REGULATORY LAW CHAMBERS

ENERGY REGULATORY REPORT

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

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ALBERTA COURT OF APPEAL

Macdonald Communities Limited v Alberta (Utilities Commission) (2018 ABCA 317)

Permission to Appeal - Wastewater Utilities - Public Utilities Act

This Alberta Court of Appeal ("ABCA") decision considered Macdonald Communities Limited's ("MCL") application for permission to appeal the AUC's findings in AUC Decision 21340-D01-2017, and affirmed in Decision 23203-D01-2018, that the AUC did not have jurisdiction to regulate privately owned wastewater utilities.

The ABCA granted MCL permission to appeal, finding that MCL raised a serious arguable question regarding the AUC's jurisdiction to regulate privately owned wastewater utilities.

Background

MCL is a development company that is developing certain phases of a housing development known as Monterra on Cochrane Lakes. Horse Creek Water Services ("HCWS") provides treated water supply and distribution services to customers within Monterra. Its affiliate, Horse Creek Sewer Services Inc. ("HCSS"), provides wastewater services in the same area.

The AUC Decisions

MCL intervened in AUC Proceeding 21340 regarding HCWS water rates application to the AUC. MCL asked the AUC to find that HCSS was a public utility under *the Public Utilities Act* ("*PUA*"), or that HCSS and HCWS were functionally integrated and therefore part of a single public utility, such that the AUC could determine rates for wastewater services in addition to potable water service.

The AUC declined to make those determinations. In the original decision, the AUC concluded that s 1(i) of the *PUA* does not include wastewater or sewage collection and, therefore, the AUC did not have jurisdiction to set rates for HCSS, the wastewater utility in question.

In Decision 23203-D01-2018, the AUC denied MCL's application for a review of the original decision.

MCL Permission to Appeal Application

MCL sought permission to appeal the AUC decisions on the grounds that:

(a) the original AUC panel erred in determining that it lacked jurisdiction under the *PUA* to regulate privately owned wastewater utilities such as HCSS;

(b) in doing so, failed to properly apply principles of statutory interpretation; and

(c) the AUC review panel erred in adopting a reasonableness standard in its review of the original decision.

ABCA Decision Granting Permission to Appeal

Test for Permission to Appeal

The ABCA explained that the test for permission to appeal requires the applicant to demonstrate that the questions raise a serious arguable point. The ABCA noted that it considers "… many factors, including the standard of appellate review if permission is granted."

Findings

The ABCA granted MCL permission to appeal the AUC's findings regarding the regulation of wastewater services under the *PUA*, finding that MCL had raised a serious arguable point.

ALBERTA ENERGY REGULATOR

Request for Regulatory Appeal by Longshore Resources Ltd.

Request for Regulatory Appeal - Granted

In this decision, the AER considered Longshore Resources Ltd.'s ("Longshore") request for a regulatory appeal of the AER's decision to refuse to issue Longshore a formal disposition (the "Decision") for a Licence of Occupation ("LOC").

Longshore's request for regulatory appeal was opposed by the AER Oil and Gas Northwest staff ("OGNW").

The AER granted Longshore's request for a regulatory appeal.

Eligibility to Apply for Regulatory Appeal

The AER accepted that Longshore was an "eligible person" and that the AER decision was an appealable decision for the purposes of section 38 of the *Responsible Energy Development Act* ("*REDA*").

Whether the Request for Regulatory Appeal was "Frivolous" or "Without Merit"

The OGNW submitted that the regulatory appeal request should be dismissed under section 39(4)(a) as the request was "frivolous" or "without merit."

Section 39(4) of the REDA states:

> 39(4) The Regulator may dismiss all or part of a request for regulatory appeal
>
> (a) if the Regulator considers the request to be frivolous, vexatious or without merit,
>
> (b) if the request is in respect of a decision on an application and the eligible person did not file a statement of concern in respect of the application in accordance with the rules, or
>
> (c) if for any other reason the Regulator considers that the request for regulatory appeal is not properly before it.

The AER declined to dismiss Longshore's request for regulatory appeal under section 39(4) of *REDA*.

