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.

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ALBERTA UTILITIES COMMISSION

***Northstone Power Corp. Removal of the Nighttime Restriction and Implementation of Noise Mitigation at the Elmworth Generation Station*, AUC Decision 28897-D01-2024**

Noise Control – Deferred Facility Status

Application

Pursuant to Alberta Utilities Commission (“AUC”) Approval 28306-D02-2023 ("Approval"), Northstone Power Corp. (“Northstone”) is the operator of the Elmworth Generation Station power plant ("EGS"). The Approval was subject to a condition that prohibits the operation of the EGS between 11 p.m. and 7 a.m. ("Nighttime Restriction"). Northstone applied to remove the Nighttime Restriction and to implement mitigation at the EGS that will reduce the noise associated with future modifications to equipment to remain compliant with *Rule 012: Noise Control* ("*Rule 012*").

Decision

The AUC approved the application from Northstone, subject to conditions.

Pertinent Issues

Northstone submitted that, after the removal of the Nighttime Restriction, the power plant was still expected to comply with *Rule 012* in its current configuration and that the Nighttime Restriction was causing a significant financial loss because pool prices during the night-time hours have been at record highs and were expected to continue above historical levels.

The AUC considered whether the removal of the Nighttime Restriction was in the public interest, including compliance with *Rule 012*, the adequacy of the participant involvement program (“PIP”), the potential environmental effects and the additional mitigation to accommodate future equipment changes.

The AUC approved Northstone's application for the following reasons: other energy-related facilities in the project area were the dominant sound source; the noise impact of the EGS operation at nearby residences was predicted to be negligible relative to the noise impact of the other energy-related facilities; stakeholders did not have outstanding concerns; and no adverse environmental effects were expected since the EGS would continue to comply with ambient air quality objectives during the nighttime operation. The AUC also approved Northstone’s proposal to implement noise mitigation for one unit at the EGS.

The AUC imposed conditions of approval on Northstone in relation to the following: inform the AUC and submit a report regarding any noise complaints; file a report with the AUC after the first year of operation regarding any noise complaints received; implement the noise mitigation measures by the end of 2024; and for any future equipment modifications that may increase noise levels, Northstone must file an amendment application with the AUC.

***Market Surveillance Administrator Application to Make Public a Record that Identifies a Market Participant by Name*, AUC Decision 29038-D01-2024**

Offer Control – Calculation Method

Application

The Market Surveillance Administrator ("MSA") filed an application requesting the Alberta Utilities Commission ("AUC") to determine whether its decision to name a market participant in its Market Share Offer Control Report ("Report") was reasonable.

Decision

The AUC found that the MSA’s determination was reasonable and that the MSA may identify the market participant by name when making the Report public.

Pertinent Issues

The MSA issues the Report to comply with s 5 of the *Fair, Efficient and Open Competition Regulation* ("*FEOC Reg*"), which requires the MSA to annually make available to the public an offer control report that must include the names and the percentage of offer control held by electricity market participants, where the percentage of offer control is greater than five per cent.

Pursuant to s 6(4)(c) of the *Market Surveillance Regulation* (“*MSR*”), the MSA must notify a market participant before publicly releasing a document that

names the market participant. This means that the MSA must notify any market participant who will be named in the Report as holding more than five per cent of offer control. In addition, the MSA's determination of offer control in the Report is relied on for the purpose of determining the applicability of the offer cap under the *Market Power Mitigation Regulation* ("*MPMR*"), which was enacted in March 2024. The MPMR offer cap limits the offer price into the power pool of the market participants with offer control greater than five per cent for the balance of any month when the net monthly revenues exceed a prescribed threshold.

The market participant in question objected to being publicly named in the Report to the MSA and expressed concerns regarding the application of the *MPMR*. More specifically, the market participant expressed concerns regarding the MSA's calculation of offer control and proposed an alternative method for calculating offer control consistent with the *FEOC Reg*.

Pursuant to s 6(4) of the *MSR*, before making public a record that will identify a market participant by name, the MSA must consider the following factors: the benefits of making public the name of the market participant; undue financial loss or significant harm to the competitive position of the market participant; the implications of not making public the name of the market participant to other market participants; any practical alternatives; any other relevant factors; and the benefits and the harms of disclosure.

The AUC assessed whether it was reasonable for the MSA to determine that the factors it assessed under s 6(4) of the *MSR* favoured the naming of the market participant in the Report. According to the AUC, the dispute between the MSA and the market participant turned on the meaning of "offer control" in the *FEOC Reg*. The AUC emphasized that it did not make any findings of law on the correct statutory interpretation of "offer control" in this decision and that it reviewed the MSA's determination for reasonableness only. As a result, the AUC did not undertake a de novo analysis and did not ask what the correct decision would have been. Instead, it determined whether the MSA's interpretation was defensible in light of constraints imposed by law.

