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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.

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ALBERTA COURT OF APPEAL

ATCO Electric Ltd. v. Alberta (Utilities Commission) (2017 ABCA 331)
Permission to Appeal Application – Application Denied

In this decision, the Alberta Court of Appeal ("ABCA") considered ATCO Electric Ltd.'s ("ATCO") applications for Permission to Appeal certain aspects of the following AUC decisions:

(a) Decision 20272-D01-2016 regarding ATCO's 2015-2017 General Tariff Application (the "2016 GTA Decision"); and

(b) Decision 22094-D01-2017 regarding ATCO's application for review of the 2016 GTA Decision (the "2017 Review Decision").

For the reasons summarized below, the ABCA dismissed ATCO's applications for permission to appeal the AUC decisions.

Disallowed Transmission Line Insurance Costs

In ATCO's 2015-2017 General Tariff Application ("GTA"), ATCO requested to include in its general revenue requirement the costs of insurance premiums for its transmission lines in Alberta (the "Transmission Line Insurance Costs"). In the 2016 GTA Decision, the AUC rejected the inclusion of the Transmission Line Insurance Costs, based on its findings that:

- the Transmission Line Insurance Costs did not constitute prudent current period operating costs;
- the charges represented costs associated with guarding against losses from the extraordinary retirement of its facilities; and
- such costs were not allowable because to do so would effectively provide the utility and its shareholders with asymmetrical access to the benefits, but not the attendant risks, of asset ownership.

In its permission to appeal application, ATCO submitted that insurance was required following the AUC's denial of ATCO's proposal to use the reserve for injuries and damages ("RID") account (as had previously been allowed). ATCO had proposed to use the RID account to cover the costs associated with damages to and destruction of its electric distribution assets caused by the fire in the Slave Lake area of Alberta. ATCO submitted that the insurance was intended to protect its shareholders in the event of an "extraordinary" loss to shareholder-owned assets, specifically the electrical transmission lines.

Alleged Grounds for Appeal

ATCO alleged that the AUC erred in law and/or jurisdiction by:

(a) interpreting the *Electric Utilities Act* (the "*EUA*"), such that ATCO would not have a reasonable opportunity to recover the prudently incurred costs of providing transmission service, with the result that it would produce rates which were not just and reasonable;

(b) unreasonably rejecting certain costs relating to the severance of employees in 2015, contrary to the evidence before it and the AUC's own findings when it found such costs to have been reasonable in the circumstances;

(c) failing to approve certain actual 2015 Capital Maintenance Costs and Rate Base Additions, in the absence of any evidence suggesting such costs had been unreasonably incurred; and

(d) with respect to the 2017 Review Decision, dismissing ATCO's application for review and variance regarding the denial of the opportunity to recover prudently incurred Transmission Line Insurance Costs.

Test for Leave

Appeals from AUC decisions are governed by section 29 of the *Alberta Utilities Commission Act* (the "*AUCA*"), which provides that an appeal lies from a decision or order of the AUC to the Court of Appeal on a question of jurisdiction or on a question of law.

To succeed on a leave application, an applicant must demonstrate that the question of law or jurisdiction raises a "serious, arguable point". The ABCA explained that subsumed in the "serious, arguable point" test are the following factors:

(a) whether the point on appeal is of significance to the practice;

(b) whether the point raised is of significance to the action itself;

(c) whether the appeal is *prima facie* meritorious;

(d) whether the appeal will unduly hinder the progress of the action; and

(e) the standard for appellant review that will be applied should leave be granted.

ABCA Reasons for Dismissing Application

The ABCA found that:

- its determination whether to grant permission to appeal devolved down to whether the appeals were *prima facie* meritorious; and
- integral to this consideration was the standard of review.

Standard of Review

The standard of review to be employed when reviewing a decision of the AUC, when applying its expertise to set rates, is reasonableness: *ATCO Gas and Pipelines v Alberta (Utilities Commission)* at para 27. To overcome the standard of review, an appellant needs to demonstrate that its interpretation "must be the only permissible interpretation."

The ABCA found that:

(a) the AUC's findings that the cost of the insurance premiums was not prudent under the circumstances, were not unreasonable;

(b) the AUC having made that determination was not then obliged to determine whether the actual amount(s) of the premiums were prudent; and

(c) therefore, the AUC's decisions were a reasonable interpretation in light of the relevant legislation and jurisprudence.

Decision

The ABCA concluded that ATCO's submissions raised neither a question of jurisdiction nor law, and accordingly, dismissed its applications.

ALBERTA COURT OF QUEEN'S BENCH

ENMAX PPA Management Inc. v. Balancing Pool (2017 ABQB 605)
PPA – Effective Date of Termination – Change in Law

In this decision, the Alberta Court of Queen's Bench ("ABQB") considered an application by ENMAX PPA Management Inc. ("ENMAX"), requesting a declaration that the effective date of the Battle River Power Purchase Arrangement ("BR PPA") termination was January 1, 2016. The Balancing Pool maintained that the termination took effect on July 13, 2016, when it assumed ENMAX's role as buyer under the BR PPA.

