REGULATORY
LAW CHAMBERS

ENERGY REGULATORY REPORT

This monthly report summarizes matters under the jurisdiction of the Alberta Energy Regulator, the Alberta Utilities Commission and the National Energy Board and proceedings resulting from these energy regulatory tribunals. For further information, please contact a member of the RLC Team.

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ALBERTA COURT OF APPEAL

ENMAX Energy Corporation v Alberta Utilities Commission, 2019 ABCA 222

Permission to Appeal - Denied

In this decision, the Alberta Court of Appeal ("ABCA") considered the applications of ENMAX Energy Corporation ("ENMAX"), TransCanada Energy Ltd. ("TCE") and Capital Power Corporation ("Capital Power") (collectively, the "Applicants") for permission to appeal Decision 790-D06-2017 (the "Invoicing Decision"). In the Invoicing Decision, the AUC determined that the power generators who paid the unlawful line loss charges would be the parties ordered to pay more or be reimbursed by the independent system operator ("ISO"), which operates as the Alberta Electric System Operator ("AESO").

The ABCA denied the applications for permission to appeal the Invoicing Decision, finding there was nothing it could usefully add or correct. There was no question of law or jurisdiction which required the ABCA's intervention.

Background

Transmission line loss charges are charged to power producers to recover the cost of transmission line losses which take place when electricity is transmitted over lengthy alternating current transmission lines. The AESO recovers the cost of transmission line losses through the ISO tariff. In 2015, the AUC decided it could order a retroactive or retrospective tariff-based remedy to correct for a decade of overpayments and underpayments of unlawful line loss charges.

In Decision 790-D03-2015, issued prior to the Invoicing Decision, the AUC determined that going forward from January 1, 2017, the previous methodology for calculating transmission line losses should be replaced with a new methodology as directed by the AUC. The ABCA noted that Decision 790-D03-2015 had not been challenged by the Applicants.

In the subsequent Invoicing Decision, the AUC decided which power generators were going to be charged for not paying their fair share of the transmission line losses over the period in which the unlawful line loss rule was in effect and which generators were to be credited for paying more than their fair share of the transmission line losses over that same period. The AUC decided that the power generators (or holders of power purchase agreements) who paid the unlawful line loss charges would be the parties ordered to pay more or be reimbursed by the AESO. The AUC ordered the AESO to issue final invoices to the same parties which received the original invoices for line losses during the period, January 1, 2006 to December 31, 2016.

In tariff terms, those power generators which received supply transmission service ("STS") on the Alberta interconnected system when the charges were incurred would be the parties receiving invoices for additional line loss charges or credits for line loss charges previously paid.

The Applicants were all former holders of power purchase agreements which were surrendered to the Balancing Pool in 2016. The problem presented in 2016 was that several significant power generators surrendered their power purchase agreements and assigned their STS contracts to the government-funded Balancing Pool. There was a provision in the ISO tariff which permitted assignments of STS. This provision stipulated that when such assignments take place, the ISO must apply to the account of the assignee all obligations of the assignor associated with system access service, "including any and all retrospective adjustments due to deferral account reconciliation or any other adjustments."

Grounds of Appeal

The Applicants sought permission to appeal the Invoicing Decision on the ground that the AUC erred in law in ordering the AESO to invoice or credit those entities which held STS contracts at the time the losses occurred and not to the entities which held STS contracts at the time the invoices were ultimately issued.

Specifically, the Applicants' proposed grounds of appeal were as follows:

(a) the AUC unreasonably declined to apply the terms of the ISO tariff in determining whom the AESO must invoice;

(b) the AUC's interpretation of the assignment provision of the ISO tariff was both incorrect and unreasonable;

(i) incorrect in that it ignored the ordinary and plain meaning of the text of the assignment provision; and

(ii) unreasonable in that it departed from past decisions regarding the treatment of assignments under the ISO tariff. The interpretation contradicted findings the AUC made in its decision on its jurisdiction to order a remedy to correct for the payment of unlawful transmission line loss charges and it was based on unsupported findings that the interpretation argued by the Applicants would not promote fair, efficient, and open competition.

Legislative Scheme

The overriding question sought to be determined by the ABCA was whether section 15(2) of the ISO tariff prevented or ought to prevent the AUC from directing the ISO to invoice prior holders of power purchase arrangements and former recipients of transmission system access service after they have assigned their power purchase arrangements and their transmission system access service agreements to another market participant.

In seeking permission to appeal, the Applicants pointed to the assignment and novation provision in the ISO tariff which was approved by the AUC and had been a part of the ISO tariff since 2003. Section 15(2) of the ISO tariff stated:

> 2(1) A market participant may assign its agreement for system access service or any rights under it to another market participant who is eligible for the system access service available under such agreement and the ISO tariff, but only with the consent of the ISO, such consent not to be unreasonably withheld.
>
> (2) The ISO must apply to the account of the assignee all rights and obligations associated with the system access service when a system access service agreement for Rate DTS, Demand Transmission Service, Rate FTS, For Nelson Demand Transmission Service, or Rate STS, Supply Transmission Service, has been assigned in accordance with subsection 2(1) above, including any and all retrospective adjustments due to deferral account reconciliation or any other adjustments. [Emphasis added by the ABCA.]

