REGULATORY LAW CHAMBERS

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ENERGY REGULATORY REPORT

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

Regulatory Law Chambers ("RLC") is a Calgary based boutique law firm, specializing in energy and utility regulated matters. RLC works at understanding clients' business objectives and develops legal and business strategies with clients, consistent with the legislative scheme and public interest requirements. RLC follows a team approach, including when working with our clients and industry experts. Visit our website to learn more about RLC.

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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 ABCA for permission to appeal an 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 had denied Fortis' request for an increased deemed equity ratio.

Decision

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

Pertinent Issues

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. According to the ABCA, the question Fortis asked was whether the AUC, by relying on the *Equs Rea Ltd v Alberta (Utilities Commission), 2023 ABCA 142 ("Equs 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. Based on the AUC's reasons, the ABCA was satisfied the appeal was *prima facie* meritorious and that it would 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' return on equity ("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.

***TransAlta Corporation v Alberta (Environment and Parks*), 2024 ABCA 127**
Statutory Appeal – Confidentiality

Application

The Minister of Environment and Parks ("AEP" or "Crown") appealed a decision of the case management judge ordering the production of eight records ("Disputed Documents"), subject to two redactions for solicitor-client privilege.

TransAlta Corporation, TransAlta Generation Partnership and TA Alberta Hydro LP (collectively, "TransAlta") commenced an action against the Crown under the *Proceedings Against the Crown Act*, seeking a declaration that the Crown breached a contract and indemnification for potential damages. The contract in question, dated June 1, 1960 ("Contract"), was between the Crown and TransAlta's predecessor and relates to the construction and operation of the Brazeau Dam (the "Dam").

Decision

The ABCA allowed the appeal. It determined that two of the Disputed Documents and specific redacted sections in a third document are privileged under solicitor-client privilege. It further determined that five of the Disputed Documents were determined to be privileged under the public interest immunity doctrine.

Pertinent Issues

Background

AEP regulates the Brazeau Dam and is responsible for the Contract, and TransAlta is the operator of the dam.

In the action brought by TransAlta against the Crown, TransAlta alleged that the Crown wrongly issued mineral leases in the vicinity of the Dam without ensuring that oil and gas production, including hydraulic fracturing, could be done without imperilling the safety of the Dam. TransAlta alleged that the Crown's failure to enact specific regulations or policies to implement a 5 km buffer zone around the Dam was a breach of s 6.1 of the Contract which protects the construction, operation, and safety, of the Brazeau storage and power development and restricts the Corwn's ability to make dispositions of the mineral rights, or any interest therein, in or under or adjacent to any of the lands underlying Dam.

The Disputed Documents relate generally to potential amendments to the *Water (Ministerial) Regulation*, which were introduced in 2018. The case management judge found that the Disputed Documents were not protected by public interest immunity, as argued by the Crown. The case management judge described the generally consisting of briefing notes describing potential amendments to the regulations in question and, in one or two instances, drafts of potential amendments. They include, among other things, changes that could have opened the door for regulation by Alberta Environmental Protection to hydraulic fracking in the vicinity of dam structures. The documents are not clear as to how this could happen, but they included revisions and amendments that are in some cases, accompanied by a description of the rationale for the amendments to help decision-makers understand why they would be made.

On appeal, the Crown argued that the case management judge erred in finding that the Disputed Documents are:

(i) relevant to TransAlta's claim;

(ii) not protected by public interest immunity; and

(iii) not protected by solicitor-client privilege.

Standard of Review

According to the ABCA, case management decisions ordering production of documents are discretionary decisions afforded deference on appeal. Absent an error of law or a palpable and overriding error, an appeal court should not interfere with the decision of a case management judge. Whether particular documents are relevant and material involves questions of mixed fact and law, which are reviewed on the more deferential standard of palpable and overriding error. The content and scope of the public interest immunity and solicitor-client privilege are questions of law reviewed for correctness.

ABCA Decision

The ABCA determined that the case management judge's decision on relevance was owed deference since his reasons disclosed no reviewable error. In allowing the appeal, however, the ABCA found that certain Disputed Documents were protected by solicitor-client privilege and that some of those documents were privileged under the public interest immunity doctrine.

The Crown argued that since two of the Disputed Documents are draft versions of the amending regulations prepared by legislative counsel, they are privileged. It also argued that because the other Disputed Documents are part of the continuum of communications associated with legal advice as part of the drafting of regulations, they are also protected by solicitor-client privilege. The ABCA repeated that to be protected by solicitor-client privilege, a document must (i) be a communication between solicitor and client, which (ii) entails the seeking or giving of legal advice and (iii) is intended to be confidential by the parties.