For the reasons summarized below, the ABQB found that the effective date of termination of the BR PPA was January 1, 2016, at 12:01 am.

Background

In December 2015 the Province of Alberta amended the *Specified Gas Emitters Regulation* and *the Climate Change and Emissions Management Act*. Those amendments, increasing ATCO's costs of running BR5 (commencing January 1, 2016), were to be borne by ENMAX under the BR PPA.

ENMAX determined that these amendments constituted a "Change in Law" under the BR PPA and reasonably expected that, as a consequence, the continued performance of its obligations as Buyer under the BR PPA would be rendered unprofitable, or more unprofitable, for the remainder of the term of the BR PPA.

On December 11, 2015, ENMAX issued a notice to ATCO and the Balancing Pool, that it was terminating the BR PPA effective January 1, 2016, at 12:01 am.

On January 27, 2016, the Balancing Pool concluded the termination to be valid. On July 13, 2016, it assumed ENMAX's role as buyer under the BR PPA.

Power Purchase Arrangements

The ABQB described the nature of power purchase arrangements ("PPA") as follows:

- a PPA is a standardized set of contract-like terms promulgated under the *Power Purchase Arrangements Determination Regulation*;
- PPAs enable parties wanting to market electricity to acquire the right to specified electricity production until year-end 2020; and
- rights to sell power under PPAs facilitated the transition from the regulated pricing of electricity towards more market-based pricing of electricity.

The BR PPA

The ABQB explained that:

- the Battle River Generating Station is a coal-fired thermal electricity generating facility located in Forestburg, Alberta, operated by ATCO Power Canada Ltd ("ATCO" or the "Owner"). The Battle River Generating Station consists of five generating units, but only the power generated by Unit 5 ("BR5") was the subject of the BR PPA;
- the BR PPA entitled ENMAX, as the "Buyer", to the rights to offer electrical power from the BR5 until December 31, 2020, and obliged it to pay the Owner throughout that term; and
- under the BR PPA, the Buyer is required to keep the Owner whole for any net changes to its cash flows resulting from any "Change in Law", as defined in the BR PPA. The Change in Law clause provided that if any such Change in Law could reasonably be expected to render continued performance of the BR PPA unprofitable to the Buyer (ENMAX), or more unprofitable to the Buyer, then the Buyer could terminate the arrangement without being liable for any termination payment.

The Balancing Pool

The ABQB explained that:

- the Balancing Pool is a statutory body established under section 75 of the *Electric Utilities Act* (the "*EUA")* and was established to facilitate the transition from the regulated pricing of electric energy towards market-based pricing within a "fair, efficient and openly competitive" ("FEOC") market;
- the Balancing Pool is funded by all system ratepayers via the Independent System Operator's ("ISO") tariff pursuant to *EUA* sections 82 and 85(1)(h); and
- the Balancing Pool's roles and responsibilities include the following:
  - conducting auctions of PPAs; and
  - providing a backstop for the market against the risk of an extraordinary event such as *force majeure* in relation to PPAs; and

- the Balancing Pool has specific duties under the *EUA,* which include:
  - selling generation assets when it can receive fair market value for them (*EUA*, s 85(1)(d);
  - acting commercially in respect of power under PPAs that did not sell by auction or that reverts to the Balancing Pool by expiry or termination of a PPA (*EUA*, s 85(1)(b));
  - managing its accounts so that no profit or loss results (*EUA* s 85(1)(j)); and
  - managing generation assets in a manner consistent with the eligibility requirements for a person to hold a PPA (*EUA* s 85(1)(c)).

Nature of PPAs

The ABQB found that PPAs are not strictly commercial contracts, but are a component of a comprehensive statutory scheme enacted to ensure FEOC operation of the electricity market in Alberta. PPAs not strictly being contractual instruments was based on the following findings:

(a) the PPA wording was made final by legislative act, rather than an agreement by private parties;

(b) PPAs do not include all the essential elements to the creation of a contract;

(c) PPAs are not stand-alone documents, and it is necessary to consider other statutory provisions to understand the complete terms that govern the relationship between PPA parties and to understand the intent behind their words;

(d) the wording of PPAs makes it clear they operate in conjunction with the broader regulatory regime contemplated by the *EUA*. (E.g. half of all their recitals commence with: "By operation of the Act" and PPAs required prior approval of the Alberta Energy and Utility Board ("AEUB")); and

(e) the parties recognized that the wording of Section 4.3(j) in the BR PPA had been revised by, or at least clarified by, the AEUB regarding: "the Buyer shall be entitled to terminate the PPA and shall not be liable for, nor entitled to any Termination Payment if a Change in Law renders the PPA unprofitable, or more unprofitable," since the words "or more profitable" were not contained in the PPA document itself.

Based on the above, the ABQB found that to interpret the BR PPA it was necessary to consider the text of the arrangement within the legislative scheme as a whole. This would include the *EUA*, the *Balancing Pool Regulation*, the *Power Purchase Arrangements Determination Regulation*, the *Power Purchase Arrangement*, the *FEOC Regulation*, and the ISO Rules.