In the Invoicing Decision, the AUC decided that section 15(2) of the ISO tariff did not prevent it from ordering the ISO to invoice those who held STS contracts at the time the unlawful line loss charges were assessed (i.e., the assignor, not the assignee). This determination was based on the AUC's finding that to assess the assignee would conflict with the purposes of the *Electric Utilities Act* and the *Transmission Regulation*.

The ABCA set out the following provisions from the *Electric Utilities Act* and *Transmission Regulation*.

- Section 5 of the *Electric Utilities Act* which sets out the purposes of the act including providing for "rules so that an efficient market for electricity based on fair and open competition can develop in which neither the market nor the structure of the Alberta electric industry is distorted by unfair advantages of government-owned participants or any other participant."

- Subsections 17(a) and (d) of the *Electric Utilities Act*, which impose a duty on the AESO to operate the power pool in a manner that promotes the fair, efficient and openly competitive exchange of electric energy and to manage and recover the costs of transmission line losses.

- Subsection 31(1)(a) of the *Transmission Regulation*, which authorizes the AESO to make rules to reasonably recover the cost of transmission line losses by establishing loss factors for generating units, importers and exporters based on their respective locations and their respective contributions to transmission line losses.

- Finally, section 116 of the *Electric Utilities Act*, which makes the ISO tariff subject to regulation by the AUC and section 121 of the Act which requires the AUC to ensure, when approving a tariff, that the tariff is not unduly preferential, arbitrary or unjustly discriminatory or inconsistent with or in contravention of the Act or any other Act or any law.

Regarding sections 116 and 121 of the *Electric Utilities Act*, the ABCA found that these provisions provide that the AUC is the final arbiter of how the ISO tariff will be applied.

Test for Permission to Appeal

The parties agreed that the test for permission to appeal regarding these applications ought to be:

(a) whether the appeal was prima facie meritorious;

(b) whether the question of law and/or jurisdiction was of significance to the practice;

(c) whether the question of law and/or jurisdiction was of significance to the action itself;

(d) whether permitting an appeal would unduly hinder the progress of the AUC's proceedings; and

(e) the standard of appellate review which would likely be applied if permission to appeal was granted.

The ABCA described that test under section 29 of the *Alberta Utilities Commission Act* as being much simpler; namely, whether there was a question of law and/or jurisdiction which merits or requires an answer from the ABCA. The ABCA found that the factors which the parties agreed ought to be considered in determining whether the test was met, while not exhaustive, were certainly relevant considerations. The ABCA confirmed, however, that other considerations might also be relevant.

Analysis

Standard of Review

The ABCA suggested that the standard of review that would apply would be reasonableness. As consistently recognized by the courts, a specialized tribunal interpreting its home statute in an area that is core to its mandate is a matter which attracts a standard of review of reasonableness (citing *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 21, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54, and *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34). The ABCA found that this presumption of reasonableness was even stronger when the AUC is interpreting a tariff provision which it approved in the first place.

Importance of the Question to the Parties

The ABCA noted there was potential for the transfer of tens or even hundreds of millions of dollars from one power generator or utility customer to another. However, in the ABCA's view, it was important that no new charges were levied. Rather, the charges already levied and paid were to be distributed more fairly and in accordance with the *Electric Utilities Act* and *Transmission Regulation*.

Significance of the Question to the Practice

The ABCA found that if the Invoicing Decision was unduly preferential, arbitrary, unjustly discriminatory, or inconsistent with or in contravention of the *Electric Utilities Act* or *Transmission Regulation*, then the question could be of significance to the practice.

Hindering Proceedings?

The unanimous view of the AUC was that this matter went on long enough. In January of 2018, AUC Chairman, the late Willie Grieve, Q.C., notified participants that the AUC would not review the impugned decisions because it would prolong market uncertainty. He expected that the permission to appeal process would proceed expeditiously.

The ABCA found that granting permission to appeal would further hinder the progress of the AUC's proceedings. While this consideration might not be sufficient to justify a denial of permission to appeal, the ABCA acknowledged that industry participants would have to wait for the remedy to which they have been found to be entitled pending an appeal.

The ABCA found that the AUC's proceedings, having already taken more than a decade to complete, at the very least, may be a reason to apply heightened scrutiny to the issue of whether there was a compelling question of law or jurisdiction which required a decision by the ABCA.

Did the Question Merit an Opinion from the ABCA?

The ABCA considered whether the AUC's interpretation of section 15(2) of the ISO tariff was an unreasonable departure from past practices.

The ABCA found that the AUC not being able to dictate ultimate liability was not a reason for the AUC to refrain from making an order that was consistent with prior practice and which attempted to reward those who utilized the transmission system in a

manner which reduced losses and charged those who utilized the transmission system in a manner which increased line losses.