The AUC determined that it was reasonable for the MSA's not to calculate offer control on a company-by-company basis, as requested by the market participant. Furthermore, the AUC found that it was reasonable for the MSA to rely on the market participant's calculations and previous representations to the AUC and the MSA for the purpose of assessing the market share offer control for the Report, which resulted in the calculated offer control being greater than five per cent.

The AUC concluded that the MSA's calculation of offer control was justifiable, intelligible, and consistent with the *FEOC Reg* and that the MSA's determination that the factors in s 6 of the *MSR* favoured naming of the market participant in the Report was reasonable.

***ENMAX Power Corporation Recovery of Land and Property Rights Tribunal Order Payments Related to Remington Lands Matter,* AUC Decision 28911-D01-2024**

Rates – Knowledge Exception

Application

ENMAX Power Corporation ("EPC") applied to recover, in its 2025 revenue requirement, the amount of $13.63 million related to EPC's obligations to pay Remington Development Corporation ("RDC"). This amount was determined in a decision (the "Compensation Decision") issued by the Land and Property Rights Tribunal ("LPRT").

Decision

The Alberta Utilities Commission ("AUC") approved the recovery of the $13.63 million on a placeholder basis to allow for any future true-up, given the ongoing litigation related to the LPRT compensation decision. The AUC also approved EPC's 2025 revenue requirement as final and directed EPC to establish a placeholder for costs related to the RDC land matter.

Pertinent Issues

Background

EPC is a transmission facility owner ("TFO") that owns and operates transmission lines subject to the LPRT decision, including 138-2.82L and 138-2.83L ("Transmission Lines"). The Transmission Lines cross four parcels of land that were owned by RDC until October 2023 ("Lands"). RDC purchased the Lands in 2002 and terminated the right-of-way agreements that allowed EPC to site the Transmission Lines on the Lands. This termination resulted in litigation between EPC and RDC, which is still ongoing.

In 2018, the Surface Rights Board ("SRB"), the LPRT's predecessor, issued four right-of-entry orders ("Orders") regarding the Transmission Lines located on the Lands. In 2022, the LPRT set the compensation owed by EPC to RDC with respect to the Orders ("Compensation Decision").

EPC Application

In this application, EPC sought to recover the $13.63 million, as a one-time charge to the Alberta Electric System Operator ("AESO"), effective January 1, 2025. The $13.63 million include amounts that EPC is legally required to pay RDC, as determined by the Compensation Decision, including a cost award and carrying costs, until the transmission lines are permanently removed from the RDC lands at the end of 2024.

EPC submitted that RDC appealed and EPC cross-appealed the Compensation Decision, scheduled to be heard in October and November 2024, respectively. As a result, EPC stated it would apply to the AUC, in a future general tariff application, for a true-up of the Compensation Decision to reflect any changes resulting from the appeal and cross-appeal.

AUC Determination

The AUC considered whether: (i) the applied-for $13.63 million was prudently incurred; (ii) the recovery of the applied-for $13.63 million was permissible and, if so, what was the appropriate recovery mechanism; and (iii) the additional, but not yet applied-for, costs related to the Lands should also be granted placeholder treatment.

Were the Costs Prudently Incurred

The AUC found that EPC prudently incurred the applied-for $13.63 million. The AUC was satisfied that EPC acted prudently prior to and during the LPRT proceeding resulting in the Compensation Decision, that the quantum of the LPRT compensation decision was reasonable, and that there was no other reason to question the prudency of these costs.

Is Recovery Permissible

The AUC considered that the Compensation Decision payment marked a point of resolution of sufficient certainty to meet the AUC's previous requirement that the matter must be resolved prior to testing for prudence any amounts arising from the litigation, including their addition in EPC's tariff. The AUC was of the view that it was in the public interest to approve the recovery of the applied-for $13.63 million at this time, even though the litigation between EPC and RDC was not fully resolved, to avoid incurring ongoing carrying costs into the future for the now-known amounts EPC was required to pay. On this basis, the AUC approved as a placeholder the inclusion of the $13.63 million in EPC's 2025 revenue requirement for recovery as a one-time charge to the AESO, effective January 1, 2025. The AUC also directed EPC to apply for any true-up of this placeholder in its next general tariff application.

Additional Costs

EPC provided a list of the following costs that it intended to recover in the future: additional past legal costs related to the LPRT process and the litigation; future legal costs related to the appeal and cross-appeal and the litigation; compensation pursuant to any court award in the litigation; and costs of EPC's 2014 application to move the Transmission Lines subject to the ongoing litigation. The AUC found it necessary to consider the costs associated with the Lands matter, subject to a future prudence review, through the same placeholder mechanism. Consequently, the AUC approved placeholder treatment for the costs described by EPC, including any other costs related to the Lands matter not listed above, which EPC has incurred or will incur.

Conclusion

As a result of the approval of the $13.63 million in EPC's 2025 revenue requirement and recovery of these costs as a one-time charge to the AESO, effective January 1, 2025, the AUC approved EPC's 2025 revenue requirement as final, subject to the true-up of any placeholders. The AUC directed EPC to file, as a post-disposition filing, updated minimum filing requirement schedules to reflect the findings of this decision, within 30 days of the issuance of the decision.

