REGULATORY LAW CHAMBERS

ISSUE: AUGUST 2024 DECISIONS

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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IN THIS ISSUE:

ALBERTA COURT OF APPEAL

***Battle River Power Coop v Alberta Utilities Commission*, 2024 ABCA 259**

Statutory Appeal – Determination of Compensation

Application

Battle River Power Coop ("BRPC") applied to the Alberta Court of Appeal ("ABCA" or "Court") for permission to appeal the Alberta Utilities Commission ("AUC") *Decision 28358-D01-2024* that determined the compensation payable by FortisAlberta Inc. ("Fortis") to BRPC as a result of the transfer to Fortis of certain service area parts previously served by BRPC.

Decision

The ABCA allowed the application in part on the question of whether the AUC should have determined the compensation pursuant to s 29(4) or s 32(2)(b) of the *Hydro and Electric Energy Act* ("*HEEA*").

Pertinent Issues

Background

Decision 28358-D01-2024 followed from a prior AUC decision regarding an application by Fortis to reduce the service areas of certain rural electrification associations ("REAs"), including BRPC, to prevent incursion into Fortis' exclusive service areas subject to franchise agreements between Fortis and various municipalities. The prior decision granted Fortis' application, determining it was in the public interest, but did not order immediate transfer of associated REAs facilities and customers to Fortis, making the transfer contingent on the enactment of municipal bylaws or the satisfaction of other conditions.

The prior AUC decision made no order regarding compensation, and since Fortis and BRPC could not agree on compensation regarding several sites, Fortis applied to the AUC for an order pursuant to s 32 of the *HEEA* approving the transfer of the outstanding BRPC assets to Fortis and determining the compensation payable by Fortis to BRPC.

Grounds for Permission to Appeal

BRPC argued that the AUC erred in applying s 32(2)(b) of the *HEEA* rather than s 29(4) to determine the appropriate compensation submitting that, had the AUC calculated its compensation under s 29(4) of the *HEEA*, it would have awarded compensation for the reduced service area, as opposed to just the transferred facilities.

S. 32(2)(b) of the *HEEA* provides as follows:

> **Rural electrification association**
>
> **(2)** When the Commission makes an order under subsection (1), it may
>
> …
>
> (b) provide for any or all of the following:
>
> (i) the payment of compensation, if any, and the matters in respect of which compensation is payable;
>
> (ii) the persons by whom compensation is payable and the apportionment of liability for the compensation among those persons;
>
> (iii) the determination by the Alberta Utilities Commission of the amount of compensation if that amount cannot be agreed on between the parties;
>
> (iv) any other matters that may be necessary with respect to the transfer of the service area or part of it or with respect to the transfer of any facility associated with the electric distribution system from the rural electrification association to another person.

S 29(4) of the *HEEA* provides as follows:

> **Boundaries**
>
> **(4)** When an order made under subsection (1) or (3) reduces the service area of an electric distribution system, the Commission, if it considers such a provision suitable, may make provision in the order for

> (a) payment of compensation to the owner of the electric distribution system whose service area is reduced,
>
> (b) the circumstances and conditions under which, and the time at which, that owner is entitled to receive compensation,
>
> (c) the matters in respect of which any compensation is payable, which matters may include
>
> > (i) any facilities transferred, based on reproduction cost new, less depreciation,
> >
> > (ii) severance damages based on
> >
> > (A) any period of time the Commission considers reasonable, not exceeding the period that would be remaining had the owner been a party to an agreement under section 45 of the Municipal Government Act, and
> >
> > (B) the actual load at the time the service area is reduced,
> >
> > and
> >
> > (iii) the economic effect on the overall operation of the owner of the electric distribution system,
>
> (d) the persons by whom the compensation is payable and the apportionment of liability among those persons, and
>
> (e) compensation for any obligations or commitments arising from financial arrangements to manage financial risk associated with the pool price or from other arrangements made by the electric distribution system,
>
> and provide that if agreement on the amount of any compensation provided for cannot be reached between the parties, the amount is to be determined by the Alberta Utilities Commission on the application of either party.

BRPC also argued that the AUC erred in its calculation of compensation because it did not accept the depreciation and construction costs approved by the BRPC's Board of Directors, and that it erroneously considered the financial interests of Fortis' customers in setting compensation.

