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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

...



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(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.

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.

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,

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;



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(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.