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DECISIONS

REGULATORY
LAW CHAMBERS

ENERGY REGULATORY REPORT

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*This monthly report summarizes energy decisions or resulting proceedings from applications before the Alberta Energy Regulator ("**AER**"), the Alberta Utilities Commission ("**AUC**") and the National Energy Board ("**NEB**"). For further information, please contact Rosa Twyman at Rosa.Twyman@RLChambers.ca or 403-930-7991 or Vincent Light at Vincent.Light@RLChambers.ca or 403-930-7994.*

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ALBERTA ENERGY REGULATOR

Application Requirements for Activities within the Boundary of a Regional Plan (AER Bulletin 2014-28)
AER Bulletin – Application Requirements

The AER updated its requirements for applications within regional plans under the *Alberta Land Stewardship Act* as set out in *Bulletin 2012-22: Application Procedures for Approval of Activities Located In or Near the Boundaries of the Lower Athabasca Regional Plan*.

Applications within the boundary of an approved regional plan must assess the following factors:

(a) Whether the activity would also be within the boundaries of a designated conservation area, a provincial park or recreation area, or a public land area for recreation and tourism. And if so, whether the mineral rights associated with the activity are subject to cancellation;

(b) Whether the activity is consistent with the land uses, outcomes, objectives and strategies set out in the applicable regional plan; and

(c) How the activity is consistent and complies with any regional trigger or limit established under the management frameworks or any notices issued in response to an exceedance of a regional trigger or limit.

The AER provides specific guidance for applications under certain Acts as follows:

(a) *Environmental Protection and Enhancement Act* ("*EPEA*") and *Water Act* applications: Applications under *EPEA* and the *Water Act* must address the requirements in Alberta Environment and Sustainable Resource Development's ("ESRD") *Guide to Content for Industrial Approval Applications*;

(b) *Public Lands Act* ("*PLA*") applications: Applications under the *PLA* must run a land standing report or use a Landscape Analysis Tool to identify potential conflicts at the site of the proposed activity; and

(c) *Oil and Gas Conservation Act* ("*OGCA*"), *Oil Sands Conservation Act* ("*OSCA*"), *Pipeline Act, and Coal Conservation Act* ("*CCA*") applications: Applications under the *OGCA*, *OSCA*, *Pipeline Act* and *CCA* must submit the same information as applications under the *EPEA, Water Act*, and *PLA* if any of the following apply:

(i) If the proposed activity is within the boundaries of a designated conservation area, provincial park or recreation area, or a public land area for recreation and tourism;

(ii) If the activity is not permitted and is inconsistent with the land uses and outcomes, objectives, and strategies set out in the relevant regional plan;

(iii) If the activity may result in the exceedance of a regional trigger or limit in the applicable regional plan, including contravention of a notice issued in response to a previous exceedance; or

(iv) If the activity is "incidental" to a previously approved and existing activity.

Any applications submitted to the AER under Directives 51, 56, or 58 for which any of the above factors apply must be submitted as non-routine applications.

Alberta Energy Regulator Takes Over Responsibility for Environmental Assessments (AER Bulletin 2014-30)
AER Bulletin

The AER issued a notice stating that, effective October 1, 2014, it would assume responsibility from Alberta Environment and Sustainable Resource Development for environmental assessment processes related to upstream oil, natural gas, oil sand and coal projects under the *Environmental Protection and Enhancement Act and the Responsible Energy Development Act*.

ALBERTA UTILITIES COMMISSION

Syncrude Canada Ltd. Alterations to 260-kV Transmission Lines (Decision 2014-250)
Transmission Line Alteration

Syncrude Canada Ltd. ("Syncrude") applied to relocate 12.7 kilometres (km) from existing 260-kilvolt (kV) transmission lines 201-PTL260-1 and 201-PTL260-2 that are within Syncrude's industrial system for mining and operations near Fort McMurray. The overall length of the transmission lines would be extended by six km. Syncrude stated that the relocation was necessary for future mining at Syncrude's Muskeg River location.

No objections were received from stakeholders, however the AUC did inquire into the preferred route put forth by Syncrude. Syncrude's preferred route would parallel Highway 63 and an existing transmission line right-of-way.

The AUC held that the application met all of the requirements of AUC *Rule 007: Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations and Hydro Developments*. Furthermore, as the relocation and new construction would take place within an industrial system and existing disturbed areas, the AUC held that there would be minimal environmental impacts. The AUC therefore approved the application and issued the applicable permits and licences.

2615991 Canada Ltd. (ATCO Power Canada Ltd.) 400-MW Heartland Natural Gas Power Plant (Decision 2014-253)
Application – Power Plant

2615991 Canada Ltd. ("ATCO") applied to the AUC to construct and operate a 400-megawatt natural gas-fired combined cycle power plant northeast of Fort Saskatchewan.

ATCO stated that it selected the site for its close proximity to other heavy industrial facilities and nearby infrastructure to facilitate the operation of the proposed plant.

