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## ALBERTA COURT OF APPEAL

### **FortisAlberta Inc. v. Alberta Utilities Commission, 2024 ABCA 110** *Statutory Appeal - Rates*

#### Application

FortisAlberta Inc. (“Fortis”) applied to the Alberta Court of Appeal (“ABCA”) for permission to appeal an Alberta Utilities Commission (“AUC”) generic cost of capital decision dated October 9, 2023 (the “Decision”), which set the cost of capital parameters for all gas and electric utilities in Alberta for 2024-2028. In the Decision, the AUC denied Fortis’ request for an increased deemed equity ratio.

#### Decision

The ABCA was satisfied the appeal was *prima facie* meritorious and that it will not unduly hinder any proceeding. The court granted Fortis permission to appeal.

#### Pertinent Issues

In determining cost of capital parameters, the AUC follows a two-step process. First, it sets a generic return on equity (“ROE”) applicable to all regulated utilities, as well as a deemed equity ratio for the average or benchmark utility. Second, the AUC then considers whether any adjustment is required for individual utilities based on their unique business and regulatory risks. The AUC accounts for any differences in risk between utilities by adjusting the deemed equity ratio.

In the Decision, the AUC denied Fortis’ request for an increased deemed equity ratio to account for risks arising from: (i) increased competition for customers from rural electrification associations; and (ii) the removal from Fortis’ recoverable revenue requirement of over \$10 million on an ongoing annual basis, beginning in 2023.

Fortis submitted that the AUC misinterpreted its authority under s 122(1)(a) of the *Electric Utilities Act* (“EUA”), fettered its discretion, and failed to correctly undertake the second stage of the required analysis in rejecting Fortis’ request for a deemed equity ratio 3% higher than the generic ratio set by the AUC. Fortis argued these errors were significant to the Decision itself and strike at the core of the regulatory compact.

According to the ABCA, the question Fortis asked was whether the AUC, by relying on the *Equus Rea Ltd v Alberta (Utilities Commission)*, 2023 ABCA 142 (“*Equus Rea*”) decision, erroneously considered Fortis to be seeking something impermissible and, as a result, refused to address a change in the risk Fortis faced, which is a legal question reviewable for correctness. In *Equus Rea*, the ABCA upheld the AUC’s decision that Fortis could not recover from its customers by way of its distribution tariff the costs Fortis incurs by allowing the rural electrification associations to use Fortis’ distribution system to serve their members.

Fortis argued that, in making the Decision, the AUC misdirected itself by focusing on the tariff issue decided in *Equus Rea* instead of looking at the unique

**ABCA re FortisAlberta v. AUC**

business risk created by the regulatory framework that leaves it to recover certain mandated costs through negotiation or arbitration, which is a risk other utilities do not face.

Based on the AUC's reasons in the Decision, the ABCA was satisfied the appeal was *prima facie* meritorious and that it will not unduly hinder any proceeding. The court granted Fortis permission to appeal on the following grounds:

Did the Commission err by:

i. Conflating the legal issue of the proper forum in which to recover the actual costs related to rural electrification associations with the legal issue of whether adjusting Fortis' ROE, deemed equity ratio, or both is required to address the increased business and regulatory risk associated with post-

2018 Commission and Court of Appeal interpretation of the regulatory framework applicable to Fortis, the resulting rural electrification associations revenue removal, and the impact of these factors on the AUC's duty to satisfy the fair return standard;

ii. Mistakenly considering that it did not have the authority to provide Fortis a fair return on invested capital that is commensurate with the level of business and regulatory risk it faces, by equating that result with "compensating" Fortis for something outside the AUC's authority; and,

iii. Improperly fettering its discretion to consider all relevant business and regulatory risks.