 9, 2017, Keyera requested the removal of all references to the OMERS reservoir in their upcoming renewed Environmental Protection and Enhancement Act ("*EPEA*") approval.

The AER noted that following Keyera's request, all references to the OMERS reservoir were removed from the *EPEA* approval.

Based on the above, the AER found that the remedy that OMERS requested had been granted and that given OMERS' original concerns had been addressed, OMERS' would not be directly and adversely affected by approval of the application.

***AER Bulletin 2017-12: Implementation of OneStop for Pipelines Licence Applications***
***AER Bulletin – Pipelines Licence Applications***

In an AER bulletin dated June 26, 2017, the AER announced implementation of a new online process for new pipeline construction applications under the *Pipeline Act* using the "OneStop" platform.

The Bulletin stated that new pipeline construction applications must be submitted using OneStop. The AER also announced the release of quick reference guides explaining how to use OneStop to submit new pipeline construction applications. The AER noted that the information requirements for pipeline licence applications have not changed.

For more information, the AER refers stakeholders to its "Integrated Decision Approach" webpage.

## ALBERTA UTILITIES COMMISSION

***Power Renewable Energy Corporation - Jenner Wind Power Plant and Interconnection (Decision 21394-D01-2017)***

***Wind Power Plant Application –Noise Impact Assessment – Rule 12 – Class C2 Adjustment***

In this decision, the AUC considered the following applications:

(a) facility applications from Power Renewable Energy Corporation ("PRE"):

  (i) to construct and operate the 120-megawatt Jenner Wind Power Plant (the "Wind Power Plant Application"), and

  (ii) to construct and operate the Halsbury 306S Substation and transmission line 949L;

(b) a needs identification document application from the Alberta Electric System Operator (the "AESO NID Application"); and

(c) a facility application from AltaLink Management Ltd. to alter the Jenner 275S Substation.

AESO NID Application

The AUC found that the AESO's assessment of the need to be correct and that approval of the proposed developments, including the Preferred Route of transmission line 949L, was in the public interest, having regard to the social and economic effects of the project and its effect on the environment.

The AUC approved the AESO NID Application.

Jenner Wind Power Plant Noise Impacts

PRE retained RWDI Consulting Engineers & Scientists ("RWDI") to prepare a noise impact assessment ("NIA") for the project.

The AUC noted that this proceeding was the first time it considered an application utilizing a Class C2 adjustment (to address noise issues related to wind masking).

The AUC explained that *AUC Rule 012: Noise Control* ("*Rule 012*") allows project proponents to apply for a Class C2 adjustment to the permissible sound level ("PSL") at a residence if the proponent can demonstrate that the ambient wind sound level at a particular dwelling is higher than an assumed ambient sound level. In other words, the Class C2 adjustment accounts for "wind masking," which can occur when the sound of the wind at a residence "drowns out" the sound of the wind turbine. The maximum available Class C2 adjustment under *Rule 012* is 10 dBA.

The AUC went on to explain that to qualify for a Class C2 adjustment, the project proponent must complete an ambient wind sound level survey to determine the difference between the ambient sound level set out in *Rule 012* and the measured ambient sound level.

The AUC first assessed the NIA without the requested Class C2 adjustment. The AUC found that:

- the NIA met the requirements of *Rule 012*; and
- the cumulative sound level predicted by the NIA met the daytime and nighttime PSL at all receptor locations assessed.

The AUC noted that PRE's rationale for applying for a Class C2 adjustment was driven primarily by concerns about meeting the nighttime PSL when conducting post-construction noise monitoring. The AUC found that:

- PRE demonstrated that the wind in the area would likely result in an ambient sound level greater than the assumed ambient sound level (i.e., wind masking) at receptors R3 and R7; and
- the methodology used to conduct the ambient wind sound level survey in aid of its requested Class C2 adjustment was acceptable and met the requirements of *Rule 012*.

However, the AUC did not accept the NIA's conclusion that a Class C2 adjustment allows for a broad adjustment to the nighttime PSL. The AUC found that *Rule 012* provides for a Class C2 adjustment to the PSL for a specific wind speed and wind direction when that wind speed and direction is present near the applicable dwelling (i.e. receptor). The AUC noted that in this case, the NIA was unable to collect sufficient data for many of the wind directions. In particular, the NIA did not collect sufficient data for the wind direction relative to the nearest turbine to receptor R4, for which PRE was applying for a Class C2 adjustment.

The AUC found that:

(a) because PRE had not applied for a Class C2 adjustment at receptor R7, it could not apply for a Class C2 adjustment at receptor R4 based on measurements at receptor R7; and

(b) the clause regarding dwellings with acoustically similar environments was intended to refer to groupings of houses, such as receptors R2 and R3, and was not meant to allow for

measurements at two or more receptors that are not grouped or in immediate proximity to each other.