One stakeholder, True-Arc Holdings Ltd., and its associated company 1063320 Alberta Ltd. (collectively "True-Arc"), a welding and fabrication company adjacent to the proposed power plant site, objected to the proposed power plant based on:

(a) The need for the project;

(b) The appropriateness of the proposed location;

(c) Possible adverse health effects, real and perceived; and

(d) The impact on the potential for property development and on property values.

ATCO submitted a motion to the AUC to strike the issue of need. The AUC granted ATCO's motion on the basis that section 3 of the *Hydro and Electric Energy Act* requires the AUC not to consider the need for the facility.

The AUC held that the proposed location was appropriate, primarily on the basis that the AUC did not consider that any evidence on the record showed that the location was not in the public interest. Conversely, the AUC found that the plant's location in Alberta's Industrial Heartland was appropriate and reasonable, as it was in close proximity to necessary infrastructure, was in an area designated for industrial use, and was consistent with current land use in the area.

The AUC also held that the noise impact assessment submitted was consistent with noise requirements in AUC Rule 012: *Noise Control*, and that the consultation and participant involvement program was consistent with the requirements of AUC *Rule 007: Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations and Hydro Developments*.

With respect to health effects submitted by True-Arc, the AUC understood the main concern of True-Arc to relate to effects from electro-magnetic fields ("EMF"). The AUC held that True-Arc did not provide any evidence to show a link between EMF and adverse health effects, thus making ATCO's evidence uncontroverted. The AUC accepted ATCO's expert report on EMF, which concluded that extremely low frequency EMF has no causal link with long-term adverse health effects.

True-Arc further did not provide evidence on the effects of property value or how the proposed power plant may limit True-Arc's expansion plans. Therefore, in the absence of any evidence on the point, the AUC held that there was no negative impact on True-Arc's property value or development plans.

Accordingly, the AUC found that the proposed power plant was in the public interest and approved the application.

ATCO Electric Ltd. 2014 Rider G (Decision 2014-255)
Rider G – Dispense Deferral Account Balances

ATCO Electric Ltd. ("ATCO") applied to the AUC for approval of a temporary rate rider, to be designated as Rider G, effective from October 1, 2014 to September 30, 2015 to dispense with deferral account balances and other true-ups related to previous system access service ("SAS") riders.

ATCO submitted that Rider G would be comprised of three components:

(a) True-up of 2013 transmission amounts;

(b) True-up of 2011 and 2013 Rider G amounts; and

(c) True-up of 2012 and 2013 Balancing Pool amounts.

The total amount to be collected under Rider G for all three components would create a net refund of $11.273 million to customers, to be implemented over a 12 month period and apportioned amongst rate classes. The AUC found this refund to be warranted and approved ATCO's 2014 Rider G effective October 1, 2014 to September 30, 2015.

AltaLink Management Ltd. Refiling Pursuant to Decision 2013-407 and Decision 2013-459 (Decision 2014-258)
GTA Refiling

AltaLink Management Ltd. ("AltaLink") re-submitted its General Tariff Application ("GTA"), following direction from the AUC in Decision 2013-407 in respect of its initial GTA, and following direction from Decision 2013-459 in respect of generic cost of capital ("GCOC").

As a result of the delay from the re-filing, AltaLink had been collecting interim tolls effective March 1, 2014.

This decision addressed only matters that were points of contention as between parties, or where information requests or issues were raised. For the remaining parts of the GTA, the AUC determined that AltaLink had complied with the following directives from Decision 2013-407: 2 to 16, 19, 22, 25, 28, 30 to 32, 34 to 37, and 39 to 43.

Directive 24 from Decision 2013-407 directed AltaLink to review its in service dates with the Alberta Electric System Operator ("AESO") for facilities in its base plan for the GTA. The AUC held that no further adjustments to in service dates were required. However, the AUC remained concerned about what cost-mitigation opportunities would have been available by delaying the in service dates of new facilities. This is especially so, in light of the AUC's findings regarding the AESO's GTA in Decision 2014-242 on matters of costs connected to in service dates for end-use customer connections. The AUC therefore deferred consideration of the impacts of Decision 2014-242 on AltaLink's tariff for future GTAs.

Directives 26 and 27 directed AltaLink to make adjustments to forecast capital expenditures by removing its Engineering Procurement and Construction Management ("EPCM") premiums and payments made under its master services agreement and relationship agreements with SNC-Lavalin ATP Inc. and Burns and McDonnell. The AUC held that AltaLink had failed to follow these directives, but did not order a second refiling of the GTA. The AUC found that this adjustment would be the only adjustment, and that its effect on forecast returns was not significant enough to have a material effect on the test period. Further, the AUC held that the expenditures would, in any event, be reviewed as part of future direct assign capital deferral account ("DACDA") proceedings.