BR PPA Effective Date of Termination

Considering other BR PPA termination provisions

The ABQB found that:

(a) section 4.3(j) of the BR PPA was the operative provision governing ENMAX's termination, which provided that: "to the extent that a Change in Law … could reasonably be expected to render ... this Arrangement ... unprofitable to the Buyer ... then the Buyer may terminate this Arrangement";

(b) without more, section 4.3(j) suggested the right to terminate was effective immediately; and

(c) this interpretation was reinforced by reference to other BR PPA sections contemplating termination that included express notice periods before termination, indicating that the drafters turned their minds to the effective dates of terminations and chose to not insert any period of prior notice, or any payment precondition, before a Section 4.3(j) termination would take effect.

Considering the words of section 4.3(j) of the BR PPA

The ABQB found that the other wording of section 4.3(j) militated strongly in favour of ENMAX's interpretation that termination was effective on January 1, 2016. In this respect, the ABQB found that:

(a) the end part of section 4.3(j) provided that the Buyer not be liable for, nor entitled to any Termination Payment which suggested the drafters' intent not to have a Buyer bear any cost consequence from a Change in Law; and

(b) such intent that the Buyer not bear any cost consequence for a Change in Law required that termination to be effective immediately.

Considering the Balancing Pool Regulation

The ABQB found that the Balancing Pool's interpretation would render the legislated interim payment scheme between notice of the termination and verification of its validity superfluous. Section 2(i) of the *Balancing Pool Regulation* provides that "on receipt of notice [in respect of an extraordinary event (e.g. Change in Law)], begin making payments as set out in an arrangement until all matters … are agreed to or resolved."

The effect of the interim payment scheme was to immediately relieve ENMAX of its obligation to make payments while the Balancing Pool conducted its investigation. During this period, the Balancing Pool must pay the PPA owner, in this case, ATCO. On the completion of the assessment, the Balancing Pool can either: (1) verify the legitimacy of the claim of an extraordinary event; or (2) dispute the claim's validity. In the case of dispute, if the Balancing Pool prevailed through the dispute resolution process, ENMAX would be obligated to reimburse it for payment made during the interim period.

That was not the case here, as the Balancing Pool confirmed the validity of ENMAX's termination of the BR PPA under the Change in Law provision. This meant no reimbursement was necessary. The ABQB noted that if the Balancing Pool's interpretation were correct, section 2(1)(i) of the *Balancing Pool Regulation* would require ENMAX (the Buyer), not the Balancing Pool, to continue to make such payments until the Balancing Pool verified the extraordinary event. The ENMAX interpretation of the effective date of termination was the one consistent with the broader legislative scheme.

Considering the Purposes and Objects of Legislative Scheme

The ABQB found that the ENMAX interpretation was more consistent with the purposes and objects of the legislation in two respects:

(a) a Change in Law termination taking effect immediately was more consistent with the intended role of PPAs in the transition towards a FEOC market; and

(b) this interpretation was also more consistent with the Balancing Pool's statutory role as the backstop for extraordinary events.

With respect to being more consistent with the Balancing Pool's "backstop" role for extraordinary events, the ABQB explained that the Balancing Pool interpreted the PPA and its statutory regime in a way that would keep itself whole in such events, rather than it keeping affected market participants whole, for the transition to a FEOC market.

Conclusion

The ABQB concluded that the Balancing Pool's interpretation undermined the attainment of the statute's objects, whereas the ENMAX interpretation fulfilled them. The ABQB found the effective date of a section 4.3(j) PPA termination to be the date the Buyer indicates in its notice of termination, that is on or after the Change in Law takes effect.

The ABQB declared the effective date of termination of the BR PPA to be January 1, 2016 at 12:01 am.

ALBERTA ENERGY REGULATOR

Amended Notice of Question of Constitutional Law – Prosper Petroleum Ltd. Rigel Project (Proceeding ID 350)
Notice of Question of Constitutional Law

On June 22, 2017, Fort McKay First Nation ("FMFN") filed a Notice of Question of Constitutional Law (the "Notice") pursuant to the *Administrative Procedures and Jurisdiction Act* ("*APJA*").

The panel wrote to the parties suspending the date for FMFN reply and asking the parties to provide comments regarding the relevance of two recent Supreme Court of Canada ("SCC") decisions, *Clyde River v. Petroleum Geo-Services Inc.* and *Chippewas of the Thames First Nations v. Enbridge Pipelines Inc.*, to the matters raised in the Notice. In its response to the Panel's request for comment, FMFN asked that it be permitted to file an amended Notice, which was granted by the AER. FMFN filed an amended Notice on August 30, 2017.

In this decision, the AER panel determined that it could not consider the questions or refer them to court because:

(a) FMFN did not satisfy the notice requirements of the *APJA;* and

(b) FMFN did not raise questions of constitutional law that fell within the AER's jurisdiction.