In the Invoicing Decision, the AUC found that the ISO tariff was "subordinate to the AUC's statutory obligation to safeguard the fair, efficient and openly competitive operation of the market and to ensure that rates are just and reasonable."

The ABCA found that there was support in the *Electric Utilities Act* for the AUC's finding that an ISO tariff provision cannot prevent it from discharging its mandate to ensure that the ISO and its tariffs and rules were consistent with the purposes and dictates of the *Electric Utilities Act* and that those purposes may require a finding by the AUC that a particular ISO tariff provision which it approved could not have been intended to apply in circumstances such as those which presented themselves in this case.

The ABCA found that there was little merit to the Applicants' argument that the AUC's decision that section 15(2) of the ISO tariff was inapplicable to the surcharges and refunds ordered as a consequence of its finding that the ISO's line loss charges were unlawful was erroneous or unreasonable.

The ABCA found no question of law was raised by the AUC's acknowledgment that it could only determine who to invoice, not who would bear ultimate responsibility. The question of law was whether section 15(2) prevented or ought to prevent the AUC from directing the AESO to invoice the holders of transmission system access service who paid the unlawful transmission line loss charges.

The ABCA further found that the Applicants' argument that the AUC's interpretation of section 15(2) of the ISO tariff promoted fair, efficient, and open competition lacked evidentiary support and failed to raise a question of law. The ABCA found that the AUC is a specialized tribunal and its views on what will or will not promote fair, efficient and open competition must be accorded great deference and can be made without direct evidence.

Findings

The ABCA denied the Applicants permission to appeal the Invoicing Decision.

The ABCA indicated there was nothing it could usefully add or correct. There was no question of law or jurisdiction which required the ABCA's intervention.

ALBERTA ENERGY REGULATOR

Request for Reconsideration of Application No. 1891278 by Desmond Anderson and Bonnie Anderson - Alberta Products Pipe Line Ltd. License No. 7634 (AER Reconsideration No.: 1920885)

Reconsideration Request

In this decision, the Alberta Energy Regulator ("AER") considered the request by Desmond Anderson and Bonnie Anderson under section 42 of the *Responsible Energy Development Act* (the "*REDA*") for a reconsideration of the AER's decision to approve the licence.

The AER denied the request to reconsider its decision.

Legislative Scheme

The AER has authority to reconsider its decisions pursuant to section 42 of the *REDA*. Pursuant to section 42, the AER has sole discretion whether to reconsider a decision made by it. Given the appeal processes available under the *REDA*, and the need for finality and certainty in its decisions, the AER will only exercise its discretion to reconsider a decision in extraordinary circumstances and where it is satisfied that there are exceptional and compelling grounds to do so.

Pipeline Approval Decision

The application was approved on the basis that *Directive 056: Energy Development Applications and Schedules* ("*D056*") requirements were met for the pipeline project as a whole.

After the application was approved, an AER inspector determined *D056* was not met with respect to the valve installation on the Andersons' property and issued a notice of non-compliance. Alberta Products Pipeline Ltd. ("APPL") remedied the non-compliance by providing additional information to the Andersons in writing about the valve installation on their property and the company was then considered to be in compliance.

Request for Reconsideration

The Andersons raised environmental and safety concerns but offered little information to support these concerns. The AER found that the concerns related to the project appeared to be primarily related to the appearance of the valve installation on the Andersons' property. Given the type of project, the nature of the Andersons' concerns and the fact that the non-compliance was addressed, the panel determined that no further process was warranted.

In order to avoid this type of situation in the future, the AER strongly advised APPL to provide more detailed written information when it meets with a landowner to ensure that there is a clear record of the level of information provided and to ensure that the landowner is afforded the opportunity to clearly understand what is contemplated for their property before the surface lease agreement is signed.

Request for Regulatory Appeal by Mike Partsch - Tidewater Midstream and Infrastructure Ltd. (AER Request for Regulatory Appeal No.: 1919481)

Request for Regulatory Appeal - Dismissed

In this proceeding, the Alberta Energy Regulator ("AER") considered Mike Partsch's request under section 38 of the *Responsible Energy Development Act* (the "*REDA*") for a regulatory appeal of the AER's decision to issue Amending Approval No. 12203E (the "Amending Approval").

The AER found that Mr. Partsch did not show that he may be directly and adversely affected by the Amending Approval and therefore was not an "eligible person" under section 36(b)(ii) of the *REDA*. Accordingly, the AER dismissed the request for regulatory appeal.

AER Approval Decision

The AER reviewed the wording of the decision letter sent to Mr. Partsch dated February 27, 2019 (the "Decision Letter") and confirmed that the Decision Letter stated in error that the maximum allowable reservoir pressure was lower than the initial reservoir pressure. In fact, the approved pressure was no higher than the initial reservoir pressure. However, the Decision Letter correctly stated that the reservoir was not in itself a pressure vessel, and any risk of fracturing the reservoir rock was mitigated by the maximum wellhead injection pressure assigned to the approval.