The AUC however, made explicit that not ordering a second refiling did not constitute an approval of the EPCM premiums, and that AltaLink's non-compliance would be addressed in any future DACDA proceedings. In anticipation of such a proceeding, the AUC ordered AltaLink to keep records of EPCM costs governed by the relationship agreements for each capital project, and calculate the difference between the EPCM costs and costs under former master services agreements. The AUC also directed AltaLink to file this information with any future application concerning its DACDA.

AltaLink also applied for adjustments to its GTA to collect amounts from the AESO, resulting from interim tariff revenue shortfalls for the remaining four months of 2014, as follows:

(a) September 2014 to December 2014: $59,953,967; and

(b) January 1, 2015 onward: $51,783,333.

The AUC confirmed AltaLink's revenue requirements as follows, notwithstanding the outstanding compliance with Directives 26 and 27:

(a) 2013 – $481.3 million; and

(b) 2014 – $621.4 million.

ATCO Gas and Pipelines Ltd. ATCO Gas North 2014 Weather Deferral Account Rider W Application (Decision 2014-263)
Rider W – Water Deferral Account Balance

ATCO Gas and Pipelines Ltd. ("ATCO") applied to the AUC to refund the balance in its weather deferral account ("WDA") of $13.457 million, to be effective from August 1, 2014 to July 31, 2015. The refund, as applied for, would be allocated among ratepayers as follows:

(a) $ (0.138)/gigajoule (GJ) for the low use rate group; and

(b) $ (0.116)/GJ for the mid use rate group.

The WDA was originally approved in Decision 2008-113 for the purpose of accounting for differences between actual and normal temperatures and the revenue forecast approved by the AUC.

No objections were received from interested parties to the application.

The AUC held that ATCO's methodology and timeframe as applied for in calculating the WDA refund were reasonable and consistent with past WDA rate rider applications. The AUC therefore approved the application as filed.

Alberta Electric System Operator Approval of Alberta Reliability Standards Definitions (Decision 2014-264)
Alberta Reliability Standards

The Alberta Electric System Operator ("AESO") applied to the AUC for approval of a large number of Alberta reliability standards definitions, pursuant to Section 19(4)(b) of the *Transmission Regulation* (the "*T-Reg*"), and included its recommendations to amend, add or delete the definitions.

The AUC stated that, according to section 19(5) and 19(6) of the *T-Reg*, it is obligated to follow the recommendation of the AESO, unless the recommendation is demonstrated to be technically deficient or not in the public interest.

As no party objected to, or filed evidence in relation to the recommendations, the AUC approved the changes to the reliability standards definitions, to be effective on October 1, 2014.

ATCO Gas and Pipelines Ltd. ATCO Gas North and South Load Balancing Rate Rider Application (Decision 2014-268)
Rider L – Load Balancing Deferral Accounts

ATCO Gas and Pipelines Ltd. ("ATCO") filed an application with the AUC to recover amounts from its North and South load balancing deferral accounts ("LBDA") current to April 30, 2014 through Rate Rider L, as the balance for both North and South had reached the $2 million threshold for Rider L, as set out in Decision 2008-021. The LBDA arises from part of the physical operation of the ATCO gas pipeline system which requires gas supply adjustments to maintain proper operating pressure.

The North LBDA balance as of April 30, 2014 was approximately $7.9 million, and the South LBDA was approximately $2.5 million. ATCO proposed to recover these amounts over the months of October and November, 2014 for the North LBDA, and October, 2014 for the South LBDA. ATCO applied to have the Rider L amounts allocated amongst the rate classes, ranging from $0.191/gigajoule (GJ) for irrigation customers in the south, to $0.336/GJ for high use northern customers.

ATCO submitted that the amounts per GJ, adjusted to a total billing basis, would not constitute rate shock for any of its customers.

The balances would only be collected until April 30, 2014, as in ATCO's submission, it would be changing to a province-wide LBDA thereafter, and a reconciliation of accounts was needed before proceeding with closing the North and South LBDAs.

The AUC retained the existing $2 million threshold for triggering a rider for collecting the Rider L amounts for the new province-wide LBDA. The AUC also directed ATCO to provide analysis in support of its proposed materiality threshold for triggering a refund or recovery of LBDA amounts.

Finally, the AUC approved ATCO's request to include post final adjustment mechanisms into its LBDA, as the AUC held that timely adjustments of imbalances for retailers was of a net benefit to consumers by reducing inter-generational inequity. The AUC reasoned that timely corrections were necessary, since ATCO was required to purchase physical volumes of gas to adjust for imbalances at market prices. Therefore the larger the timeframe between adjustments, the larger the potential for differing market prices for actual gas volumes purchased.

EPCOR Distribution & Transmission Inc. 2013 and 2014 Transmission Facility Owner Tariff (Decision 2014-269)
General Tariff Application

EPCOR Distribution & Transmission Inc. ("EDTI") applied to the AUC for approval of the following as part of its General Tariff Application ("GTA"):

(a) The transmission rates to be paid by the Alberta Electric System Operator ("AESO") for the use of EDTI's transmission facilities, based on EDTI's forecast transmission revenue requirement;

(b) EDTI's applied for transmission rates;

(c) EDTI's terms and conditions of service;

(d) The continued use of the following reserve and deferral accounts:

  (i) Hearing cost reserve;

  (ii) Self-insurance reserve;

  (iii) AESO directed projects deferral account; and

  (iv) Short-term incentive deferral account; and

(e) Placeholders related to capital structure and rate of return on equity for transmission, subject to direction from the AUC in respect of any generic cost of capital proceedings.