Notice

The AER explained that the *APJA* and its *Designated Decision Maker Regulation* ("*DMR*") govern the AER's consideration of a question of constitutional law. The AER found that the prescribed notice requirements under that scheme "are strict and compliance is mandatory."

The AER explained that the notice requirements, set out in section 12 of the *DMR*, ensure that the responsible branch of government is notified of any Constitutional challenge so that it has a full opportunity to support the constitutional validity of their legislation or to defend its action or inaction.

No relief sought or specified

The AER noted that the Notice stated in the request for relief that FMFN was asking "… the AER form the opinion that the Court of Queen's Bench of Alberta is a more appropriate forum to decide the questions."

The AER panel found that FMFN's Notice was deficient because it did not specify what relief FMFN sought nor did it describe a question for the AER to decide.

Conclusion

The AER panel concluded that the notice requirements in the *APJA* were not met and that the matters raised by the Notice did not fall within the AER's jurisdiction. Because all of the threshold criteria must be met for the AER to consider a question of constitutional law and whether to refer it to Court and because the panel found that two of the notice criteria were not met, that was sufficient to dispose of the matter.

ALBERTA UTILITIES COMMISSION

Horse Creek Water Services Inc. – General Rate Application (Decision 21340-D01-2017)
Water Utility – General Rate Application – Wastewater Utilities not subject to AUC Jurisdiction

In Decision 21340-D01-2017, the AUC considered Horse Creek Water Services Inc.'s ("HCWS") general rate application requesting approval of its proposed water rates for 2017 and 2018.

Based on the AUC's determinations regarding operating, maintenance and administration ("OM&A") expenses, depreciation, and return on owner-invested capital, the AUC directed HCWS to maintain its current rates, effective as of November 1, 2017.

The AUC further directed that HCWS' interim rates approved in Decision 20663-D01-2015 be deemed as final.

Jurisdiction to Set Waste Water Rates

The intervener group consisting of the Monterra residents and MCL Development Corp. (the "Monterra Group") submitted that the wastewater system owned by HCWS' affiliate, Horse Creek Sewer Service ("HCSS"), was also subject to the AUC's rate-setting jurisdiction.

The AUC did not accept the Monterra Group's argument that the wastewater system was a "public utility" subject to the AUC's rates setting jurisdiction, finding as follows:

> [T]he Commission is of the view that the definition of "public utility" in the *Public Utilities Act* deliberately excludes provision of wastewater services, except in relation to the supply by municipal public utilities and regional services commissions on order under Section 122. The Commission does not consider that reading in wastewater or sewage into the definition of "public utility" in Section 1(i) can be justified. Accordingly, the Commission concludes that its jurisdiction to deal with public utilities as provided for in the *Public Utilities Act* does not generally extend to wastewater utilities.

Tie-in Fees

The AUC approved a tie-in fee of $10,000 per new lot, a reduction from the $16,500 amount applied for by HCWS. However, the AUC stated that this level of the tie-in fee should not continue indefinitely. The AUC found that as HCWS expands its customer base, the revenue shortfall would decline. The AUC directed HCWS to monitor its revenue shortfall on a go-forward basis, and report the shortfall amount to the AUC, on an annual basis, commencing with the 2017 year-end. Based on this information, the AUC stated that it might reconsider the amount of the tie-in fee based on HCWS' annual reporting.

In addition, the AUC directed HCWS to track the amount it receives from the tie-in fee and whether such amounts are used to offset the revenue deficiency or fund capital expenditures. To the extent that the tie-in fee is used to fund capital expenditures, the AUC directed HCWS to record any amounts received from the tie-in fee as a customer contribution, which would reduce the rate base.

Operator Contract Costs

The AUC approved the operator contract costs applied-for by HCWS, based on the following findings:

- HCWS' agreement with Aquatech (the "Operator Contract") set out the components included in the water treatment plant and distribution system, and provided a contract price for operating the water treatment plant and distribution system; and
- the Operator Contract did not include any wastewater system assets or the costs for the operation and maintenance of those assets.

With respect to alternative H20 Pro operator contract costs proposed by the Monterra Group, the AUC found that the alternative operator contract costs were not a suitable comparator. Specifically, the AUC found that:

(a) the estimate provided by H2O Pro did not include expenses associated with non-routine services, parts, and subcontractors; and

(b) that this may explain the difference between HCWS forecast expenses and H2O Pro's estimated costs.

Cross-Subsidization between Water and Sewer

The AUC found that certain expenses included in HCWS' application represented shared expenses between the HCWS potable water system and the HCSS wastewater system. Specifically, the AUC found the following reductions in HCWS' applied-for OM&A expenses to be warranted:

(a) a reduction in its forecast electricity expenses by $4,800 per year; and

(b) a reduction in its insurance expense of $4,026 per year.

Rate Base

The AUC found that HCWS' purchase of the combined water and wastewater assets was contingent upon it assuming the liability with Rocky View County ("RVC"). On this basis, the AUC found that the total purchase price for the assets to be $1,630,855 ($1,039,999 + $590,856).