The ABCA decided that the case management judge erred when he found that the two documents discussed by the Crown were not protected by solicitor-client privilege. It determined that the affidavit of the Crown Officer in the case Mr. Davis, Assistant Deputy Minister, Resource Stewardship Division, Alberta Environment and Protected Areas, established that these two documents represent legal advice and are therefore protected. It further determined that the third documents referred to by the Crown, specifically redactions in that document fall within the scope of the "continuum of communication in which the solicitor tenders advice". Accordingly, the redaction under the heading "Other Dam Safety Work Relevant to Brazeau" remains.

Also, the redaction at under the heading “Next Steps” remains.

The ABCA did not find an error by the case management judge’s that the Crown had not established a claim of solicitor-client privilege on the remaining five documents.

The ABCA found that the case management judge erred in not finding that the five documents not subject to solicitor-client privilege, were privileged by virtue of public interest immunity. As explained in *Carey v Ontario*, [1986] 2 SCR 637, 35 DLR (4th) 161, the doctrine of public interest immunity prevents disclosure of government records and information where disclosure would not be in the public interest. It aims to balance two interests: while it is necessary for the proper administration of justice that litigants have access to all evidence that may be of assistance to the fair disposition of the issues arising in litigation, certain information regarding governmental activities should not be disclosed in the public interest.

The case management judge held that in *Carey*, the SCC rejected the existence of a class privilege over Cabinet documents and also rejected the argument that disclosure of documents prepared for Cabinet would lead to a decrease in completeness and frankness of such documents (the “candour” argument). The ABCA noted that its analysis of public interest immunity and the balancing of competing public interests and confidentiality and disclosure was informed by the SCC’s analyses of Cabinet confidentiality. Most importantly the analysis in *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2024 SCC 4, where the SCC defined the scope of the Cabinet deliberative process broadly to include discussion, consultation and policy formulation which is informed by the advice of civil servants, extends beyond formal meetings of Cabinet or its committees and encompasses conversations in the corridors, offices, over the phone, or however and wherever they may take place.

The ABCA determined that the five of the Disputed Documents fall into this scope of the cabinet’s deliberative process and are, accordingly, privileged under public interest immunity. The ABCA stated that the case management judge only referred to the Disputed Documents as being “briefing notes dealing with contemplated amendments”. He did not refer to the documents that were before the Cabinet. It determined that, contrary to the case management judge’s consideration, the claim here dealt with the formulation of policy on a broad basis that would have featured a weighing of conflicting interests. As *Carey* notes, the nature of this type of policy favours the privilege. This was not a factor considered by the case management judge, but it should have been considered.

ALBERTA UTILITIES COMMISSION

***Market Surveillance Administrator Notice of Investigation of the Alberta Electric System Operator,* Ex. 28829-X0060 in AUC Proceeding 28829**

Electricity – Transmission System Performance

On April 12, 2024, the Market Surveillance Administrator ("MSA") filed with the Alberta Utilities Commission ("AUC"), in Proceeding 28829, its notice of investigation issued to the Alberta Electric System Operator ("AESO") on April 4, 2024 ("Notice"). The AUC convened Proceeding 28829 to assess the "BHE Canada Limited Complaint Re AESO Management of Interties and Imports."

The Notice relates to the MSA's investigation into: the surveillance of the transmission system; the impact of the conduct of the AESO on the structure and performance of the electricity market; and possible contraventions by the AESO of sections 16 and 17 (fair, efficient, and openly competitive exchange of electricity AESO related obligations provisions) of the *Electric Utilities Act* ("*EUA*"), and the Independent System Operator ("ISO") rules, including *Rule 302.12* (real-time transmission constraint management) and *Rule 103.4* (power pool financial settlement).

The scope of the MSA's investigation includes:

- power flows, facilities, and congestion on the transmission system;
- transmission system capability, capacity, and utilization;
- the AESO's collection and management of data regarding the transmission system;
- the AESO's management of transmission constraints under ISO *Rule 302.1* and pool price impacts of the AESO's conduct in respect of transmission constraints; and
- the AESO's evaluation of completed transmission projects and the impact of any such evaluations on transmission system planning.