Unless otherwise noted herein, the AUC held that EDTI had complied with all previous AUC directions.

Revenue Requirement

The aggregate revenue requirement applied for by EDTI increased from $ 65.45 million in 2012 (actual) and is set out as follows for each of 2013 and 2014:

(a) $ 76.59 million – 2013 forecast; and

(b) $ 91.80 million – 2014 forecast.

The forecast capital additions and capital expenditures for 2013 and 2014 applied for by EDTI are as follows:

(a) Capital Expenditure:

  (i) $ 145.73 million – 2013 forecast; and

  (ii) $ 40.48 million – 2014 forecast; and

(b) Capital Additions:

  (i) $ 252.86 million – 2013 forecast; and

  (ii) $ 42.45 million – 2014 forecast.

The 2013 opening rate base for EDTI was set at $ 330.24 million.

EDTI submitted that the large increase in capital expenditure, capital additions, and the increase in 2014 revenue requirement was in large part related to the capitalization of the Heartland project previously approved by the AUC. The Heartland project accounted for 87.8% of the increase in revenue requirement in 2013, and 58.4% of the increase in revenue requirement in 2014.

Return on Equity

EDTI submitted that the return on equity was calculated at 8.75% for 2013 and 2014, using 37% equity thickness, and would be instituting a true-up mechanism for any changes arising from further directions in generic cost of capital proceedings. The cost of debt was applied for at 5.12% in 2013 and 5.11% in 2014. The AUC approved the equity to debt ratio as reasonable, and approved the return on equity subject to a true-up, pending any directions from any generic cost of capital proceedings.

Interest on Debt

With respect to long term debt, the AUC noted that, in Decision 2012-171, it approved the issuance of $ 35 million in long term debt for EDTI at a forecast long-term interest rate of 3.87% to fund capital expenditures such as the Heartland project. EDTI submitted that it did not issue this debt at the time, as it financed the expenditures with short-term debt. As part of the GTA, EDTI applied for a similar amount of long-term debt at a forecast long-term interest rate of 4.2%. The AUC held that a reduction to the previously approved 3.87% rate was necessary on the basis that EDTI had a reasonable opportunity to issue this debt on more favourable terms, but chose not to. The AUC held that the increased rate as applied for was therefore not in the interests of ratepayers. The AUC denied the requested interest rate, and directed EDTI, in its refiling to use a long-term interest rate of 3.87%.

Depreciation

The AUC accepted the calculations for depreciation as applied for by EDTI. However, due to the size of the Heartland project, the AUC directed EDTI to maintain accounting and depreciation records for the Heartland project in such a manner that they may be able to isolate the depreciation and net book value of the assets in the future.

Labour Costs

With respect to allocating and tracking labour costs and full-time equivalent ("FTE") positions between EDTI and its unregulated affiliates, EDTI proposed a two-step analysis:

(a) Calculate the composite cost allocation without unregulated entities; then

(b) Determine the allocation of corporate costs to those unregulated entities to be removed from EDTI's revenue requirement.

The AUC accepted this FTE cost allocation methodology, and directed EDTI to include similar calculations in future GTAs.

However, the AUC did not find it reasonable that EDTI required additional capital FTEs, despite having similar or lower levels of capital expenditure (once Heartland costs were excluded.) Therefore the AUC directed EDTI to explain this apparent decrease in productivity for capital FTEs. Further, in upcoming GTAs, the AUC directed EDTI to provide an analysis of capital FTEs measured against capital expenditures, and provide an explanation of any change in the ratio of capital FTEs to capital expenditure. In the result, the AUC denied EDTI's requested increase of capital FTEs from 2013 to 2014 test years.

With respect to vacancy levels for FTEs, EDTI applied for a zero percent vacancy rate. The Consumer Coalition of Alberta ("CCA") expressed concern with this vacancy rate, noting that customers may ultimately pay twice for capitalized FTEs. Once, from being included in the test year forecasts, and again by being included in capital costs and, thereby, the rate base.

The AUC approved the labour salary escalation rates for EDTI's unionized labour, as the forecast rates aligned well with industry and Conference Board of Canada forecasts. However, the AUC did reduce the 2014 escalation rate for non-unionized labour from 4.0 percent down to 3.5 percent.

The AUC held that there was insufficient explanation as to why the escalation factor should be at the top end of the spectrum when EDTI's non-labour compensation was already considered by EDTI to be competitive in the marketplace.

On variable compensation for labour, the AUC approved the applied for changes to EDTI's mid-term incentive program as set out in Decision 2012-272. The AUC also approved the continuation of EDTI's short-term incentive program.