Return on Rate Base

In considering the amount of return that HCWS should be allowed to collect as part of its revenue requirement, the AUC explained that there are three components used to determine the return amount:

(a) the return on equity ("ROE");

(b) the cost of debt; and

(c) capital structure (debt/equity ratio).

The following table provides a summary of values for each component the AUC approved for HCWS:

Return Component	2017	2018
ROE	8.5%	8.5%
Cost of Debt	3.5%	3.5%
Debt/Equity Ratio	60/40	60/40

The AUC explained that capital structure is the percentage of the company financed by debt versus the percentage of the company financed by equity, also known as the debt/equity ratio. In approving a debt/equity ratio of 60/40, the AUC found that:

(a) HCWS would not likely be able to obtain as favourable financing rates as large utilities; and

(b) approving a debt/equity ratio of 60/40, as compared to 75/25 recommended by the Monterra Group, balanced the lower debt return awarded to HCWS relative to the industry average.

The AUC directed HCWS to apply the deemed capital structure of 60 percent debt and 40 percent equity, to its current capital structure.

Office of the Utilities Consumer Advocate – Commission-initiated Review and Variance of Decision 20552-D01-2015 and Decision 20733-D01-2015 (Decision 21768-D01-2017)
Review and Variance

Original Decisions

In Decision 20552-D01-2015 and Decision 20733-D01-2015 (collectively, the "Original Decisions") the AUC approved FortisAlberta Inc.'s ("Fortis") purchase of the assets owned by:

(a) the Kingman Rural Electrification Association Ltd. ("Kingman REA"); and

(b) the V N M Rural Electrification Association Ltd. ("VNM REA") (collectively, the "REAs")).

In the Original Decisions, the AUC found the purchase prices paid by Fortis for the Kingman REA assets and the VNM REA assets to be prudent. It denied the Office of the Utilities Consumer Advocate's ("UCA") request to participate in the Kingman REA proceeding, Proceeding 20552, finding "… should the application be approved, any adjustment to Fortis customers' rates arising as a consequence would be addressed in a future rates application."

Decision 20818-D01-2015

Fortis applied to recover its costs to purchase the REAs in Proceeding 20818. The UCA intervened to contest the claimed amounts. The AUC rejected the UCA's position, finding that the prudence of these costs had been already determined by the AUC based on the methodology in the Original Decisions, and that "these issues are not subject to reconsideration within the context of Fortis' annual rate adjustment proceeding."

UCA Review Application

The UCA requested that the Commission review and vary Decision 20818-D01-2015. In Decision 21339-D01-2016, the AUC denied the UCA request to review Decision 20818-D01-2015, but instead initiated its own review of the Original Decisions, finding that:

(a) the combined (and seemingly unintended) effect of the AUC's decision in Proceeding 20552 to deny the UCA standing while also deeming the Kingman REA acquisition cost to have been prudently incurred was to potentially impede the UCA's ability to intervene on the question of resultant rate impacts; and

(b) while the AUC denied the UCA's review request, it initiated its own review and variance proceeding of the Original Decisions to allow the UCA to

make submissions as to whether the Kingman REA and the VNM REA acquisition costs were prudently incurred.

Legislative Scheme

The AUC explained that:

(a) the *Rural Utilities Act* (the "*RUA*") sets out the requirements for an REA seeking to discontinue operations and sell its facilities;

(b) Section 23 of the *RUA* provides that an REA, by extraordinary resolution, may authorize the sale of its entire works to a utility company; and

(c) following authorization by resolution, the REA must obtain AUC approval of the sale.

Approval of Sale of Prudent Acquisition Cost

The AUC explained that provisions in the *Hydro and Electric Energy Act* ("*HEAA*") also address the sale of REA assets to distribution utilities:

(a) Section 29(4) of the *HEEA* provides that where parties are unable to agree on a price, the AUC will make the determination based on evaluating the facilities that comprise the REA's distribution system using the reproduction methodology; and

(b) Section 32(1) of the *HEEA* provides for the AUC to transfer to another entity the service area of an REA directed to cease operations under section 29, or authorized to discontinue operations under section 30.

Under the scheme governing the sale of REAs, the AUC must first determine whether the price paid by the distribution company (in this case Fortis) for REA assets was prudent. Once the AUC determines the cost of an REA acquisition to be prudent, the distribution utility may apply for an adjustment of its rates.

Issues Subject to Review

In this proceeding, the AUC reviewed the original panels' determinations in the Original Decisions regarding the prudence of the costs paid by Fortis for the acquisition of the REA assets. In particular, the AUC considered the following issues:

(a) What methodology is permitted, replacement cost new minus depreciation (replacement methodology) or reproduction cost new minus depreciation (reproduction methodology), to set the purchase price for the REAs?

(b) Was the methodology applied by Fortis prudent?

Issue 1: What methodology is permitted, replacement methodology or reproduction methodology, to set the purchase price for the REAs?

In this instance, the REAs and Fortis reached an agreement on the purchase price.