Eligible Person

The AER found that Mr. Partsch was not eligible to request a regulatory appeal in this matter. It was on this basis that the AER dismissed the request for regulatory appeal.

Section 38 of the *REDA* which 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.
>
> [Emphasis added.]

The AER found that the Amending Approval was a decision made under an energy resource enactment and therefore an appealable decision. Mr. Partsch's request for a regulatory appeal was filed in accordance with the rules. The key issue was whether Mr. Partsch was an eligible person within the meaning of section 38(1) of the *REDA*.

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

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

The decision removed the maximum gas injection rate from the approval. All other terms and conditions of Approval 12203D remained the same.

Mr. Partsch submitted that Tidewater's entire gas storage system should be pressure tested to guarantee there are no leaks prior to it being put into service and that the system should be retested after all wells are drilled to ensure that reservoir integrity has been maintained.

The AER noted that reservoir and wellbore containment of the gas storage system were addressed by both geological and engineering controls. The existence of the initial gas pool over geological time confirmed the existence of a trapping mechanism and containment. Engineering controls in place included annual reservoir pressure surveys under *Directive 040* and annual packer isolation tests under *Directive 051*.

Further, the AER found that Mr. Partsch's concerns related generally to Tidewater's gas storage project were outside the scope of and did not relate specifically to the Amending Approval. Mr. Partsch did not indicate whether or how he would be impacted by the Amending Approval.

Summary

The AER found that Mr. Partsch did not show that he may be directly and adversely affected by the Amending Approval and therefore was not an "eligible person" under section 36(b)(ii) of the *REDA*. Accordingly, the AER dismissed the request for regulatory appeal.

Request for Regulatory Appeal by Aqua Terra Water Management Inc. (AER Request for Regulatory Appeal No.: 1916371)

Request for Regulatory Appeal - Application Closure - Appealable Decision - Dismissed

In this decision, the Alberta Energy Regulator ("AER") considered Aqua Terra Water Management Inc. ("Aqua Terra")'s request under section 38 of the *Responsible Energy Development Act* (the "*REDA*") for a regulatory appeal of the AER's closure of Application No. 1913286 filed by Aqua Terra (the "Application Closure").

The AER found that the Application Closure was not an appealable decision as defined in the *REDA*. Therefore, the request for a regulatory appeal was dismissed.

Legislation

Section 38 of the *REDA* 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 "appealable decision" is defined in section 36 of the *REDA*. For this regulatory appeal request, the relevant definition is contained in section 36(a)(iv). It says an appealable decision includes:

> A decision of the Regulator that was made under an energy resource enactment, if that decision was made without a hearing.

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

> A person who is directly and adversely affected by a decision of the Regulator that was made under an energy resource enactment, if that decision was made without a hearing.

The following AER requirements were also at issue and relevant to Aqua Terra's application for a scheme of fluid disposal under section 39(1)(d) of the *Oil and Gas Conservation Act* ("*OGCA*"):

(a) section 15.005(e) of the *Oil and Gas Conservation Rules* ("*OGCR*"), which requires an applicant under section 39(1)(d) of *OGCA* to file an application in accordance with *Directive 065: Resources Applications for Oil and Gas Reservoirs* ("*Directive 65")*;

(b) section 4.1.3 of *Directive 065*, which sets out a number of application requirements for a disposal scheme; and

(c) subsections 3(1)(e) and 3(4) of the *Alberta Energy Regulator Rules of Practice* ("*Rules of Practice*"), which deal with the completeness of an application.

Issues

The AER determined that Aqua Terra's request for regulatory appeal raised the following questions:

1. Was the Application Closure an "appealable decision" pursuant to section 36(a)(iv) of the *REDA*?
2. Was Aqua Terra directly and adversely affected by the Application Closure, so as to qualify as an "eligible person" under section 36(b)(ii) of the *REDA*?

If the answer to the first question was no, then the answer to the second question was moot since the regulatory appeal request would not properly be before the AER.

Findings

The AER dismissed the request for regulatory appeal pursuant to section 39(4)(c) of the *REDA*, based on its finding that the request was not properly before it.

The AER found that the decision to close and return the application was done under section 3(4)(b) of the AER's *Rules of Practice* and was not an appealable decision made under an energy resource enactment.

The AER noted that the Application Closure document made no mention of a denial of the application under section 39(1)(d) of the *OGCA*. While there was also no specific mention of the application being returned for incompleteness under section 3(4)(b) of the *Rules of Practice*, the Application Closure document used words such as "deficient," "closure," and "closed." The use of the term "deficient" in the Application Closure's miscellaneous reasons was conveying the AER's opinion that the application was incomplete. Without this information required by *Directive 065,* the application was, in fact, incomplete under the *Rules of Practice*.