***EPCOR Energy Alberta GP Inc. 2023-2024 Non-Energy Regulated Rate Tariff*, AUC Decision 28457-D02-2024**

Electricity – Rates

Application

EPCOR Energy Alberta GP Inc.'s ("EEA") filed an application requesting approval of its 2023-2025

regulated rate tariff ("RRT") non-energy charges, price schedules and miscellaneous fees, RRT terms and conditions of service, and the establishment of deferral accounts for certain cost items. Following the commencement of this proceeding, the parties entered negotiations and agreed to a negotiated settlement agreement ("NSA"), which was submitted to the Alberta Utilities Commission ("AUC") for approval. The NSA settled all aspects of the application except the matter of EEA's recovery of its applied-for non-energy credit costs.

Decision

The AUC approved the NSA, as filed, and denied one revenue requirement item that was not subject to the NSA, which was the credit costs for 2023-2024.

Pertinent Issues

The NSA

In making its determination if the NSA should be accepted or rejected in its entirety, the AUC considered whether:

- the negotiated settlement process ("NSP") was procedurally fair with respect to both adequate notice and the NSP itself;

- the NSA resulted in rates, and terms and conditions that are just and reasonable; and

- the settlement was patently against the public interest or contrary to law.

The AUC was satisfied that the NSP was fair and that the procedural requirements set out in AUC *Rule 018: Rules on Negotiated Settlements* ("*Rule 018*") were met. The AUC found that the NSA, taken as a whole, was not patently against the public interest or contrary to law and that the NSA resulted in rates and, terms and conditions that were just and reasonable. Accordingly, the AUC approved the NSA as filed.

The Credit Costs

EEA is the regulated rate provider in FortisAlberta Inc.'s ("Fortis") service territory under the RRO Arrangement Agreement between Fortis and EEA, which was approved by the AUC in *Decision 24839-D01-2019*. EEA submitted that it was required to provide financial security to Fortis under the *Electric Utilities Act* ("*EUA*") and Fortis' terms and conditions of service ("T&Cs"). As a result, EEA applied for approval of its credit costs for providing financial security to Fortis. EEA's position was that Fortis requires EEA to provide security under a commercial arrangement, adding that financial security is commonly required by parties to commercial arrangements.

The AUC agreed with EEA that the legislative framework does not expressly prohibit distribution system owners ("DFOs"), and Fortis in this case, from requiring financial security from regulated rate option ("RRO") providers. The AUC also agreed that Fortis and EEA may choose to enter into a commercial arrangement whereby EEA may be required to provide financial security to Fortis. However, whether costs associated with any such arrangement should be recovered through EEA's RRT is a matter for the AUC's determination.

The AUC, citing its previous decision, concluded that s 8 of the *Distribution Tariff Regulation* ("*DTR*") requires a security deposit from retailers and not RRO providers, such as EEA. According to the AUC, the security deposit required by Fortis did not conform with the plain meaning of a retailer in the EUA and the financial security provisions that apply to retailers pursuant to s 8 of the *DTR*.

The AUC was satisfied that its prior decision was correct when it found that the requirement imposed by Fortis on EEA, as an RRO provider, to pay security was inconsistent with the legislative scheme, in general, and s 8 of the *DTR*, in particular.

The AUC noted that there was no specific legislative provision in either the *DTR* or the *Regulated Rate Option Regulation* ("*RROR*") requiring RRO providers to give financial security to distribution companies and that the only requirement with respect to the RRT is found in s 6(1)(a) in the *RROR*, which requires the AUC to provide the owner with a reasonable opportunity to recover the prudent costs and expenses.

With regard to the prior approval of the RRO Arrangement Agreement in *Decision 24839-D01-2019*, the AUC noted that it approved the agreement pursuant to s 113 of the *EUA* as being in the public interest. In addition, the requirement for EEA to provide security to Fortis was not brought to the AUC's attention and did not receive any scrutiny from parties in that proceeding. In the AUC's view, the parties had an obligation to bring the inclusion of the security requirement in the RRO Arrangement

Agreement to the attention of the AUC in Proceeding 24839, which they failed to do so. Consequently, it is unclear whether the AUC would have expressly approved at that time the security requirement included in the RRO Arrangement Agreement.

The AUC was not persuaded that EEA's claim for credit costs for providing financial security to Fortis should be approved. The AUC found that the credit costs claimed by EEA were not reasonable or prudent costs under s 6(1)(a) of the *RROR*. The AUC denied EEA's claim for credit costs associated with providing Fortis financial security and directed EEA, in the compliance filing to this decision, to exclude any credit costs incurred as a result of posting security with Fortis. The AUC also directed Fortis to modify its T&Cs and not require an RRO provider to post security based on requirements applicable to retailers pursuant to the *DTR*.