For those reasons, and having regard for the fact that the project would be in compliance with the PSL without a Class C2 adjustment at receptor R4, the AUC denied the request for the Class C2 adjustment at receptor R4.

With respect to the applied for C2 adjustment at Receptor R3, the AUC found that the receptors R2 and R3 were within sufficiently close proximity to each other and acoustically similar. The AUC therefore approved the applied for Class C2 adjustment for those receptors of +4dBA for a nighttime PSL of 44 dBA for a wind direction of 150 degrees, +/- 15 degrees at a wind speed of 4 m/s or higher for receptors R2 and R3.

Wind Power Plant Approval

With respect to the other aspects of the Wind Power Plant Application, the AUC found that:

(a) the technical, siting, environmental and noise requirements for the power plant comply with the requirements prescribed in Rule 007; and

(b) the participant involvement program undertaken by PRE was satisfactory and met the requirements of Rule 007.

The AUC concluded that the adverse effects of the wind power plant, including noise and impacts to the environment, could be mitigated to an acceptable degree. The AUC therefore considered the project to be in the public interest in accordance with Section 17 of the *Alberta Utilities Commission Act*.

***ATCO Gas and Pipelines Ltd. - 2015 Capital Tracker True-up Application (Decision 21843-D01-2017)***
***Performance Based Regulation – Capital Tracker True-up***

In this decision, the AUC considered ATCO Gas and Pipelines Ltd.'s ("ATCO Gas") application requesting approval of its 2015 capital tracker true-up, capital tracker treatment for the capital costs related to the 2013 southern Alberta floods for the years 2014 and 2015, and its updated forecast for the 2017 Steel Mains Replacement ("SMR") capital tracker program.

Capital Tracker and K-Factor Overview

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

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

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

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

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

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

Criterion 1 requires a two-stage assessment of each project or program for which capital tracker treatment is requested. At the first stage (project assessment), an applicant must demonstrate the project is:

(a) required to provide utility service at adequate levels; and, if so,

(b) that the actual scope, level and timing of the project are prudent.

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

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

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

AUC Approach to Capital Tracker True-up Applications

The AUC explained that for a capital tracker true-up application, it will assess all three criteria for capital tracker treatment for capital projects or programs not previously considered.

For projects or programs for which the AUC has previously confirmed are necessary (first part of Criterion 1) in prior capital tracker decisions, the AUC will not reassess of the need in the absence of evidence that the project or program is no longer required. However, the AUC will assess the scope, level and timing of each project or program for prudence, and whether the actual costs of the project or program were prudently incurred, as required by the second part of the project assessment under Criterion 1.

The AUC explained that it will not reassess against the Criterion 2 unless the driver for the project or program had changed.

Decision Summary

The AUC found that:

- ATCO Gas' proposed grouping into projects or programs was reasonable;
- the need for the capital tracker projects or programs included in the 2015 true-up was confirmed and the actual scope, level, timing and actual costs of each of the projects or programs included in the 2015 true-up were prudent. As a result, each of those programs or projects met the project assessment requirement under Criterion 1;
- the capital tracker projects or programs included in the 2015 true-up satisfied the accounting test requirement of Criterion 1. Therefore, all of ATCO Gas's programs or projects included in the 2015 true-up satisfy the requirements of Criterion 1 for capital tracker treatment;
- the previously-approved capital tracker projects or programs included in the 2015 true-up continue to meet the requirements of Criterion 2. The new Alberta Floods program also meets the requirements of Criterion 2;
- all of ATCO Gas's capital tracker projects or programs included in the 2015 true-up satisfy the two-tiered materiality test requirement of Criterion 3;
- the Alberta Floods program meets all three capital tracker criteria based on the actual expenditures in 2014; and
- The Steel Mains Replacement (SMR) capital tracker program meets all three capital tracker criteria based on an updated forecast basis for 2017.

The AUC approved:

- the 2015 K factor true-up refund of $2.9 million and $1.8 million in the north and south, respectively;
- the portions of the 2017 forecast K factor amounts of $0.8 million and $0.5 million in the north and south, respectively, arising from the approval of the 2017 updated SMR forecast; and
- The portion of the 2014 K factor amount associated with the Alberta Floods program of $0.375 million in the south.

***Paul First Nation – Application for Review of AUC Decision 21030-D02-2017 (Decision 22560-D01-2017)***
***Leave Application – Review of AUC Decision***

In this decision, an AUC review panel considered whether to grant leave to Paul First Nation to file an application for review of Decision 21030-D02-2017 approving Alberta PowerLine General Partner Ltd.'s application to construct the Fort McMurray 500-Kilovolt Transmission Project.