The AER rejected OGNW's submissions that Longshore failed to provide adequate justification or mitigation for the proposed new connector access road in the applied for location. The AER found that the issue of whether Longshore provided adequate justification or mitigation in its application went to the merits of the regulatory appeal and the panel hearing the regulatory appeal must determine whether it should vary, suspend, or revoke the appealable decision.

The AER also rejected OGNW's submission that Standard 1014-AS of the *Master Schedule of Standards and Conditions* (2017) ("MSSC") document did not allow additional LOC applications if access under disposition already existed. The AER found that there can be exceptions and that it was not prohibited from issuing a second LOC where the circumstances were appropriate. In the AER's view, a company, such as Longshore, could apply for a second LOC and include acceptable, alternative mitigation or justification as to why a second LOC is needed for access or mitigation strategies for the proposed new LOC. If the applicant could demonstrate that the mitigation or justification met the desired outcomes of the MSSC, the application could be approved by the AER. The AER found that whether Longshore had, in this case, provided sufficient justification or mitigation strategies went to the merits of the application and was a question for the panel hearing the regulatory appeal.

Summary

The AER granted the request for regulatory appeal and stated that it would appoint a panel of hearing commissioners to conduct a hearing of the appeal.

Request for Regulatory Appeal by Joslyn Energy Development Incorporated

Request for Regulatory Appeal - Dismissed

In this decision, the AER considered Joslyn Energy Development Incorporated's ("JEDI") request for a regulatory appeal of an AER decision approving Suncor's requested amendments to its commercial scheme operating approval for its Millennium oil sands mine (the "Amending Approval").

The AER dismissed JEDI's request for regulatory appeal, based on its determination that JEDI was not an "eligible person" under section 38 of the

Responsible Energy Development Act ("*REDA*") and therefore not eligible to request a regulatory appeal.

Amending Approval

The Amending Approval approved amendments to Suncor's existing approval, issued under the *Oil Sands Conservation Act*.

The AER noted that the scope of the Amending Approval was limited to terms and conditions relating to Suncor's tailings management plan ("TMP") and modifications to Suncor's Millennium mining operation arising from the TMP.

The Amending Approval authorized implementation by Suncor of its TMP and dealt with tailings management on the mine site, including modifications to Suncor's Millennium mining operation arising from its TMP.

"Eligible Person"

JEDI was required to establish that it was an "eligible person" to request a regulatory appeal in accordance with section 38 of *REDA*. As set out in section 36(b)(ii) of *REDA*, an "eligible person" is a person who is directly and adversely affected by a decision of the AER.

The AER found that:

(a) JEDI was not directly and adversely affected by the Amending Approval; and

(b) therefore, JEDI was not an "eligible person" under section 36(b)(ii) of the *Responsible Energy Development* Act ("*REDA*").

The AER cited the factual part of the test set out by the Alberta Court of Appeal in *Dene Tha' First Nation v Alberta (Energy and Utilities Board)* for guidance on what indicates a person that may be directly and adversely affected. In particular, the AER must consider the "degree of location of connection" between the project or its effects and the person, and whether that connection is sufficient to demonstrate that the person may be directly and adversely affected by the proposed activity. Reliable information is required that demonstrates a reasonable potential or probability that the person asserting the impact will be affected.

The AER found that:

(a) the applied for amendments did not include changes to Suncor's previously approved project boundary, final pit highwall design or the mine pit limits or boundaries, and thus setbacks from lease boundaries remained unchanged from those shown in the previous application; and

(b) intrusion onto Oil Sand Lease 428 did not increase as a result of the Amending Approval.

The AER found that JEDI had an opportunity to raise concerns in relation to Suncor's previously approved applications when those matters arose. JEDI did not do so. Accordingly, the AER found that JEDI failed to raise these concerns at the appropriate time.

Without information regarding the particulars of JEDI's future development, the AER found that it was unable to determine that there was a reasonable potential or probability that JEDI would be affected by the Amending Approval.

Decision

The AER dismissed the request for regulatory appeal.

AER Bulletin 2018-26: Reminder of Increased Risk During Migratory Bird Season

Migratory Bird Season - Protection Plans

In this bulletin, the AER reminded licensees that it was migratory bird season in Alberta. During this period, the weather may cause birds to land unexpectedly and in places where they would not normally seek to rest. The AER issued this bulletin as a reminder of the responsibility to follow waterfowl protection plans.