The AER found that providing an applicant with an Application Closure document, such as the one provided to Aqua Terra, that provided a basic summary of the application and indicated that it was "closed" for specified reasons meant that the application was closed and was being returned. Aqua Terra's application was returned due to incompleteness in accordance with section 3(4)(b) of the *Rules of Practice*.

Is the Application Closure an Appealable Decision?

The AER found that the Application Closure did not fall under the definition of "decision" and by extension could not be an appealable decision under section 36 of the *REDA*.

In order for the AER's Application Closure to be an appealable decision, it must be a decision that was made under an energy resource enactment and without a hearing.

The AER indicated that the closure and return of an application did not prejudice an applicant's right to reapply with complete information, nor did it obligate an applicant to do so. It did not grant or impact any other right.

Summary

Even if the Application Closure could be considered a decision under the *REDA* definition, it was not an appealable decision as required by section 38(1) of the *REDA*. This was because the AER's decision to close and return Aqua Terra's application was made under section 3(4) of the *Rules of Practice*. The *Rules of Practice* are not an energy resource

enactment as required by section 36(a)(iv) of the *REDA*. Therefore, the Application Closure was not an appealable decision, and the request for a regulatory appeal was not properly before the AER under section 38(1) of the *REDA*.

AER Bulletin 2019-14: Invitation for Feedback on Revisions to Directive 081

Directive 081 - Feedback

In this bulletin, the Alberta Energy Regulator ("AER") announced that it was seeking public feedback on a new edition of *Directive 081*: *Water Disposal Limits and Reporting Requirements for Thermal In Situ Oil Sands Schemes* ("*Directive 081*"). The AER indicated that the proposed changes encourage the use of alternative water sources, with the goal of maximizing the use of high-quality nonsaline make-up water at thermal in situ operations.

The current and draft editions of *Directive 081* are available on the AER website.

AER Bulletin 2019-15: Invitation for Feedback on Draft Requirements for Public Involvement

Draft Directive - Public Involvement - Feedback

In this bulletin, the AER announced that it was seeking public feedback on a draft directive setting out industry requirements for engaging and informing members of the public on energy resource developments throughout the life cycle of a project.

When finalized, this directive will replace the existing participant involvement requirements identified in section 3 of *Directive 056: Energy Development Applications and Schedules* and section 4 of *Draft Directive 023: Oil Sands Project Applications*. The directive would be applicable to most activities regulated by the AER, except those regulated under Part 8 of the *Mines and Minerals Act*. The directive was developed by the AER following extensive discussions with Albertans and indigenous communities across the province.

The directive is accompanied by a manual that provides guidance, context, and examples that are relevant for understanding the directive. Refer to both documents for a comprehensive understanding of the AER's expectations.

The draft directive and manual are available on the AER website. Information to provide written feedback on the draft directive is available on the AER's website until August 25, 2019.

ALBERTA UTILITIES COMMISSION

ATCO Utilities (ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd.) Information Technology Common Matters Proceeding (AUC Decision 20514-D02-2019)

Information Technology - Just and Reasonable

In this decision, the Alberta Utilities Commission ("AUC") considered whether to approve the prices contained in the information technology master services agreements ("MSAs") between the ATCO Utilities and Wipro Solutions Canada Limited ("Wipro") for inclusion in each of the regulated utilities' revenue requirements.

The AUC found that the ATCO Utilities failed to demonstrate that the information technology ("IT") pricing in the MSAs would result in just and reasonable rates if included in the revenue requirements. The AUC ordered that the ATCO Utilities would only be permitted to recover those IT costs that were prudent in the circumstances and would result in just and reasonable rates. More specifically, the AUC determined that in the first year of the MSAs (2015) pricing would be reduced by 13 percent. In each of years two through ten of the MSAs, a glide path that reduces prices on a weighted average basis across towers by 4.61 percent would be imposed.

IT Placeholders and Other Related Regulatory Proceedings

A placeholder is created when specific costs for a utility are not finalized because those costs are contingent upon some other event or proceeding. The IT costs included in the revenue requirement for those utilities affected by the IT common matters proceeding have been treated as a placeholder until the MSA prices are determined in this proceeding. The approved IT rates will be multiplied by utility-specific IT volumes to determine costs that will be approved for inclusion in revenue requirement in a future rate proceeding. The IT costs for each of the ATCO Utilities will then be finalized and included in revenue requirement and rates.

Scope of the Proceeding and Test to be Applied

The fundamental issue raised by this proceeding was whether the IT service costs under the MSAs should be approved for inclusion in the ATCO Utilities' revenue requirements, which were ultimately recovered from utility customers through rates.

The AUC found that it was within the AUC's mandate to consider whether the corporate decisions made by the ATCO Utilities on the procurement of IT services resulted in just and reasonable rates for the ATCO Utilities' customers.

ATCO Utilities bore the onus of demonstrating, that the inclusion of the MSA costs in the revenue requirements resulted in just and reasonable rates. That was the ultimate test that must be satisfied, failing which the ATCO Utilities were at risk of a disallowance.