For the reasons summarized below, the review panel denied the leave request.

Paul First Nation Leave Request

Paul First Nation submitted that it holds and exercises Aboriginal and Treaty No. 6 rights throughout its territory, under Section 35 of the *Constitution Act*. It added that the project is directly adjacent to Wabamun Indian Reserve 133A lands and former reserve lands and that it will *prima facie* directly and adversely affect Paul First Nation. Further, Paul First Nation submitted that it was identified by the Alberta Consultation Office as a First Nation that will be affected and requires consultation. It cited Alberta PowerLine's participant involvement program and Decision 21030-D02-2017 in support.

Paul First Nation acknowledged that it did not participate in Proceeding 21030. It added that in order to grant leave, the Commission requires the existence of extraordinary circumstances that prevented Paul First Nation's participation in Proceeding 21030. It

submitted that it was unable to gain standing due to leadership and staff transitions, and capacity constraints which limited Paul First Nation's ability to successfully apply for standing. More particularly, Paul First Nation contended that it had applied for standing in Proceeding 21030 and that the attachment to the standing application was not received by the Commission and follow-up communications from the Commission to Paul First Nation were inadvertently overlooked due to a transition in staff and lack of a consultation manager.

Principles re Review of AUC Decisions

The AUC stated that the review process is not intended to allow parties, who had notice of a proceeding, a second opportunity to challenge a project that they oppose. The AUC noted that such an approach would be inefficient, unfair and create considerable regulatory uncertainty.

The AUC explained that section 3(2) of *AUC Rule 016: Review of Commission Decisions* ("*Rule 016")* grants broad discretion to a reviewing panel's decision whether to grant leave to review. With respect to applications for review filed outside the timelines set out in Section 3(3) of *Rule 016*, the AUC noted the following factors considered in previous AUC decisions regarding applications for review:

- whether a person had effective notice of a hearing and a fair opportunity to pursue his or her issues before the Commission in the first instance;
- the nature of the proceeding that led to the original decision (e.g. written process or full public hearing);
- whether the issues the review applicant intends to raise were issues considered in the original proceeding;
- whether other, extraordinary circumstances existed that prevented the participation of the person;
- whether upon learning of a decision or approval, the person acted expeditiously to initiate a review of that decision;
- whether approval of the project had the potential to materially affect a person's future use of their property; and
- the potential prejudice to the original application from allowing a person to file a review application outside of the timeline specified in *Rule 016.*

In light of the above principles and factors, the review panel found that the Paul First Nation's leave request raised two issues, namely:

(a) whether Paul First Nation had effective notice of Proceeding 21030, the hearing, and a fair opportunity to participate; and

(b) in light of the nature of the proceeding, whether Paul First Nation had made a case for the existence of extraordinary circumstances.

The review panel found that Paul First Nation had adequate notice of Proceeding 21030 and fair opportunity to participate, but that other than filing a statement of intent to participate, Paul First Nation did not follow up when asked to do so or take any other steps to bring its concerns with the project forward.

The review panel found that granting leave:

(a) would be contrary to the principle of finality of an AUC decision; and

(b) would afford Paul First Nation a second opportunity to make submissions on the issues considered in the proceeding such as historical resource impact assessment.

No Exceptional Circumstances

The review panel went on to consider whether Paul First Nation had demonstrated exceptional circumstances.

With respect to the extraordinary circumstances advanced by Paul First Nation, the review panel found that:

(a) there was no support for the submission that leadership transitions or capacity constraints prevented Paul First Nation from participating in the proceeding; and

(b) Paul First Nation had the opportunity to file information regarding its rights and concerns and to ask for further information, but chose not do so.

Decision

The AUC found that Paul First Nation was not deprived of notice or a fair opportunity to participate in Proceeding 21030 and that it had not demonstrated the existence of extraordinary circumstances preventing it from participating in the proceeding. The AUC review panel therefore dismissed the leave request of Paul First Nation.

## NATIONAL ENERGY BOARD

***NEB signs agreement with Mexico's Energy Regulatory Commission (NEB News Release)***
***Press Release – International Collaboration***

June 13, 2017 – Montreal, Quebec – National Energy Board

The NEB announced in a press release its entering into a Memorandum of Understanding ("MOU") with Mexico's Energy Regulatory Commission – *Comisión Reguladora de Energía* – to guide ongoing collaboration and the exchange of technical and regulatory information.

The NEB stated that the MOU provides a framework for the two organisations to share experiences, lessons learned and best practices on subjects such as pipeline safety, damage prevention, safety culture, transparency and communications.