The AER noted that migratory bird season may change each year, depending on weather, and that it may require licensees to extend their bird-deterrent programs past the typical date.

The AER also reminded licensees that certain attractants, such as vegetation around industrial ponds and ditches, could attract wildlife and should be managed to mitigate impacts.

ALBERTA UTILITIES COMMISSION

Direct Energy Regulated Services 2017-2018 Default Rate Tariff and Regulated Rate Tariff Compliance Filing to Decision 22004-D01-2018 (Decision 23748-D01-2018)

Rates - Default Gas Tariff - Regulated Electricity Rate Tariff

In this decision, the AUC considered Direct Energy Regulated Services' ("DERS") compliance filing application, pursuant to the AUC's order in Decision 22004-D01-2018 (the "Original Decision").

The AUC found that DERS complied with the applicable directions from the Original Decision. The AUC approved the default rate tariff ("DRT") and the regulated rate tariff ("RRT") revenue requirements for 2017 and 2018, as filed.

The AUC did not approve any of the DRT or RRT interim rate true-up amounts also requested by DERS as part of its compliance filing. The AUC directed DERS to file a separate application to finalize its DRT and RRT interim rate true-up amounts after it completed billing on interim rates up to September 30, 2018.

Compliance with Directions from the Original Decision

The AUC found that:

(a) DERS complied with the AUC directions to use the actual cost data for 2017 and January to April 2018, and develop updated forecasts for the remainder of 2018; and

(b) DERS complied with the AUC directions regarding various other costs including: amortization expenses, customer costs, administrative costs, corporate service costs, and DRT reasonable return schedule updates.

True-Up of Interim Rates

The AUC did not accept the interim rate true-up proposed by DERS because of a flaw in DERS' methodology, summarized below. The AUC also noted its preference was for DERS to include all the true-ups in a single application.

The AUC found that DERS' proposed methodology for calculating the interim rate true-up figures did not reflect the risks for the entire time period because it included a mixture of actual and forecast information. The AUC noted that to properly account for the volume and site count risk, true-up amount calculations need to consist entirely of actual gas volumes and site counts for the period for which the true-ups were being calculated. The AUC, therefore, directed DERS to file a separate application for the true-up of each of the DRT and RRT services from January 1, 2017, to September 30, 2018, after it completed billing on interim rates for September 30, 2018 (the "Interim Rates Period").

For the DRT return margin and energy related "other" costs, the AUC found that DERS was at risk for the revenue associated with the difference in actual gas volumes and DERS' forecasted volumes for the Interim Rates Period.

With respect to the DRT and the RRT non-energy services rates, the AUC similarly considered DERS at risk for the revenue associated with the variance from forecasted site counts during the Interim Rates Period. If the actual number of sites was greater than the forecasted number, this resulted in more non-energy revenue, thus benefiting DERS. Conversely, if the actual number of sites for the Interim Rates Period was less than the forecasted number, resulting in less revenue, this would be to DERS' detriment.

Revenue Requirements and Final Rates for 2017 and 2018

The AUC approved the DRT and RRT revenue requirements for 2017 and 2018. The approved revenue requirements are shown in the following tables:

AUC approved DRT revenue requirements for 2017 and 2018

	2017	**2018**
	($ million)	
Energy-related revenue requirement	1.883	1.445
Non-energy Revenue requirement	54.421	52.824

AUC approved RRT revenue requirements for 2017 and 2018

	2017	2018
	($ million)	
Energy-related revenue requirement	0.626	0.434
Non-energy Revenue requirement	17.100	15.925

The AUC approved the final DRT and RRT non-energy rates for 2017 and 2018.

The AUC approved the final DRT return margin charges for 2017 and 2018 (shown in the following table).

Final DRT Return Margin Charges

	2017	2018
DRT return margin charge	0.053 $/GL	0.045 $/GJ

The AUC directed DERS to reflect the approved DRT return margin charge for 2017 in the remaining monthly gas cost flow-through rate filings, beginning with the October 2018 filing.

The AUC approved the DRT energy-related "other" charges for 2017 and 2018 from the updated DRT revenue requirement schedule. The AUC ordered DERS to reflect the 2018 AUC approved rate of $0.010 per GJ for DRT energy-related "other" costs in its remaining 2018 monthly gas cost flow-through rate filings, beginning with the October 2018 filing.