The AUC found that an REA and an incumbent utility may agree on a price using any method that they choose. Section 32 of the *HEEA* provides no express prohibition on a distribution utility and an REA agreeing on any pricing methodology that they deem fit, including the replacement methodology, which the parties relied on in this case.

The AUC explained that the primary difference is that reproduction cost refers to the present-day cost of building an asset with identical materials and quality of workmanship as the subject asset. Whereas, replacement cost refers to the present-day cost of replacing the subject assets with ones having exactly the same utility, but built to present-day standards, which may include the use of new technology and materials.

The AUC found that Fortis applying the replacement methodology to determine the purchase price of both Kingman and VNM REAs was reasonable for the following reasons:

(a) given the age, and the technical specifications of the REAs' distributions systems, estimating the cost of the REAs' actual systems would likely have been impractical because the reproduction of obsolete equipment is an expensive and onerous exercise, and may result in higher costs in this instance given that obsolete equipment is not readily available;

(b) the UCA was unable to put forward any other practical valuation methodology that could have been applied in this instance; and

(c) given the vintage of the assets being acquired by Fortis, the application of the calculated depreciation to the replacement value of these assets should serve to largely protect ratepayers from paying for older assets at the prices of an upgraded system (i.e., the replacement value).

Issue 2: Was the methodology applied by Fortis prudent?

The AUC went on to evaluate the prudence of the purchase price based on the replacement methodology used by the parties.

A utility will be found prudent if it exercises good judgment and makes decisions which are reasonable at the time they are made, based on information the owner of the utility knew or ought to have known at the time the decision was made.

The AUC accepted the calculations performed by Fortis for all the asset groups in the REAs' distribution systems, and found the associated costs to be prudently incurred, with the exception of the calculation of costs associated with easements.

Considering Easement Costs

The AUC found that Fortis should only have compensated Kingman and VNM REAs for assigned land rights for the portion of the lines that were actually installed on private landowners' land. The AUC found unreasonable Fortis' assumption that all primary lines systems were installed on private landowners' land and therefore not an adequate assumption for the purposes of estimating a value for the land rights assigned from the REAs to Fortis. [NTD: CHECK IF RT REVISION MAKES SENSE.]

Accordingly, the AUC found that the portion of the costs assignable to the estimate of the acquisition of land rights should reflect the actual portion of the lines that are installed on private lands.

The AUC directed Fortis, in the compliance filing, to re-estimate the value of the land rights acquired from the REAs by providing an accurate accounting for the portion of the lines that are actually installed on private land.

Salt Box Coulee Water Supply Company Ltd. – Interim Water Rates (Decision 21908-D01-2017)
Water Utility – Interim Rates

On August 12, 2016, Salt Box Coulee Water Supply Company Ltd. ("Salt Box"), applied to the AUC requesting water rates consisting of:

(a) $7.18/m3 variable charge; and

(b) $120/customer/month fixed charge.

This was Salt Box's first water rate application. Salt Box, an investor-owned water utility, purchased the water utility in 2008. At the time of its application, Salt Box's customer base consisted of 29 residential customers and 2 co-operatives customers.

Salt Box served customers in four subdivisions:

(a) 18 customers in the Ranch subdivision;

(b) 11 customers in the Deer Springs subdivision;

(c) the water co-op serving the residents of Windmill Way, which had 30 co-operative members; and

(d) the CHECAL water co-op serving the residents of Calling Horse, which had 15 co-operative members.

Salt Box is a Public Utility

The AUC found that:

(a) Salt Box operated "a system, works, plant, equipment or service" for the delivery or furnishing of water directly or indirectly to customers; and

(b) Therefore, Salt Box met the definitions of a "public utility" and an "owner of a public utility" as defined in the *Public Utilities Act*, subject to AUC regulation to ensure that customers receive safe and reliable service at just and reasonable rates.

Interim Rates

The AUC found that given the seriousness of the concerns raised by interveners respecting the management, operation, and ongoing safe and reliable service provided by Salt Box, the information provided by Salt Box was not sufficient to allow parties and the AUC to adequately test the reasonableness of the revenue requirements proposed by Salt Box and to make a determination on the setting of final rates.

However, the AUC found that it was important to establish interim rates as quickly as possible so that both current and future customers would have some idea of the rates they would be required to pay.

The AUC explained that when evaluating the merits of an interim rate application, it must consider:

(a) the potential benefits of rate stability and minimization of potential rate shock on approval of final rates weighed against the expenses and costs that support an interim rate increase;

(b) whether the utility's expenses and costs are contentious or non-contentious items;

(c) the impact the revenue deficiency has on the financial welfare of the utility; and

(d) the potential impact on safe and reliable utility operations.

The AUC noted that it considered several factors in prior rate applications, which could be divided into two broad categories:

(a) those that relate to the quantum of, and need for, the rate increase; and

(b) those that relate to more general public interest considerations.

The AUC found that the following factors were relevant to its consideration of Salt Box's application:

- The identified revenue deficiency should be probable and material.
- All or some portion of any contentious items may be excluded from the amount collected.
- The financial integrity of the applicant or the avoidance of financial hardship to the applicant.
- Safe utility operations.
- Interim rates should promote rate stability and ease rate shock.
- Interim adjustments should help to maintain intergenerational equity.
- Interim rate increases may be required to provide appropriate price signals to customers.
- It may be appropriate to apply the interim rider on an across-the-board basis.