The AUC held that the vacancy rate proposed by EDTI was consistent with Decision 2010-505, and that the further application of a vacancy rate in addition to the FTE reductions would result in a double counting of the reduction. Therefore the AUC approved EDTI's zero percent vacancy rate.

Variance Analysis

EDTI proposed to change its variance analysis between actual amounts and forecast amounts as between prior decisions and test years, as well as for capital projects. EDTI proposed to report only on variances that exceed $65,000 instead of the prior methodology of 10% variance for an account. EDTI submitted that the 10% cost variation method frequently required explanations for what EDTI considered insignificant cost amounts. However, EDTI considered that its application was nonetheless comprehensive and transparent.

The Utilities Consumer Advocate ("UCA") submitted that the level of cost details provided by EDTI, considering its size as a utility relative to other providers, was overly inclusive and burdensome to all parties. The UCA requested that the AUC direct EDTI to provide more concise cost analyses, and to omit offsetting cost variances. The CCA expressed similar sentiments in submitting that cost variances of less than $100,000 were unnecessary relative to the time and expense required to review them.

The AUC held that business cases for forecast capital projects and their cost variances were lacking some relevant information, despite the level of cost detail. Therefore, in circumstances where EDTI may not be able to meet the minimum filing requirements, that EDTI should state why the required information could not be provided, such as providing summaries of incremental capital and operational costs associated with other alternatives provided.

Removal of CPC Costs

The EDTI GTA removed all costs allocated to Capital Power Corporation ("CPC"). Under the reorganization, CPC was no longer considered to be an affiliate, and therefore no costs associated with CPC were allocated to revenue requirement.

Corporate Restructuring Costs

With respect to corporate restructuring costs, EDTI noted that its application reflected a nine percent reduction in corporate services costs consistent with the AUC's Decision 2012-272. EDTI submitted that it recovered its corporate service costs from three general mechanisms:

(a) Direct assignment of costs;

(b) Allocation of costs; and

(c) Asset usage fees.

The AUC found that the allocation methodology and the use of 2012 corporate services costs as a base to assess future years' costs were reasonable, and accordingly approved the corporate services costs as filed by EDTI.

Heartland Project Costs

The AUC also approved the costs for the Heartland project on a full deferral basis, as it noted the project was an AESO directed project. Therefore the amounts for the Heartland project's forecast costs were approved on a placeholder basis. A determination on the prudence of these costs would be addressed when EDTI applies for a reconciliation of the deferral account.

Specific Deferral and Reserve Accounts

EDTI also applied for continuation of four deferral and reserve accounts, which were approved in Decision 2012-272, including the hearing cost reserve, self-insurance reserve, AESO direct assigned capital deferral and short-term incentive deferral accounts. Each of these were approved by the AUC as filed.

Lack of Clarity and Error Remedy

The AUC expressed some overall concern over a lack of clarity for which AUC direction EDTI was responding to in its submissions. Therefore the AUC directed EDTI to refer specifically to the decision number and paragraph number when responding to AUC directions in all future GTA filings.

Throughout the course of the proceeding, EDTI identified a number of minor errors in its application whereby it had inadvertently included a typographical error or a disallowed cost from a prior proceeding. EDTI proposed to remedy the errors in its refilings.

Next Steps and Directions

The AUC approved EDTI's transmission facility owner tariffs, terms and conditions, and reserve and deferral accounts, subject to the specific AUC directions. The AUC ordered

EDTI to submit a compliance filing by October 20, 2014 to reflect the AUC's findings and directions, and to correct any errors and omissions identified throughout the course of the proceeding. The AUC also directed EDTI to provide a summary of the changes made in its compliance filing arising from any AUC findings or directions.

EPCOR Utilities Inc. Inter-Affiliate Code of Conduct Compliance Plan (Decision 2014-270)
Code of Conduct Compliance Plan

EPCOR Utilities Inc. ("EPCOR") filed its revised inter-affiliate code of conduct and compliance plan, pursuant to directions from the AUC in Decision 2014-045. No other parties registered any statements of interest to participate.

The revised code of conduct and compliance plan were filed to reflect changes in the corporate structure of EPCOR, notably including EPCOR Energy Alberta GP Inc. as the general partner of EPCOR Energy Alberta Limited Partnership to provide regulated rate option service to customers in EPCOR Distribution & Transmission Inc. and FortisAlberta Inc.'s respective distribution service areas.

After review, the AUC determined that both the code of conduct and compliance plan continue to meet the necessary requirements, and approved the documents as filed.