Summary

The AUC approved the DRT rate schedules and the RRT schedules for DERS on a final basis. The AUC approved the DRT return margin charges and the DRT energy costs on a final basis. These approvals were effective October 1, 2018.

The AUC ordered DERS to file an application including its true-up figures for the period of January 1, 2017, to September 20, 2018.

Application for Review of an AUC Decision Dated May 3, 2018, Dismissing an Appeal Pursuant to Section 43 of the Municipal Government Act (Decision 23579-D01-2018)

Review Application - Rate Structure - Municipal Public Utilities - Application Dismissed

In this decision, the AUC considered Ian Murdoch's application for a review of the AUC's decision dismissing Mr. Murdoch's appeal regarding the method used by the City of Calgary to estimate Mr. Murdoch's wastewater charges (the "Original Decision").

The AUC denied the review application for the reasons summarized below.

The Original Decision

The Original Decision addressed an appeal filed pursuant to section 43 of the *Municipal Government Act* ("*MGA*"). In that decision, the original hearing panel dismissed the appeal based on the following findings:

(a) Calgary's Bylaw 14M2012, which regulates wastewater and includes "Schedule D - Monthly Wastewater Charge," was properly passed on March 12, 2012;

(b) the AUC's jurisdiction under section 43(2) of the *MGA* did not extend to consider challenges to Calgary's rate structure for wastewater utility services; and

(c) the wastewater charges to Mr. Murdoch were not discriminatory because Calgary had demonstrated a rationale for determining the wastewater charges.

The review application addressed the second and third findings in the Appeal Decision. Mr. Murdoch did not dispute that the relevant bylaw was properly passed.

Alleged Grounds for Review

Mr. Murdoch sought a review of the following findings from the Original Decision:

- that the AUC's jurisdiction under section 43(2) of the *MGA* does not extend to ordering the creation of new rate classes; and
- that the wastewater charges to Mr. Murdoch were not discriminatory because Calgary demonstrated a rationale and logic for

determining wastewater charges and for applying one wastewater return factor to the residential metered class.

Review Process

The review application was filed pursuant to section 10 of the *Alberta Utilities Commission Act* ("*AUCA*") and AUC Rule 016: *Review of Commission Decisions* ("Rule 016").

The review process under Rule 016 has two stages. At the first stage, a review panel must decide whether there are grounds to review the decision subject to review. If the review panel decides there are grounds to review the decision, it moves to the second stage of the review process where the AUC holds a hearing or other proceeding to decide whether to confirm, vary, or rescind the decision.

Section 6(3) of Rule 016 describes the circumstances in which the AUC may grant a review, namely:

(a) when the applicant has demonstrated an error of fact, law or jurisdiction, or

(b) when previously unavailable facts material to the decision became available, or when circumstances material to the decision changed.

Under section 6(3) of Rule 016, the AUC may grant a review if the reviewing panel determines there is an error of fact, law or jurisdiction that is either apparent on the face of the decision or otherwise exists on a balance of probabilities that could lead the AUC to materially vary or rescind the decision.

The AUC reiterated guidance it provided in previous decisions that the review process is not intended to provide a second opportunity for parties to reargue the issues in a proceeding.

Findings

The AUC review panel found that Mr. Murdoch's assertion regarding insufficient classes constituted a challenge to the rate structure itself as the addition of one or more new rate classes would be a change to the rate structure.

The AUC review panel found no error of interpretation by the hearing panel findings regarding the AUC's jurisdiction under section 43 of the *MGA*.

The AUC review panel found the hearing panel's determination that the residential rate class did not result in discriminatory treatment of Mr. Murdoch to be reasonable. The AUC review panel also confirmed the hearing panel's determination that the AUC's jurisdiction does not extend to ordering the creation of new rate classes.

Summary

The AUC review panel denied Mr. Murdoch's review application for review of the Appeal Decision and dismissed the review application.