***Complaint of Suncor Energy Inc. in Respect of Section 203.1 of the Independent System Operator Rules, Offers and Bids for Energy,* Ex.29009-X0002.01 in AUC Proceeding 29009**

Electricity – FEOC

Complaint

On April 30, 2024, Suncor Energy Inc. ("Suncor") filed a complaint with the Alberta Utilities Commission ("AUC"), pursuant to ss 25(1)(b)(ii) and (iii) (electricity market participant complaint provisions) of the *Electric Utilities Act* ("*EUA*") ("Complaint"), in respect of the Independent System Operator ("ISO") Rule 203.1, *Rules, Offers and Bids for Energy* ("*Rule 203.1*") and the associated definitions in the AESO's *Consolidated Authoritative Document Glossary* ("*Glossary*").

The Complaint alleges that *Rule 203.1*:

(a) does not support the fair, efficient and openly competitive ("FEOC") operation of the electricity market; and

(b) is not in the public interest.

Suncor Submissions

Suncor submitted that the definitions of 'source assets' and 'import source assets' in the *Glossary*, read together with the provisions of *Rule 203.1*, result in inequitable treatment of the electricity generating assets located in Alberta ("Generators") and the import source assets not physically located in Alberta that offer into the electricity market via transmission interties originating outside of Alberta ("Importers"). Pursuant to *Rule 203.1*, Generators must always offer the maximum volume of megawatts ("MW") they are physically capable of providing, resulting in a must offer obligation ("Must Offer"). Importers, however, under *Rule 203.1* have the option of offering any volume of MW into the electricity market, including not offering any MW at all.

Customers pay for supply adequacy through the pool price, which has a certain cost. Due to Importers being held to a lower standard than Generators under *Rule 203.1*, customers receive substandard supply adequacy while Importers receive a benefit in the form of payment without contributing to that supply adequacy.

This results in inefficient, substandard supply adequacy relative to the cost of electricity in the market. Consequently, *Rule 203.1* does not support the FEOC operation of the electricity market and is not in the public interest. Suncor estimated that consumers paid on average more than $200 million per year through the electricity market for a contribution to supply adequacy that was not provided. Suncor's share was over $800,000 per year.

Suncor submitted that the operation of *Rule 203.1* creates significant costs and inefficient subsidization. The Must Offer obligation in *Rule 203.1* creates a capacity commitment for Generators but not for Importers. In the energy-only market, the single pool price is intended to pay pool participants for both the delivered energy and the asset capability commitment to Alberta to recover the cost of investment. The latter component of the pool price is driven either by higher cost units setting price, by economic withholding or by scarcity pricing at the price cap.

Suncor stated that these two components of the pool price were expressly recognized by the AESO in its capacity market proposal in Proceeding 23757 through two payment streams: a capacity payment and a residual energy payment. The capacity payment reflected the value attributed to the commitment of the capability to Alberta and the residual energy payment reflected the value attributed to the provision of energy.

Suncor alleges that by not imposing on Importers the same Must Offer obligation imposed on Generators, while paying Importers the same hourly pool price as Generators, Importers are being paid as if they provided a capacity commitment. Suncor proposed that an estimate of the cost of new entry ("CONE") for the next/marginal generating asset minus the expected energy market return ("net-CONE") could be used to estimate the subsidy that Importers obtain from not being subject to the Must Offer obligation.

Requested Relief

As primary relief, Suncor requested that the AUC direct the AESO to change *Rule 203.1* to include a charge applicable only to Importers for the recovery of the value of the capacity commitment embedded in the pool price received by Importers without providing the commensurate supply adequacy created under the Must Offer obligation. Suncor requested that the charge be set:

1. at $0/MWh for hours where AESO declared an Energy Emergency Alert;
2. at $0/MWh for hours where the pool price is less than the reference price defined in ISO *Rule 201.6 Pricing*, s 6; and
3. equal to the pool price minus the reference price for all other hours.

Suncor sought a secondary relief, in addition to the primary relief, requesting that the AUC direct the AESO to commence a consultation process directed at updating *Rule 203.1*.

***Alberta Electric System Operator Application for Revised Adjusted Metering Practice Implementation Plan and Related Amendments to Independent System Operator Tariff and Rules,* AUC Decision 28441-D02-2024**

Electricity – Rules

Application

The Alberta Electric System Operator ("AESO") applied for approval of a revised adjusted metering practice ("AMP") implementation plan for metering i.e. measuring electric energy that enters and exits the transmission system, including contracting and billing practices for transmission system access service ("SAS") at transmission substations that serve distribution facility load. The AESO also applied for approval of associated amendments to the Independent System Operator ("ISO") tariff and the ISO rules.