Test for Permission to Appeal

When assessing a permission to appeal application, the ABCA generally considers the following:

(i) whether the point on appeal is of significance to the practice;

(ii) whether the point raised is of significance to the action itself;

(iii) whether the appeal is prima facie meritorious;

(iv) whether the appeal will unduly hinder the progress of the action; and

(v) the standard of appellate review that would be applied if permission to appeal is granted.

According to the Court, this assessment frequently comes down to an overall consideration of whether there is an issue of law of sufficient importance to justify a further appeal.

Analysis

In granting permission to appeal, the ABCA determined that the question of whether compensation to BRPC should have been determined pursuant to s 29(4) or s 32(2)(b) of the *HEEA* warrants a review through an appeal. The matter has not yet been considered by the ABCA and has broader significance for the practice. The Court noted that the nature of the question and the statutory right of appeal suggest a less deferential standard of review. The Court concluded that the issue could benefit from appellate review and comment.

The ABCA acknowledged the AUC's point that its broad approach to s 32(2)(b) of the *HEEA* compensation rendered it inconsequential that the AUC applied s 32(2)(b) rather than s 29(4). However, the question of what would have

happened if the AUC had relied on s 29(4) remained unknown.

The ABCA was satisfied that if compensation was properly governed by s 32(2)(b) of the *HEEA*, then the AUC's specific calculation of that compensation should not be reviewed by the Court. The ABCA disagreed with BRPC that the AUC was bound to accept the method of depreciation adopted by the BRPC's Board of Directors for the purposes of assessing compensation or that the AUC improperly privileged the interests of Fortis' customers. The ABCA accepted that the AUC calculated compensation based on its assessment of the evidence provided by both parties, noting significant deficiencies in the evidence provided by BRPC. The ABCA held that the AUC's determination of compensation raised a question of fact that did not, absent a finding of the Court that the AUC applied the incorrect provision of the *HEEA*, fall within the scope of the statutory right of appeal since it was not a question of law and had no significance beyond the interests of the parties to this appeal.

***Municipal District of Ranchland No. 66 v Alberta Energy Regulator*, 2024 ABCA 274**

Permission to Appeal – Coal Exploration

Application

The applicant, the Municipal District of Ranchland No. 66 ("Ranchland"), sought permission to appeal a decision of the Alberta Energy Regulator ("AER") that accepted three applications by Northback Holdings Corporation ("Northback") for coal exploration permits in Grassy Mountain located within the municipal district, including the decision to refer the applications for a hearing before the AER.

Decision

The Alberta Court of Appeal ("ABCA") granted permission to appeal on the following questions:

(a) Did the AER improperly fetter its authority in accepting Northback's applications?

(b) Did the AER err by relying on a letter from the Minister of Energy while interpreting the Ministerial Order?

(c) Did the AER err in its interpretation of the term "advanced coal project" in the Ministerial Order?

Pertinent Issues

Background

The regulation of coal mining in Alberta is governed by, *inter alia*, *Ministerial Order 002/2022* ("*Order*") issued by the Minister of Energy ("Minister") under s 67 of the AER's home statute, the *Responsible Energy Development Act* ("*REDA*"). The *Order* prohibits the AER from accepting new coal applications on Category 3 and 4 lands, as defined in "A Coal Development Policy for Alberta (1976)," unless the lands were subject to an "advanced coal project." Grassy Mountain is located on Category 4 lands.

Northback's previous application for a proposed coal mine on Grassy Mountain was rejected by the AER. The *Order* came into effect following the release of that decision. The following year, Northback submitted new coal exploration applications to the AER related to Grassy Mountain and Ranchland submitted a statement of concern ("SOC") to the AER about the applications. After the applications were filed, the AER received a letter from the Minister ("Letter") explaining that the purpose of the Letter was to provide his interpretation regarding the appropriate application of the definition of "advanced coal project" under the *Order*. According to the Minister, four projects met the definition of "advanced coal project" under the *Order*, one of which was Grassy Mountain.

The AER accepted the three applications by Northback and scheduled a hearing. The AER explained that s 67 of *REDA* allowed the Minister to provide, by order, guidelines to the AER to follow in the carrying out of its powers, duties and functions. The AER held that the Letter clarifying the application of the *Order* carried significant weight and that the Category 4 lands upon which application activities had been proposed were subject to an "advanced coal project."