Applications for Review of Decision 22986-D01-2018, Compliance Application to Decision 22011-D01-2017, ATCO Pipelines 2017-2018 General Rate Application (Decision 23539-D01-2018)

Review Application - Granted in part - Rule 016

In this decision, the AUC considered applications by ATCO Pipelines, a division of ATCO Gas and Pipelines Ltd. ("ATCO Pipelines") and the Office of the Utilities Consumer Advocate ("UCA") for review of Decision 22986-D01-2018 regarding ATCO's compliance application to Decision 22011-D01-2017, 2017-2018 General Rate Application ("the Decision").

The Decision addressed a compliance filing from ATCO Pipelines, in Proceeding 22986, in accordance with the findings and directions provided in Decision 22011-D01-2017, in relation to ATCO Pipelines' 2017-2018 general rate application (the "GRA Decision").

The AUC granted ATCO Pipelines' review application. The AUC found that the UCA did not meet the test for review. However, the AUC determined that a review, on its own motion, was warranted in relation to the issue of ATCO Pipelines' accumulated depreciation balances.

Review Process

The AUC considered the review applications in a single proceeding.

The review applications were filed pursuant to section 10 of the *Alberta Utilities Commission Act* ("*AUCA")* and Rule 016: *Review of Commission Decisions* ("Rule 016"). The AUC set out the process for review under Rule 016, including the following:

- The review process has two stages. In the first stage, a review panel must decide whether there are grounds to review the original decision. If the review panel decides that there are grounds to review the decision, it proceeds to the second stage of the review process where the AUC holds a hearing or other proceeding to decide whether to confirm, vary, or rescind the original decision.

- Section 4(d) of Rule 016 requires an applicant to set out the grounds it is relying on in support of its application for a review.

- Section 6(3) of Rule 016 describes the circumstances in which the AUC may grant a review when the applicant demonstrated an error of fact, law or jurisdiction, when previously unavailable facts material to the decision became available, or when circumstances material to the decision changed.

The AUC reiterated guidance it provided in previous decisions that the review process is not intended to provide a second opportunity for parties to reargue the issues in a proceeding, nor is it an opportunity to express concerns about a decision determining issues in a related proceeding.

ATCO Pipelines' Review Application

The AUC granted ATCO Pipelines' review application on the basis that the evidentiary foundation for certain of the hearing panel's material findings of fact were not apparent on the face of the Decision.

Grounds for Review

In its application, ATCO Pipelines claimed that the hearing panel erred in directing ATCO Pipelines to remove its 2016 re-inspection costs from its 2017 opening rate base and the forecast 2017 and 2018 re-inspection capital expenditures from its 2017-2018 revenue requirements. Specifically, ATCO Pipelines asserted that the AUC erred in fact, law or jurisdiction as follows:

(a) the hearing panel denied ATCO Pipelines an adequate opportunity to respond by way of evidence or an oral hearing to the positions being advanced by the interveners in argument;

(b) the hearing panel unfairly imposed an expectation on ATCO Pipelines that it establish the reasonableness of its past conduct, by determining that the weld assessment and repair program ("WARP") costs were not prudently incurred on the basis that better processes "could have been and should have been in place";

(c) the hearing panel denied 100 percent of the WARP costs in the absence of evidence on the record, in conflict with the standard or "periodic review and monitoring" that the hearing panel determined should be expected of ATCO Pipelines in respect of weld re-inspections; and

(d) by denying 100 percent of the WARP costs but allowing ATCO Pipelines to recover any potential proceeding from legal action relating to the deficient inspections to the benefit of shareholders, the hearing panel fettered its ratemaking jurisdiction by delegating the determination of the prudence of the WARP costs to the Courts.

AUC Findings

The AUC review panel found the hearing panel erred in largely relying on argument put forth by interveners based on the actions taken by ATCO Pipelines subsequent to the discovery of the deficient weld inspections, as the basis for what actions ATCO Pipelines should have taken prior to discovering the deficiencies.

As a result, the AUC review panel found that ATCO Pipelines demonstrated that an error of fact, law or jurisdiction was apparent on the face of the decision. In recognizing this error, the AUC may vary or rescind the Decision as it related to the WARP re-inspection costs. Accordingly, ATCO Pipelines' request for a review was allowed.

UCA's Review Application

Review Application Dismissed

The UCA's review application concerned findings in the Decision denying a request from the UCA to eliminate depreciation expense for a Supervisory Control and Data Acquisition ("SCADA") asset account.