The AUC took the view that fair market value ("FMV") was but one criterion that may be considered. The AUC was not bound to equate FMV with just and reasonable rates, nor was it restricted to considering only FMV in the determination of just and reasonable rates.

Does the MSA Pricing Result in Just and Reasonable Rates?

Sourcing Strategy and Tender/Bid Process

The ATCO Utilities asserted that their IT service sourcing strategy was prudent and resulted in MSA rates that were at FMV. Therefore, the ATCO Utilities asserted that inclusion of the MSA rates in revenue requirement was just and reasonable.

The AUC found that the ATCO Utilities failed to demonstrate that their IT services sourcing strategy was prudent. The ATCO Utilities also failed to satisfy the AUC that it can be reasonably concluded from the sourcing strategy of the tender/bid process employed, that the resulting MSA prices were at FMV, met the least cost alternative and no-harm tests, and would result in just and reasonable rates if included in revenue requirement.

Consideration of Sourcing Options

The AUC's mandate is to ensure that whichever option is chosen, the costs are prudent, and customers are not paying more than is just and reasonable. The ATCO Utilities bear the onus of establishing both of these things. The AUC agreed that it was ATCO Utilities' right to determine whether it will remain in the IT business.

The ATCO Utilities must also demonstrate that the MSA pricing was reasonable, that its reasonableness could clearly be determined, and that the price paid was associated with the least cost option that met the needs of the ATCO Utilities.

The AUC found that neither reasonable consideration of the options nor documentation of the decision-making process occurred, and therefore, that the prudence of the sourcing strategy was not established.

The AUC could not come to any reasoned conclusion about whether the chosen sourcing strategy was the least cost option that met the needs of the ATCO Utilities and resulted in costs that were prudent, just, and reasonable.

The Tender/Bid Process

In approving revenue requirement amounts that would flow out of a typical outsourcing contract, among other things, the AUC generally sought to confirm the competitive nature of the process; considered the rationale for selecting the chosen contract; and confirmed that competing parties were under no compulsion to act.

It was reasonable to conclude that all else equal, more bidders would have likely resulted in lower MSA pricing. On this basis, the AUC was satisfied that, on its own, the sourcing strategy (the decision to procure IT services from a provider who would also be required to purchase ATCO I-Tek), had the potential to compromise the achievement of competitive pricing for the MSAs.

The evidence supported that the combination of the sourcing strategy and the actual tender/bid process (running the MSA and ATCO I-Tek sale processes concurrently) was expected to and did influence MSA terms and pricing.

The AUC found that bidders altered their bids in a manner that demonstrated a relationship between increases in the proposed ATCO I-Tek purchase price and in the proposed MSA pricing.

The AUC found the evidence on the degree of separation between the sale and MSA processes contradictory.

The AUC found that neither the sourcing strategy nor the tender/bid process established that the MSA pricing was at the level that would have prevailed under an unrestricted, fully competitive process; that FMV for the MSAs on a stand-alone basis was achieved; or more broadly, that the inclusion of MSA costs in revenue requirement would result in just and reasonable rates.

KPMG Price Assessment and Gartner Benchmark

The ATCO Utilities failed to satisfy the AUC that the KPMG price assessment and Gartner analyses established, individually or collectively, that the MSA pricing was at FMV, involved no cross-subsidization and that if included in revenue requirement, the MSA prices would result in just and reasonable rates.

Lack of Transparency

Gartner's benchmark approach identified differences between the MSA and the selected peer contracts, and took these differences into account through a normalization process. KPMG's price review identified key parameters about the MSA, then selected a larger group of peers and offered market pricing ranges without normalization for differences. The AUC was of the view that a benchmark with normalizations allowed for a more rigorous examination of FMV, while KPMG's price assessment offers a more high-level perspective of FMV.

The AUC found that there was limited transparency into how comparable peers were determined by Gartner, the empirical size and relative importance of any normalizations applied to the comparator data, and the underlying calculations in the benchmark report.

The AUC found that due to the lack of visibility into these processes, it was not apparent whether or how Gartner (through its normalizations) or KPMG (through its final report) accounted for the term of the MSAs.

The AUC found that this lack of visibility:

(a) restricted the ability of interveners and the AUC to properly examine the KPMG and Gartner evidence;

(b) limited the AUC's ability to assess whether the conclusions reached by KPMG and Gartner in their respective reports were reasonably adjusted and aligned to the MSAs to provide a meaningful FMV determination;

(c) inhibited the AUC's ability to effectively rely on either report as demonstrating that the MSA pricing was at FMV; and

(d) ultimately, did not assist the AUC in determining whether the MSA pricing was just and reasonable.

The AUC found that the lack of visibility significantly diminished the weight that may be afforded to the KMPG price assessment and the Gartner benchmark.

Limited to First Year Pricing; Failure to Consider the Total Contract Value

The AUC was unable to accept that Gartner's glide path analysis demonstrated that MSA pricing was at FMV over the whole of the term.