Appeal Grounds

Ranchland argued that the AER committed multiple errors of law or jurisdiction by: improperly delegating its decision-making power to the Minister and fettering its discretion; contravening the principles of procedural fairness by failing to consider the evidence of the applicant and other affected parties, and by relying on improper and irrelevant evidence; and incorrectly finding that the term "advanced coal project" in the *Order* includes projects that were previously rejected by the AER.

The Test

In determining whether to grant permission to appeal, the ABCA considers four factors:

(a) whether the applicant has demonstrated a question of law or jurisdiction of general importance, rather than of interest only to the immediate parties;

(b) whether the issue is significant to the underlying administrative proceeding, or is merely interlocutory or collateral, or may not affect the ultimate outcome of the proceeding;

(c) whether the appeal raises a serious, arguable point of law; this factor considers the standard of review to be applied and is balanced with the importance of the issue; and,

(d) whether an appeal will unduly hinder the underlying proceedings.

The weight attached to the factors depends on the circumstances and, in essence, involves an overall consideration of whether an issue of law is presented with sufficient importance to justify an appeal.

Analysis

Ground 1: The AER erred by improperly delegating the decision to the Minister or fettered its discretion in making the decision

Ranchland argued that the AER failed to engage in any meaningful, independent analysis of the definition of an "advanced coal project" in the *Order* and relied excessively on the Minister's interpretation that Grassy Mountain met that definition.

The ABCA held that, in its decision, the AER confirmed that it is vested with the authority to consider if the application lands are subject to an "advanced coal project" and whether to accept Northback's applications. Reading the AER's decision as a whole and in context, the ABCA concluded the AER did not treat the Letter as a "binding direction."

The ABCA, however, determined that Ranchland raised an arguable issue about the AER fettering its discretion because there was no independent analysis of whether Grassy Mountain met the definition of an "advanced coal project" when it decided to accept Northback's applications. The ABCA held that the AER did not explain why a project it previously rejected continues to be an "advanced coal project" or why a rejected project continues to be a "project" under the *Order* at all.

The ABCA granted permission to appeal on this ground as it determined that it raises an arguable point of law, having general importance.

Ground 2: The AER erred by failing to consider relevant issues, facts and arguments

Ranchland argued that the AER failed to provide procedural fairness by relying solely on the Letter as the basis for its decision, while disregarding other submissions, including those of entities or individuals who submitted an SOC about the project proposal.

Given the absence of any requirements under the Alberta Energy Regulator Rules of Practice to consider Ranchland's SOC at the application acceptance stage of the regulatory proceeding, and the lack of detail about any arguments the AER purportedly failed to consider, the ABCA held that Ranchland did not demonstrate a serious, arguable issue on this proposed ground of appeal.

Ground 3: The AER erred in finding that the Minister's letter constitutes "written notice" or "guidelines" as contemplated by the Ministerial Order and

Ground 4: The AER relied on improper or irrelevant evidence by giving "significant weight" to the Minister's opinion as expressed in his letter

Ranchland asserted that the AER's decision concluded that the Letter was either guidelines for the AER, as contemplated by s 67 of *REDA*, or a "written notice" within the scope of the *Order* by which the Minister was ending the suspension for the acceptance of project applications.

The ABCA found that both contentions involved questions of fact or mixed fact and law, with no extricable issue of law. The ABCA concluded it had no jurisdiction to entertain an appeal on that basis.

Ranchland also contended that the AER may not take guidance from the Minister about the interpretation of Ministerial orders through extrinsic evidence where the *Order* itself should be varied to provide the necessary direction.

The ABCA agreed and concluded that Ranchland raised a serious, arguable issue on this point of law, which has general importance to the use and interpretation of Ministerial orders more generally, both under *REDA* and otherwise, and granted permission to appeal on this point of law.

Ground 5: The AER erred in finding that the term "advanced coal project" includes projects which have been rejected by the AER

Ranchland argued that the AER gave the term "advanced coal project" an incorrect interpretation and that this error involves a question of law. Ranchland contended that once an application for exploration or development was rejected, as it was here, the "project" ceased to exist. A new application involving the same lands is not the same project. The AER's decision did not address this alternative interpretation.

The ABCA found that a serious, arguable issue was established. The issue had importance beyond the immediate parties because three other "projects" or lands were potentially affected by this interpretation of the exception to the suspension. Moreover, the AER's interpretation invited the possibility of a sequence of applications involving each of the four identified projects or lands over many years, which could repeatedly affect multiple parties and stakeholders with an interest in either supporting or opposing a new application. Consequently, the court granted permission to appeal on this question of law.