Alleged Errors by the *UCA*

ATCO Pipelines retired a SCADA asset from utility service in 2001, which was not recorded in its financial records. This resulted in continuing depreciation of the asset until 2006 when the error was discovered. ATCO Pipelines issued a one-time $1.584 million debit to accumulated depreciation and credit to depreciation expense on its books in 2012, to correct for the additional depreciation expense that had been collected from 2001-2006.

In its review application, the UCA asserted that the hearing panel erred in denying its request to eliminate the depreciation expense relating to the SCADA account. The UCA requested that the review panel find that the hearing panel committed an error of law and the AUC should deny recovery of the depreciation expense relating to the SCADA account over the current test period. In the alternative, the UCA submitted that the issue should be:

(a) reconsidered as part of ATCO Pipelines' next rate application, in the interests of efficiency; or

(b) remitted to consideration at first instance, with a brief evidentiary phase providing the UCA with a procedurally fair process to address ATCO Pipelines' case.

AUC Initiated Review of Accumulated Depreciation

The AUC review panel was not convinced that the UCA demonstrated an error on the part of the hearing panel. Nonetheless, the review panel was satisfied that an AUC-initiated review of the issue of ATCO Pipelines' accumulated depreciation balance, as it related to the findings of Decision 22011-D01-2017 and Decision 22986-D01-2018, was warranted.

During the course of the review applications proceeding, ATCO Pipelines provided additional information and further variance explanations regarding its accounting transactions within the SCADA and Communication Equipment accounts. The AUC review panel considered this to constitute previously unavailable material facts, which existed prior to the issuance of the decision in the original proceeding but which were not previously placed in evidence or identified in that proceeding or in the compliance proceeding. The review panel found that this new information could lead the AUC to materially vary its findings in Decision 22011-D01-2017 or Decision 22986-D01-2018, or both, with respect to accepting that ATCO Pipelines properly accounted for and reflected the retirement transactions in its accumulated depreciation account.

The AUC review panel found that this AUC initiated review, including any necessary adjustments as a result of the review, may be considered and addressed in ATCO Pipelines' next GRA proceeding.

The review panel directed ATCO Pipelines to provide a complete reconciliation of the information in its 2019-2020 GRA.

Decision

In answering the preliminary question on the ATCO Pipelines review application, the AUC review panel found that ATCO Pipelines had demonstrated an error that was apparent on the face of the Decision and could lead the Commission to materially vary or rescind the Decision. Accordingly, the AUC allowed ATCO Pipelines' application for a review of the findings in paragraphs 47-49 of the Decision.

The review panel said that it would issue process and scope directions for the second stage of the review process for that proceeding in due course.

In answering the preliminary question on the UCA's application, the review panel found that the UCA had not demonstrated that an error was apparent on the face of the Decision, or existed on a balance of probabilities, that could lead the Commission to materially vary or rescind the Decision. However, the AUC initiated its own review of ATCO Pipelines' depreciation account balances. The AUC directed that the matter of reviewing ATCO Pipelines' depreciation account balances and any adjustment to ATCO Pipelines' depreciation expense would be considered in the proceeding established to consider ATCO Pipelines' 2019-2020 GRA.

NATIONAL ENERGY BOARD

NEB News Release: NEB Announces First Steps for TransMountain Expansion Project Reconsideration Hearing

TransMountain Expansion Project - Environmental Assessment - Species at Risk Act

The NEB announced that it will hold a public hearing to carry out its reconsideration related to the Trans Mountain Expansion Project.

On September 20, 2018, the Government of Canada issued the Order in Council referring aspects of the NEB's May 2016 recommendation report – related to the application of the *Canadian Environmental Assessment Act, 2012* ("*CEAA 2012*") and the *Species at Risk Act* to project-related marine shipping – back to the NEB for reconsideration. The Government directed the NEB to complete the reconsideration process and issue its resulting report no later than February 22, 2019 (155 days from the Order in Council).

On September 26, 2018, the NEB issued a letter seeking public comments on, among other things, the draft amended factors and scope of the factors for the environmental assessment under the *CEAA 2012*; the draft list of issues to be considered in the hearing; and on the design of the hearing process itself.