FortisAlberta Inc. 2013 AESO Charges Deferral Account and 2015 Transmission Adjustment Rider (Decision 2014-275)
Deferral Account – Transmission Adjustment Rider

FortisAlberta Inc. ("FAI") applied to the AUC for approval of the following amounts:

(a) A refund of the amounts recorded in FAI's 2013 Alberta Electric System Operator ("AESO") charges deferral account ("ACDA") pursuant to Decision 2013-072 to be effective from January 1, 2015 through December 31, 2015 through a Transmission Adjustment Rider ("TAR");

(b) A refund of 2013, 2014, and forecast 2015 carrying costs to December 2015 for amounts to be refunded in accordance with AUC *Rule 023: Rules Respecting Payment of Interest*; and

(c) A provision for a true up of the difference between actual and forecast recovery of the 2013 ACDA amounts in subsequent applications.

The proposed refund for all components requested amounted to a net $36.721 million refund to customers, although due to the allocation methodology, irrigation and transmission connection rate classes would see a charge as part of the TAR. FAI proposed to collect the charges and allocate refunds based on previously approved methods, using a percentage of base distribution tariff transmission component charges.

No objections were raised with respect to the amounts or the proposed allocation methodology.

The AUC found that FAI's refund amounts were reasonable, and approved the net refund of $36.721 million through the proposed methodology. The AUC also found that the border customer cost allocation applied for was reasonable; holding that section 16 of the *Isolated Generating Units and Customer Choice Regulation* suggested a legislative intent to confer similar treatment to border customers as if they were connected to the Alberta power grid.

FAI also applied for specific refinements to the AESO quarterly demand transmission service rider methodology. However, the AUC deferred consideration of this issue to a later hearing, as it held that any refinement to a generic methodology should be undertaken with the input of all relevant stakeholders.

ENMAX Power Corporation 2014 Formula-based Ratemaking Annual Rates (Decision 2014-279)
Formula-based Ratemaking

ENMAX Power Corporation ("EPC") applied for approval of its formula-based ratemaking ("FBR") annual rates and technical reports.

However, due to complications and delays in the schedule, EPC applied for an interim refundable direct access system adjustment rider effective October 1, 2014 until such time as a final decision in respect of the FBR application is rendered. The AUC approved the interim adjustment rider on the basis that it would promote rate stability in the interim.

Various AUC NID and Facility Applications
Needs Identification Document – Facility Application

The AUC approved the following need application and related facility application upon finding that:

- The public consultation complies with *AUC Rule 007*;
- The noise impact assessment summary complies with *AUC Rule 012*;
- There was no evidence that the AESO need assessment is technically deficient;
- The facility proposed satisfies the need identified;
- Technical, siting and environmental aspects of the facilities comply with *AUC Rule 007*;
- Considering the social, economic and environmental impacts, the project is in the public interest; and
- The project is in accordance with any applicable regional plan.

Decision	Party	Application
2014-262	AESO	Tucuman 478S Substation Modified NID Application
	AltaLink	Tucuman 478S Substation Facility Application

The AUC approved the following facility applications upon finding that:

- The public consultation complies with *AUC Rule 007*;
- The noise impact assessment summary will comply with *AUC Rule 012*;
- Technical, siting and environmental aspects of the facilities comply with *AUC Rule 007*; and
- Considering the social, economic and environmental impacts, the project is in the public interest.

Decision	Party	Application
2014-257	ATCO Electric Ltd.	Decommission and Alteration of Kinuso 727S Substation
2014-261	Manning Diversified Forest Products Ltd.	Facility Application for Biomass Thermal Power Plant
2014-278	Foster Creek Industrial Designation	Amendment Order No. U2014-389
	Cenovus FCCL Ltd.	Kodiak 1210S Substation Permit and Licence No. U2014-290
	ATCO Electric Ltd.	Transmission Line 7L86 Permit and Licence No. U2014-392
	ATCO Electric Ltd.	Transmission Line 7LA86 Permit and Licence No. U2014-393
	ATCO Electric Ltd.	Transmission Line 7LB86 Permit and Licence No. U2014-394
	Cenovus FCCL Ltd. and ATCO Electric Ltd	Connect Foster Creek ISD to Transmission Line 7L86 Order No. U2014-391

ALBERTA COURT OF APPEAL

Saskatchewan Power Corporation v NaturEner USA, LLC, 2014 ABCA 318
Respondent Status – Appeal

The Alberta Court of Appeal ("ABCA") heard motions from Morgan Stanley Capital Group Inc. ("Morgan Stanley") and NaturEner USA, LLC ("NaturEner") to be added as respondents to four appeals of the Alberta Utilities Commission Decision 2013-025 concerning ISO Rule Section 203.6, *Available Transfer Capability and Transfer Path Management*.

The ABCA, citing both the economic nature of the decisions and the inherent power of the courts to add parties, granted Morgan Stanley's and NaturEner's motions on the basis that it would be unjust to allow their direct competitors to appeal the decision without affording Morgan Stanley and NaturEner an equivalent voice to defend it.

The ABCA held that Morgan Stanley and NaturEner have interests as the holders of rights to northbound transmission capacity on the Montana intertie, interests that are directly affected by the decision, and will be directly affected by the outcome of the appeal.