Benchmark

The AUC concluded that using a benchmark that focused on the mean and not the lowest quartile pricing supported higher customer rates than could otherwise be obtained, and consequently rates that were not just and reasonable.

The AUC also found that the concurrent sale of ATCO I-Tek influenced MSA pricing. The AUC found that MSA pricing was higher than it otherwise would have been as a consequence of the concurrent sale and purchase price for ATCO I-Tek.

10-Year Term of the MSAs

The AUC found that 10-year terms for IT service contracts were atypical at the time the MSAs were negotiated and that a term of this length should have been associated with lower prices. These considerations raised significant doubt as to whether the MSAs were at FMV. Furthermore, the AUC was not satisfied that any risks associated with the 10-year term were mitigated by the other terms and conditions of the MSAs, as asserted by the ATCO Utilities.

The AUC found that the ATCO Utilities failed to provide cogent evidence of the alleged transition risks and costs. The evidence likewise failed to demonstrate achievement of the cost savings reasonably expected of transactions associated with the scale/volume, duration, and other characteristics of the MSAs.

MSA Governance Provisions

The AUC found that the ATCO Utilities failed to establish that any risks associated with the 10-year term of the MSAs were mitigated by the governance provisions in the MSAs.

The governance provisions had the potential to provide for and ensure competitive pricing over time. However, that was so, only if they were exercised by the ATCO Utilities in a timely, reasonable, and prudent manner. The AUC was not satisfied that the ATCO Utilities had done so. Accordingly, the AUC could not reasonably accept that these governance provisions offered some assurance that the MSA rates were at FMV and would result in just and reasonable rates if included in revenue requirement. For the same reason, the AUC was not satisfied that any risks associated with the 10-year term were effectively mitigated through these governance provisions.

Adjustments to IT MSA Service Rates

The AUC found that the ATCO Utilities failed to demonstrate that the inclusion of the MSA costs in revenue requirement would result in just and reasonable rates.

The AUC concluded that on average, the MSA pricing was 10 percent too high as a consequence of the sourcing strategy chosen and the tender/bid process employed.

Rate-Setting - Implementation of Any Adjustment to IT Rates for Cost of Service and Distribution Utilities

The AUC directed the ATCO Utilities to show the disallowances calculations and clearly show the directed IT disallowance on an annual basis by capital, indirect capital, and operation and maintenance in the applicable rebasing and K-bar schedules in their next annual Performance Based Regulation ("PBR") filings. The distribution utilities should also demonstrate that the first year disallowance in 2015 does not affect the determination of the lowest operation and maintenance cost year and, if it does, they should adjust the notional 2017 revenue requirement accordingly to reflect a different lowest operation and maintenance cost year.

Decision and Order

The AUC directed the ATCO Utilities to file compliance filings to this decision reflecting the impact of this decision as part of their next annual PBR filings.

AUC Bulletin 2019-06: AUC Rule 012: Noise Control - Workshop on Rule 012 Changes

Rule 012 - Noise Control

The Alberta Utilities Commission ("AUC") regulates noise associated with electric and gas pipeline facilities. In December 2017, the AUC initiated a consultation process on changes to certain provisions of Rule 012: *Noise Control*. The AUC approved amendments to Rule 012 on April 16, 2019. The final results of the consultation process were a revised Rule 012 and a revised Rule 007, which were issued and published on the AUC website. The amendments to these rules are effective on August 1, 2019.

Prior to the amendments coming into effect, the AUC wanted to gauge stakeholder interest in a workshop led by AUC staff that would summarize the major changes to Rule 012 and provide a forum to ask questions arising from the amendments. The AUC tentatively scheduled a workshop in Calgary and a workshop in Edmonton.

AUC Bulletin 2019-07: AUC Rule 033: Post-Approval Monitoring Requirements for Wind and Solar Power Plants

Rule 033 - Monitoring - Wind - Solar

On June 12, 2019, the Alberta Utilities Commission ("AUC") approved Rule 033: *Standardized Post-Approval Monitoring Requirements for Wind and Solar Power Plants*. This rule took effect on July 1, 2019.

The intent of post-construction monitoring standards is to ensure that approved wind and solar power plant owners and operators implement effective, consistent operational mitigation measures to minimize the potential for negative effects on Alberta's wildlife and wildlife habitat. The AUC believes that the establishment of standardized post-approval monitoring requirements will improve the consistency of monitoring obligations for owners and operators of approved wind and solar power plants, and will add certainty to the regulatory process.

AUC Bulletin 2019-08: Changes to the AUC's Application Process for Gas Utility Pipeline Applications

Rule 020 - Amendments - Gas Utility Pipeline Applications

The Alberta Utilities Commission ("AUC") regulates applications for new gas utility pipelines and for amendments to existing gas utility pipelines under the *Alberta Utilities Commission Act*, the *Gas Utilities Act* and the *Pipeline Act*. In Alberta, gas utility pipelines are pipelines owned by ATCO Gas and Pipelines Ltd. ("ATCO") and AltaGas Utilities Inc. ("AltaGas"), are operated at pressures greater than 700 kilopascals and are licensed under the *Pipeline Act*.