ALBERTA UTILITIES COMMISSION

***Harmony Advanced Water Systems Corporation EPCOR Alberta Utilities Holdings Inc. Share Transfer Application*, AUC Decision 29083-D01-2024**

Share Transfer – No-Harm Test

Application

Harmony Advanced Water Systems Corporation ("HAWSCO") filed an application with the Alberta Utilities Commission ("AUC") requesting the AUC to authorize pursuant to s 102(1) of the *Public Utilities Act* ("*PUA*") the transfer on HAWSCO's books all common shares of HAWSCO from Harmony Developments Inc. ("HDI") to EPCOR Alberta Utilities Holdings Inc. ("EPCOR Holdings"). EPCOR Holdings filed an application requesting that the AUC confirm that it will request that the Lieutenant Governor in Council ("GIC") add EPCOR Holdings and EPCOR Harmony to the *Public Utilities Designation Regulation* ("*PUDR*") as designated owners of a public utility and to require EPCOR Holdings and EPCOR Harmony to conduct themselves in the meantime as if they had been so designated.

Decision

The AUC approved the applications and authorized the requested transfer, deemed EPCOR Holdings and EPCOR Harmony subject to ss 101 and 102 of the *PUA*, and confirmed that it will request the GIC to add EPCOR Holdings and EPCOR Harmony to the *PUDR* as designated owners of a public utility.

Pertinent Issues

Background

HAWSCO owns and operates a water utility located in Rocky View County, Alberta, and is a wholly owned subsidiary of HDI. EPCOR Holdings is a directly and wholly owned subsidiary of EPCOR Utilities Inc. ("EUI"). EPCOR Holdings and HDI entered into a share purchase agreement, under which EPCOR Holdings would acquire 100 per cent of HAWSCO's water, stormwater and wastewater business for $20 million ("Acquisition"). The parties anticipated that HAWSCO's name would change to EPCOR Harmony following the completion of the Acquisition.

AUC Decision

The central question for the AUC was whether the water utility customers would be harmed by the Acquisition, which is referred to as the "no-harm test." Under this test, the AUC weighs the potential positive and negative impacts of the Acquisition to determine whether the balance favours or leaves the customers no worse off, considering the circumstances. The no-harm test considers both the financial and service level impacts of the proposed Acquisition on the customers of the utility. If the AUC identifies harm, it then considers whether the harm may be effectively mitigated through approval conditions.

The AUC found no evidence of a harmful impact from the Acquisition on the rates charged to the water utility customers. The AUC found that no added operational risk would occur if the Acquisition proceeded and that EUI adequately demonstrated the necessary experience, financial strength, and commitment to utility service. The AUC accepted that there would be no change to its regulatory authority over the water utility and the entities carrying out the business, and that the Acquisition will not hinder the AUC's oversight of the water utility's affiliate relationships and transactions.

The AUC determined that the Acquisition would not result in any degradation of management or operational expertise of the water utility. The AUC was also satisfied that the Acquisition would not have a harmful effect on the utility's day-to-day operation.

The AUC considered that the protection of HAWSCO's assets from the creditors of EUI, EPCOR Holdings or any of its affiliates was important and included conditions for EPCOR Holdings to ensure this protection. The AUC directed EPCOR Holdings to include in any future credit agreements or amendments to current credit agreements wording that exempts the assets of HAWSCO/EPCOR Harmony from being pledged as security unless EPCOR Holdings receives permission from the AUC.

Based on the above and applying the no-harm test, the AUC approved the proposed transaction.

***TriSummit Utilities Inc. De-Designation Under Section 26 of the Gas Utilities Act*, Decision 29096-D01-2024**

Markets – Financial Oversight

Application

TriSummit Utilities Inc. ("TSU"), a Canadian corporation designated as an owner of a gas utility and an owner of a public utility, filed an application with the Alberta Utilities Commission ("AUC") for an order declaring that ss 26(2) through 26(5) of the Gas Utilities Act ("*GUA*") do not apply to TSU. Alternatively, TSU requested an AUC order declaring that s 26(2) of the *GUA* does not apply to all applicable transactions or classes of transactions that TSU may undertake.

Decision

The AUC granted the alternative relief requested by TSU and declared that s 26(2) of the *GUA* does not apply to TSU unless and until the order is varied or rescinded by the AUC.