With respect to the suggestion that Montana Alberta Tie Ltd. ("MATL"), recently added as a respondent to the appeals, could adequately defend the interests of the applicants, the ABCA noted that the arguments and legal positions of MATL, NaturEner and Morgan Stanley may be similar (although we are not yet in a position to say that definitively). However, in one important respect, the applicants' interests may remain unprotected. If MATL's argument is unsuccessful on appeal, the applicants will have no right to a further appeal unless they are parties.

Therefore in order to promote efficiency, reduce repetition, and reduce the potential for delays, the court ordered that both applicants be added as co-respondents, and that any materials be filed jointly, one week following the original Respondents' filing.

Ernst v Alberta (Energy Resources Conservation Board), 2014 ABCA 285
Strike Portions of Claim – Appeal

This case was an appeal of a case management judge's decision to strike certain portions of a claim against the Energy Resources Conservation Board ("ERCB", now the Alberta Energy Regulator). The case management judge applied the three part analysis test as set out in *Cooper v Hobart*, 2001 SCC 79. The case management judge held that the claim failed to disclose a reasonable cause of action, as the claims were unsupportable in law.

The case management judge had also held that, even if the claims were supportable in law, section 43 of the *Energy Resources Conservation Act* ("*ERCA*") barred any action against the ERCB (this section has been repealed and substantially replaced by section 27 of the *Responsible Energy Development Act*).

The appellant landowner in this case had sued Encana Corporation ("Encana") for damage to her fresh water supply as a result of construction, drilling, hydraulic fracturing and other activities. The appellant also sued the ERCB for "negligent administration of a regulatory regime", and for failing to adequately respond to complaints by the appellant in respect of the Encana activities.

The appellant landowner appealed the ruling of the case management judge, alleging three issues:

(a) Do the pleadings disclose a private law duty of care on the Board?

(b) Does section 43 of the *ERCA* bar a claim for negligent omissions?

(c) Can section 43 of the *ERCA* bar a *Charter of Rights and Freedoms* claim?

Using a standard of correctness, the Alberta Court of Appeal considered the test for striking out a claim under Rule 3.68(2)(b) of the *Alberta Rules of Court*. The test asks whether there is any reasonable prospect that the claim will succeed, providing some generosity to allow novel claims to proceed.

In finding that the ERCB owed a duty to the public (as opposed to an individual) the Alberta Court of Appeal found that there were strong policy considerations against finding regulators to be "insurers of last resort" in a regulated industry, and held the appellant's claim was of insufficient proximity to establish a private law duty of care.

The Court provided additional reasons for denying the private law claim, notably, that:

(a) Policy decisions should not be questioned through subjecting such decisions to a tort analysis;

(b) Even if a duty were to be imposed, the extent of the standard of care to be applied would be inherently uncertain;

(c) Subjecting the regulator to private law duties would directly conflict with its duties to the public at large; and

(d) It would be contrary to long-standing common law tradition to expose a judicial or quasi-judicial body to personal liability for its decisions.

With respect to the appellant's claims under section 43 of the *ERCA*, the appellant argued that the statutory language of "any act or thing done" permitted claims for omissions. The Court dismissed this line of argument, holding that the section covered all acts and omissions of the ERCB, noting that decisions by the ERCB inherently entails decisions both to act and not to act. A statutory regime which provided protection for only one half of decisions made by a regulatory body would lead to an absurdity.

Finally, the Alberta Court of Appeal dismissed the appellant's *Charter of Rights and Freedoms* claim, holding that the goal of protecting administrative and regulatory tribunals and their members from claims of liability is constitutionally legitimate.

As a result, the Alberta Court of Appeal found no reviewable error of the case management judge on a standard of correctness. The appeal was therefore dismissed.

NATIONAL ENERGY BOARD

DR Four Beat Energy Corp. Administrative Monetary Penalty for Failure to Comply with a Board Order
Penalty – Failure to Comply

The NEB had previously ordered, under Order SH-D081-01-2013 (the "Order"), the suspension of the Knappen Border Pipeline and Associated Facilities (the "Pipeline"). The NEB had determined that there was no Emergency Management Program in place for the Pipeline as required under section 32 of the *National Energy Board Onshore Pipeline Regulations*.

Despite the issuance of the Order, DR Four Beat Energy Corp. ("DR Corp.") had failed to suspend the operation and reduce the pressure of the Pipeline. The NEB therefore obtained an order from the Federal Court of Canada to reduce the pressure on the pipeline itself or through a third party, under docket number T-1403-13.

DR Corp. was therefore issued an administrative monetary penalty of $100,000 under section 2(2) of the *Administrative Monetary Penalty Regulations* (National Energy Board) for a failure to comply with an order of the NEB in respect of the Pipeline.

Plains Midstream Canada ULC – 2010 Management and Protection Program Audit – Corrective Action Plan (CAP) Implementation Assessment
Management and Protection Program – Corrective Action Plan

The NEB released its letter to Plains Midstream Canada ULC ("Plains") outlining the findings of the NEB arising from the corrective action plan ("CAP") filed by Plains pursuant to a 2010 audit of Plains' compliance with the *Onshore Pipeline Regulations*, 1999 (the "*OPR*", since repealed and replaced).