While the AUC is the approving authority for gas utility pipelines, the AER includes all approved gas utility pipelines in its pipeline database. Accordingly, when the AUC approves a new gas utility pipeline or an amendment to an existing gas utility pipeline, the AER database must be updated to reflect the amendment.

Currently, the AUC issues a decision report and a licence for each gas utility pipeline application. If the AUC approves an application, it then initiates updates to the AER's pipeline database by filing an application through the AER's OneStop system to reflect the amendment it approved.

The AUC proposed two material process changes to its application process for gas utility pipeline applications. First, while the AUC would continue to issue a licence for all approved applications, the AUC would discontinue filing related applications to update the AER database using the OneStop system on behalf of ATCO and AltaGas. Instead, ATCO and AltaGas would be responsible for filing the OneStop applications following approval from the AUC. Second, the AUC would continue to issue updated licences for pipeline amendment applications that address minor, administrative changes, but would no longer issue decision reports for these minor applications. The AUC would continue to issue licences and decision reports for all other gas utility pipeline applications.

The licence holder has all the pertinent information related to the pipeline that is the subject of the application. Therefore, the AUC was satisfied that the changes proposed to its application process for gas utility pipeline applications acknowledged that it was more efficient for the holder of the gas utility

pipeline licence to make the necessary updates to the AER database.

The changes will be implemented by amending Section 5 of *Rule 020: Rules Respecting Gas Utility Pipelines* and are effective on August 1, 2019.

NATIONAL ENERGY BOARD

TransCanada PipeLines Limited - North Bay Junction Long Term Fixed Price Service, (NEB RH-002-2018 Reasons for Decision)

Just and Reasonable Tolls - No Unjust Discrimination

The National Energy Board ("NEB") previously approved TransCanada Pipelines ("TransCanada")'s North Bay Junction Long Term Fixed Price ("NBJ LTFP") service application.

The NEB issued its reasons for the approval in this decision.

Need for the NBJ LTFP Service

The NEB found there was a need to offer the NBJ LTFP service in order to retain and attract long term, long-haul contracts on the Mainline. The NEB agreed with TransCanada that long-haul contracts at Empress decreased from over 5 petajoules per day ("PJ/d") in 2005 to a forecast of just over 1 PJ/d in 2020. At the same time, short-haul contracting in the Dawn area increased from approximately 1 PJ/d in 2005 to a forecast of approximately 4 PJ/d by 2020. Primarily driving these contracting changes on the Mainline was the dramatic growth of production from the Marcellus and Utica basins, which are closer to eastern Canadian and northeastern U.S. markets compared to Western Canada Sedimentary Basin ("WCSB") supply.

Benefits and Impacts of the NBJ LTFP Service

The NEB found that the NBJ LTFP service would provide significant benefits to the Mainline and its shippers. Through the offering of the service, net Mainline revenues would increase relative to what they would otherwise be and Mainline tolls would be lowered overall.

On a general basis, the NEB expressed its support for toll initiatives that promote the use of existing infrastructure. The NEB also considered that the NBJ LTFP service may significantly reduce the need for incremental facilities that would otherwise be required to provide additional short-haul service from other Eastern Triangle receipt points. TransCanada's uncontroverted evidence estimated these capital cost savings to be approximately $2.2 billion, resulting in cost of service reductions of approximately $5.1 billion over the contract terms.

The NEB also considered other benefits of the NBJ LTFP service, including increasing market access for WCSB producers, enhancing diversity of supply sources and transportation paths for eastern market participants, and reducing the level of abandonment surcharge revenue to be recovered from other Mainline services.

Requirements of the *National Energy Board Act*

The NEB's mandate regarding traffic, tolls, and tariff matters is set out in Part IV of the *National Energy Board Act* ("*NEB Act*"). Section 62 of the *NEB Act* states that all tolls shall be just and reasonable and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate. Section 67 of the *NEB Act* prohibits a company from making any unjust discrimination in tolls, service, or facilities against any person or locality. The NEB has broad discretion to determine whether tolls and tariffs comply with these provisions of the *NEB Act*.

Just and Reasonable Tolls

The NEB found the proposed toll was a market-driven, negotiated solution developed to retain and attract long term, long-haul contracting on the Mainline that otherwise would not occur. The NEB found that the NBJ LTFP service would promote economic efficiency through increased system utilization and the net lowering of Mainline tolls.

No Unjust Discrimination

The NEB found the service was developed to respond to unique competitive circumstances that exist in eastern markets and which warrant a different toll and service to attract incremental volumes and revenues to the Mainline. The service attributes of the NBJ LTFP were also more restrictive than firm transportation service. Accordingly, the NEB found that the NBJ LTFP service can be charged at a different toll than other services.

Summary

The NEB approved TransCanada's NBJ LTFP service application as filed.