Operating Costs

Salt Box provided Aquatech invoices for portions of 2015 and 2016. However, Aquatech doubled the cost of providing service, and as a result, Salt Box submitted that it could not afford to continue using the services of Aquatech. Salt Box explained that it worked with Aquatech to find a replacement operator. Salt Box entered contracts with:

(a) Mr. Glumicic to operate the water treatment plant for $2,000 per month, increasing to $4,000 per month once Salt Box's rate review was successful and complete; and

(b) with Mr. Knight to operate the water treatment plant 2 to 5 times per week with compensation set at $100 per day.

The AUC found that:

(a) the annual operating costs under the two contracts would result in annual costs of $33,600;

(b) if Salt Box continued using the services of Aquatech, operating costs would result in an annual cost of $53,940; and

(c) given the amounts reflected in the contracts and the higher amounts paid to Aquatech in 2015 and 2016, Salt Box's proposed annual amount of $30,366 for plant and water operations was reasonable in the circumstances.

Repair & Maintenance Costs

The AUC found that:

- significant repair expenses incurred in 2015 appeared related to a line break that occurred in January 2015, resulting in total repair expenses of approximately $30,000, consisting of $23,50042 for repair of the line and $6,100 in landscaping expenses;
- details surrounding the line break, such as whether the line was a transmission line impacting all customers or whether it was a distribution line and only impacted residential customers was not provided;
- Salt Box failed to adequately explain the significant variability in the historical values, making it difficult to determine a reasonable repair and maintenance forecast; and
- repairing and maintaining utility infrastructure is a key function in providing safe and adequate water service.

For the purpose of setting interim rates, and in the absence of sufficient information, the AUC assumed the 2015 line break was a one-off event. On that basis, the AUC disallowed $30,000 of repair from the amounts forecasted by Salt Box.

The AUC directed Salt Box to develop a maintenance plan to ensure that routine maintenance and repairs as part of its next rate application. The AUC directed that the plan provides:

(a) an explanation of the proposed repair work; and

(b) the anticipated expenses to complete the work.

Administration Expenses

Salt Box forecasted administration expenses of $180,000 for 2016. In its application Salt Box indicated that its "operating and management staff include [a] manager, one accounting staff for bookkeeping and billing, one co-ordinator, and one onsite operator and contractor for plant operation." Salt Box explained that these expenses are the result of an agreement with Regional GP Enterprises Inc., which was then subcontracted to other companies.

The AUC found that the proposed administrative expenses, as determined by arrangements with affiliated companies, resulted in total administration expenses about three times the gross revenue of Salt Box. The AUC found the total administration expenses were unreasonable and could not be approved as filed.

The AUC found that given Salt Box's small customer base and quarterly billing, the annual amount of $12,000 would afford sufficient coverage of administration expenses.

Rate Base

The AUC accepted Salt Box's description of its fixed assets, depreciation rates, accumulated depreciation amounts and resulting net book value ("NBV") of the assets for the purposes of this interim decision.

The AUC noted that it had approved the use of a deemed capital structure of 75 percent debt and 25 percent equity in previous water rate decisions. The AUC found that a capital structure of 75 percent debt and 25 percent equity reasonably balanced the interests of Salt Box and its customers in setting the return.

Using a debt/equity ratio of 75/25, Salt Box's debt cost rate for debt, and rate of return consistent with the 2016 GCOC decision, entitles an annual return of $21,954.72, as shown below:

	Deemed capital structure	Prorated rate base	Rate	Return
Debt	75%	$250,434.08	6.00%	$15,026.04
Equity	25%	$83,478.02	8.30%	$6,928.68
		$333,912.10		$21,954.72

Coalspur Mines (Operations) Ltd. – Application for an Exemption Under Section 24 of the Hydro and Electric Energy Act

Electric Distribution Line – Exemption under Section 24 of the Hydro and Electric Energy Act

Coalspur Mines (Operations) Ltd. ("Coalspur") applied to the AUC requesting an exemption under section 24 of the *Hydro and Electric Energy Act* (the "*HEEA*") to own and operate a distribution line on its lands.

The AUC approved the requested exemption for the reasons summarized below.

AUC Findings

Regarding the Legislative Scheme

HEEA Section 24(1) states:

> Exemption from Part 3
>
> 24(1) A person distributing or proposing to distribute electric energy solely on land of which the person is the owner or tenant for use on that land and
>
> > (a) not across a public highway, or
> >
> > (b) across a public highway if the voltage level of the distribution is 750 volts or less
>
> is not subject to this Part unless the Commission otherwise directs.