Decision

The AUC found the proposed implementation plan provided a reasonable way to implement the AMP that meets the requirements of the *Electric Utilities Act* ("*EUA*") and approved the application from the AESO. The AUC also found that the AESO complied with the AUC direction issued in paragraph 23 of Decision 27047-D01-2022, which required the AESO to provide certain cost information.

Applicable Legislation

Electric Utilities Act

Pertinent Issues

Under the previous net metering practice, a distribution facility owner ("DFO") substation was treated as a single point of delivery and supply, which aggregated and netted electric energy flowing

out of and into the transmission system on each feeder. SAS at each DFO substation was then contracted and billed under a single agreement for demand transmission service ("DTS") and a single agreement for STS.

In Decision 22942-D02-2019, the AUC found that the net metering practice could cause significant erosion of billing determinants because of increased distribution connected generation ("DCG") proliferation. According to the AUC, the netting of reverse flows (electric energy flowing into the transmission system) caused by DCGs against existing DTS load caused billing determinant erosion, as net metering reduced DTS billing determinants compared to the separate gross metering of DTS and STS. Consequently, the AUC determined that the continuation of the net metering practice would increase the cross-subsidy of DCG by DTS load customers.

In Decision 27047-D01-2022, the AUC denied the original AMP implementation plan, finding that the AESO did not provide sufficient information for the AUC to determine whether approval of the application was in the public interest or supported the fair, efficient and openly competitive operation of the electricity market. Specifically, the AUC was not satisfied by the level of accuracy and completeness of the cost estimates provided by the AESO in that proceeding.

The AESO submitted that, under the proposed AMP, each individual feeder at a DFO substation is recognized as a single point of delivery and supply, and electric energy flowing out of and into the transmission system is measured separately at each feeder. For SAS contracting and billing purposes at DFO substations, DTS agreements would be based on the total sum of the electric energy flowing out of the transmission system, and STS agreements would be based on the total sum of the electric energy flowing into the transmission system, as measured at each individual feeder.

The proposed AMP implementation plan includes the following primary features:

- Updates to the existing SAS agreements at DFO substations that have feeder-level metering in place. For new and existing DFO substations where feeder-level metering or the metering infrastructure is in place, the plan will require all system access service requests ("SASRs") submitted after the AMP is effective to be compliant with the AMP.
- For DFO substations that do not have feeder-level metering or metering infrastructure in place but have reverse flows, compliance with the AMP will not be immediately required. Instead, transmission facility owners ("TFOs") will be required to install the feeder-level metering and to update SAS agreements to comply with the AMP when the switchgear lineup for the substation will be replaced in the future.
- The cost allocations (between participant and system) for AMP implementation will be consistent with the cost-causation principle, and the way in which the costs of meters and metering infrastructure are allocated for all AESO-directed transmission facility projects or TFO-initiated lifecycle replacement projects.

The AUC found that the updated ISO rules support the fair, efficient and openly competitive operation of the electricity market because they are correcting differential treatment that exists under the previous AMP between DFO substations with and without reverse flows and, transmission-connected generators and DCGs.

The AUC was further satisfied that the updated AMP implementation plan and related amendments to the ISO rules are not unjustly discriminatory and that the proposed cost allocation method to implement the AMP supports the fair, efficient and openly competitive operation of the electricity market.

The AUC determined that the proposed AMP implementation plan was in the public interest since it was the most cost-efficient option that was proposed on the record of the proceeding to implement the AMP. Further, the plan reduced the associated billing determinant erosion at an overwhelming majority of DFO substations and implemented the AMP in a timely manner.

The AUC was satisfied that the AESO, in developing the rule amendments, complied with the informational and consultation requirements established by AUC *Rule 017: Procedures and Process for Development of ISO Rules and Filing of ISO Rules with the Alberta Utilities Commission* ("*Rule 017*").

In response to AUC direction in paragraph 23 of Decision 27047-D01-2022, the AESO proposed that the capital costs incurred to implement the AMP

should follow the existing capital cost review and oversight mechanism at the time the cost is incurred. The AESO also provided the total theoretical maximum cost of implementing the AMP for each implementation plan alternative and a quantification and analysis of the costs and benefits of AMP implementation. The AUC found that the AESO complied with its direction issued in paragraph 23 of Decision 27047-D01-2022.