Pertinent Issues

TSU

Background

Through its subsidiary companies TriSummit Utility Group Inc. ("TSG") and TriSummit Utility Holdings Inc. ("TS Holdings"), TSU wholly and indirectly owns Apex Utilities Inc. ("AUI"), a natural gas distribution utility operating solely in Alberta. AUI is regulated by the AUC pursuant to the *Alberta Utilities Commission Act* ("*AUC Act*"), the *GUA* and the *Public Utilities Act* ("*PUA*").

Designation

TSU is a designated owner of a gas utility for the purposes of ss 26 and 27 of the *GUA*, and a designated owner of a public utility for the purposes of s 109 of the *PUA*. AUI, TSG and TS Holdings are also designated owners of a gas and public utility pursuant to the regulations enacted under the *GUA* and *PUA*.

Relief Requested

TSU requested under s 3(1)(c) of the *GUA* that the AUC order de-designate TSU under s 26(1) of the *GUA* so that ss 26(2) through 26(5) of the *GUA* do not apply to TSU.

S 26(2) of the *GUA* requires that designated owners of gas utilities obtain AUC approval prior to issuing debt or equity (or consummating a number of other transactions) or the transactions are void. S 26(3) of the *GUA* lists certain financial transactions for which the AUC's approval is not required, and s 26(5) of the *GUA* provides that when a declaration is made by the AUC under s 26(4) of the *GUA*, certain transactions made prior to the declaration are no longer void or in contravention of the *GUA*.

In the alternative, TSU requested, pursuant to s 26(4) of the *GUA*, an AUC order declaring that s 26(2) of the *GUA* does not apply to all applicable transactions or classes of transactions that TSU may undertake. This makes the alternative relief narrower compared to the main one.

AUC Decision

Legal Test

When deciding whether to grant an exemption pursuant to either s 3 or s 26(4) of the *GUA*, the AUC considers whether the requested exemption is in the public interest. The public interest test requires consideration of the AUC's dual mandate to establish just and reasonable rates, and to ensure the safety, reliability and integrity of the utility system in Alberta. The AUC must be satisfied that the exemption would not undermine the ability of the utility to provide safe and reliable service at just and reasonable rates.

In the context of exemptions pursuant to s 26(4) of the *GUA*, the AUC also considers the following non-exhaustive list of factors in determining whether a requested exemption should be granted:

- the operational and regulatory history of the utility;
- the potential effect of the requested exemption on regulatory oversight;
- the duration and scope of the requested exemption;
- any potential effect on the utility's overall corporate structure;

- any objections to the application registered by interveners; and

- other general public interest concerns.

Main Relief

The AUC understood that TSU primarily sought relief from the operation of s 26(2) of the *GUA*. As a result, the AUC held that, since the express purpose of 26(4) of the *GUA* was to provide such relief, it was unnecessary for the AUC to resort to the broader s 3 of the *GUA* exemption.

Additionally, the AUC was not clear that granting a s 3 *GUA* exemption from ss 26(3), 26(4) and 26(5) of the *GUA* was in the public interest because it may affect the AUC's jurisdiction over TSU in the future. The AUC was not persuaded by TSU's arguments that a s 3 *GUA* exemption is preferable to a s 26(4) of the *GUA* exemption or that TSU will suffer any undue risk as a result of a s 26(4) *GUA* exemption.

Alternative Relief

Accordingly, the AUC considered TSU's alternative request for relief and found that granting TSU a s 26(4) *GUA* exemption from s 26(2) *GUA* was in the public interest and that it would likely result in benefits to TSU in the operation of its multi-jurisdictional assets. The AUC was satisfied that the circumstances giving rise to TSU's initial s 26 *GUA* designation as an owner of a gas utility have sufficiently changed so that the AUC no longer requires the same level of oversight to ensure the protection of customers and the integrity of Alberta's utility system.

The AUC was also satisfied that it will retain sufficient oversight over TSU because TSU will remain a designated owner of a utility under s 27 *GUA* and s 109 *PUA*, and because its subsidiary companies TSG, TS Holdings and AUI will also remain designated under ss 26 and 27 of the *GUA* and 109 of the *PUA*. Finally, AUI, the utility operator itself, will remain regulated by the AUC.

Accordingly, the AUC found that granting TSU an exemption from s 26(2) of the *GUA* will not undermine the ability of the utility to provide safe and reliable service at just and reasonable rates.