With respect to *HEEA* section 24 within the larger legislative scheme governing the regulation of electricity in Alberta, the AUC found that:

(a) to give effect to the exemption provided for in *HEEA* Section 24, to the extent that section 24 conflicted with the provisions of the *Electric Utilities Act* (the "*EUA*") section 101, *HEEA* section 24 would prevail;

(b) without an exemption under *HEEA* section 24, Coalspur would be limited in its ability to operate within FortisAlberta's service area and would have to make arrangements with FortisAlberta, pursuant to *EUA* Section 101; and

(c) in this case, Coalspur would not require a *EUA* Section 101 approval if the AUC granted the applied-for Section 24 exemption to Part 3 of the *HEEA*.

Considering the Test for Exemption

The AUC set out the two components to the section 24(1)(a) exemption as follows:

(a) first, a party seeking to avail itself of this exemption must demonstrate that it is proposing to distribute electric energy solely on land of which the person is the owner or tenant for use on that land;

(b) second, the person must not be seeking to distribute electric energy across a public highway; and

(c) third, if the express requirements of *HEEA* section 24 are met, the AUC must determine that it is in the public interest to grant an exemption.

The AUC found that the proposed project met the requirements of *HEEA* section 24, based on its findings that:

(a) Coalspur held a valid lease over the lands where its distribution system was proposed to be located and therefore met the first component of *HEEA* section 24; and

(b) the AUC found that the proposed distribution of electric energy would not cross a public highway.

Considering whether it was in the public interest to grant the exemption, the AUC found that:

(a) Coalspur's consultation with respect to the proposed distribution system was adequate in the circumstances and noted that there were no outstanding objections or concerns to Coalspur's application; and

(b) considering social, economic, or environmental effects, the AUC found that approving the distribution system was in the public interest.

The AUC also stated that: "An important consideration for the Commission was that the proposed distribution system would be wholly located within the lands that are the subject of the mining lease that was approved by the Alberta Energy Regulator."

NATIONAL ENERGY BOARD

SanLing Energy Ltd. and Yoho Resources Inc. – Abandonment of the Boundary Lake Pipeline (Abandonment Hearing MHW-001-2017)
Pipeline Abandonment

On 12 December 2016, SanLing and its partner Yoho Resources Inc. (the "Applicant") filed an application to the NEB requesting leave to abandon the Boundary Lake Pipeline (the "Pipeline).

For the reasons summarized below, the NEB, granted the Applicant leave to abandon the Pipeline.

The Abandonment Project

The Applicant proposed to abandon the Pipeline in-place and to complete abandonment activities on the existing right-of-way by depressurizing the pipeline, disconnecting it from the cathodic protection, removing all above-ground risers, and cutting and capping the pipeline on both sides of road crossings.

Engineering Matters

The NEB found that the abandonment activities:

- were appropriate in the circumstances and would be carried out in a technically safe manner;
- were required to comply with the legislative requirements, including the latest version of CSA Z662-15 related to abandonment of piping; and
- that abandoning the Pipeline in-place was acceptable in this instance, as subsidence was expected to be minimal given the small diameter of the Pipeline.

Economic Matters

The total estimated cost for abandonment was $72,000, which included monitoring activities for two years.

The NEB found that the Applicant could finance the estimated $72,000 required to conduct abandonment activities.

Consultation

The NEB found that:

- Aboriginal groups and anyone else potentially affected by the project were given sufficient notice and had the opportunity to voice their concerns; and
- the design and implementation of consultation activities was appropriate and adequate for the scale and scope of the abandonment project.

Socio-economic Matters

The NEB found that the socio-economic effects associated with the Project would be negligible. The NEB noted the limited scope and duration of abandonment activities, the fact that the line had been deactivated since 2008, and that most of the work would take place within the ROW or road allowances.

The NEB concluded that the abandonment project was not likely to cause any significant socio-economic effects.

Decision and Order

The Board granted the Applicant leave to abandon the Pipeline.

Letter Decision – Review of the National Energy Board's 30 November 2015 Sawyer Application regarding jurisdiction over the proposed Prince Rupert Gas Transmission Project
NEB Jurisdiction – Liquid Natural Gas – Natural Gas Pipelines

Prince Rupert Gas Transmission Ltd. ("PRGT"), a wholly owned subsidiary of TransCanada Pipelines Ltd ("TransCanada"), was the proponent of a proposed natural gas pipeline that was to extend from a point near Hudson's Hope to the proposed Pacific Northwest LNG facility to be located on Lelu Island, British Columbia (the "Project").

In the Federal Court of Appeal ("FCA") decision, *Sawyer v TransCanada Pipeline Limited*, 2017 FCA 159, the FCA granted Mr. Sawyer's appeal of an NEB decision that found Mr. Sawyer had failed to establish a *prima facie* case that the Project was a federal work or undertaking within section 92(10)(a) of the *Constitution Act, 1867* (the "*Constitution Act*") and therefore not subject to the jurisdiction and regulatory review of the NEB. The FCA remitted the matter back to the NEB for redetermination.

The NEB dismissed Mr. Sawyer's application on a without prejudice, as its decision was not adjudicated on the merits. Rather, given PRGT's decision to not proceed with the project, the issues raised in Mr. Sawyer's original application were moot.