Plains reported that it had submitted its progress reports and had implemented its CAP.

The NEB subsequently held two implementation assessment meetings to address the safety management and environmental protection programs in January and March of 2014. The NEB determined from these meetings that a number of the NEB's previous findings of non-compliance were not addressed, and that Plains continued to be non-compliant with section 47, 53, and 55 of the current *National Energy Board Onshore Pipeline Regulations* ("*NEBOPR*").

The NEB expressed concern with Plains' commitment and approach to compliance, as it noted that the non-compliance was ongoing, and that the requirements themselves had been in place since 1999 with minimal revision.

The NEB therefore authorized one of its members, pursuant to section 15 of the *National Energy Board Act* to assess and report back to the NEB with respect to Plains' approach to achieving compliance. The member is authorized by the NEB to recommend the following enforcement actions if the member determines they are necessary for Plains to achieve compliance:

(a) Revoking authorizations;

(b) Imposing safety orders; and

(c) Initiating show-cause proceedings, requiring Plains to demonstrate why the NEB should not shut its pipeline system down until Plains is fully compliant with the *NEBOPR*.

The authorized member met with Plains on September 4, 2014 to assess Plains' commitment to safety, environmental protection and management on Plains' pipeline system. The authorized member will be providing a report to the NEB, including a recommendation for appropriate steps to ensure Plains achieves compliance with the *NEBOPR*.

Lone Pine Resources Canada Ltd. Request for a Variance to Order XG-C357-009-2010 Year Three Monitoring Report
Variance Request – Post-construction Monitoring

Lone Pine Resources Canada Ltd. ("Lone Pine") applied for variance of Condition 15 of the NEB's Order XG-C357-009-2010 (the "Order") for its Ojay Pipeline project, which stipulated that Lone Pine was to provide a post-construction monitoring report for the third and fifth years post-construction.

Lone Pine submitted that it could not comply with the timing for the Year Three due to a restructuring, late spring breakup conditions, and a local forest fire that required the evacuation of the area.

The NEB, in its letter dated August 7, 2014, allowed the variance request, and extended the time limits to complete post-construction monitoring reports to on or before January 31 of the fourth and sixth years post-construction.

Proposed Amendments to four NEB Regulations for Pipeline Damage Prevention
NEB Regulation Amendments

The NEB is currently seeking comments from stakeholders on proposed changes to regulations affecting pipeline damage prevention.

Copies of the proposed changes can be located on the NEB's Website.

Stakeholder comments on the proposed changes can be emailed to damagepreventionregs@neb-one.gc.ca until October 20, 2014.

Ruling No. 32: Trans Mountain Pipeline ULC request for an order against the City of Burnaby permitting temporary access to Burnaby lands (Hearing Order OH-001-2014)

Temporary Access Order

Trans Mountain ULC ("Trans Mountain") filed a notice of motion on September 3, 2014 requesting an order from the NEB against the City of Burnaby ("Burnaby") to give Trans Mountain temporary access to certain lands controlled by Burnaby so that Trans Mountain can complete surveys and examinations required by the NEB. Trans Mountain argued that Burnaby had taken certain steps to prevent Trans Mountain from accessing the lands in question and now requires an order of the NEB under section 73 of the *National Energy Board Act* ("*NEB Act*").

Burnaby in turn argued that the NEB did not have constitutional jurisdiction to issue an order circumventing Burnaby's by-law enforcement powers. Burnaby therefore requested an adjournment to hear the constitutional question before the Supreme Court of British Columbia.

The NEB held that while Trans Mountain did not specifically request that Burnaby stop enforcing its own by-law, it was clearly the desired effect of such an order. Therefore, the NEB considered that the issue before it concerned whether legislation or by-laws enacted by another level of government were inapplicable to Trans Mountain, thus raising a constitutional question.

In the result, the NEB ordered that any subsequent motion by either party clearly address the following questions:

(a) Does the Board have the legal authority to determine that Burnaby's specific by-laws, which Trans Mountain is alleged to have breached, are inapplicable, invalid , or inoperative in the context of Trans Mountain's exercise of its powers under paragraph 73(a) of the *NEB Act*?

(b) If so, on the facts before the Board, should the Board find that those by-laws are inapplicable, invalid, or inoperative?

(c) If the Board can and does make a finding that those by-laws are inapplicable, invalid, or inoperable in the particular case, does the *NEB Act* provide the Board, as a statutory tribunal, with the authority to forbid Burnaby from enforcing those or any other by-laws in the future (for example, what is the scope of the authority under section 13 of the *NEB Act*, and does it encompass the remedy sought against Burnaby)?

(d) If so, do the facts before the Board support granting such an order?

Since neither party had filed adequate notice to the attorneys general in the form of a Notice of Constitutional Question, the NEB dismissed the motion without prejudice.