

December 1, 2014

Alberta Utilities Commission Approves the Proposed Sale of AltaLink's Transmission Assets to the Berkshire Hathaway Group

By: Nigel Bankes

Decision Commented On: [AUC Decision 2014-326](#), AltaLink Investment Management Ltd. and SNC Lavalin Transmission Ltd et al, November 28, 2014

AltaLink owns significant transmission assets in Alberta. AltaLink in turn is owned by SNC Lavalin. SNC Lavalin wanted to divest itself of these assets and found a willing purchaser in the form of the US based Berkshire Hathaway Group. The transaction however requires the approval of federal foreign investment and competition authorities (already in place) and of the Alberta Utilities Commission (AUC).

The AUC 's approval is required under the terms of s.102 of the *Public Utilities Act*, RSA 2000, [c. P-45](#) (*PUA*) which provides as follows:

Unless authorized to do so by an order of the Commission, the owner of a public utility designated under section 101(1) shall not sell or make or permit to be made on its books a transfer of any share of its capital stock to a corporation, however incorporated, if the sale or transfer, in itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the public utility.

The various relevant AltaLink and SNC Lavalin corporate entities are all designated under s.101: see *Public Utilities Designation Regulation*, [Alta. Reg. 194/2006](#). The AUC approved the sale subject to some limited terms and conditions. The AUC rejected many of the terms and conditions proposed by intervenors. This post discusses the scope of the AUC's authority to review this type of transaction, the matters that the AUC considers to be relevant as part of its "no harm review" and the AUC's treatment of some of the proposed conditions.

The scope of the AUC's review

As noted above, the AUC's jurisdiction over this matter arises under s.102 of the *PUA* but s.102 provides the AUC with no specific guidance as to the considerations that it should take into account in conducting its review (at para 56), leading the Commission to grasp for the "general guidance" offered by s.6(1)(a) of the *Utilities Commission Act*, [SA 2007, c. A-37.2](#), which prescribes that every member of the Commission "shall act honestly, in good faith and in the public interest". This, emphasized the Commission, distinguished its responsibilities from the

responsibilities of a director of a corporation who owes the duty to act in good faith and in the best interest of the corporation. This was enough to launch the Commission into a soliloquy on the meaning of that multifaceted term “public interest”:

58. Public interest is a multi-faceted concept that will necessarily mean different things in different contexts. Responsibility for determining the overall public interest of Canadians is divided between the Parliament of Canada and the provincial legislatures. The provincial legislatures or Parliament may then delegate responsibility for certain public interest determinations to the lieutenant-governor in council, ministers or various agencies of the province. For example, the public interest mandate of an administrative body charged by statute with overseeing public education in Alberta would be different from one charged with overseeing the delivery of public health care in Alberta and different again from an administrative or quasi-judicial tribunal like the Commission, which is charged with regulating certain public utility matters in Alberta. ...

60. It is clear from the above that the Commission does not have authority over all matters related to regulated utilities in Alberta. The responsibilities of the Commission are limited to its central rate-setting and utility system integrity functions set out in its enabling legislation.

61. It is also clear that the role of the Commission in carrying out its public interest mandate is different from that of a court. Unlike a court, proceedings before the Commission are not held to resolve private disputes. The Commission has the responsibility to arrive at an outcome in the public interest in a particular proceeding, not to make a determination in favour of one or another of the private interests of the parties participating in the proceeding. (emphasis added)

This meant that many of the concerns that had been expressed to the AUC, including concerns over the sale of infrastructure assets to a foreign investor, and concerns as to possibly increased energy exports to the United States, all fell outside the AUC’s remit (at paras 64 and 67). The Commission was also careful to emphasise that it would continue to regulate AltaLink even after the sale and that therefore many of the matters that intervenors sought to have the Commission address through conditions on its approval were more appropriately dealt with through the Commission’s ongoing regulatory review of AltaLink.

The AUC’s no harm review

What then did “public interest” mean in this context given the AUC’s focus on its rate setting authority? For the AUC this meant that it should examine the proposed transaction through a “no harm” lens. The Commission elaborated on this drawing on submissions of counsel and adding some content of its own. Here is my edited version of those considerations (the first 8 factors drawn from counsel’s submissions and the latter 3 added by the Commission) (at paras 108 – 109):

1. Will there be any impact to the rates and charges passed on to customers?
2. Will there be any operational benefit or risk as a result of the acquiring party's utility experience?

3. Will the financial profile of the utility be impacted for the purposes of attracting capital? (A crucial consideration given the ongoing expansion of Alberta's transmission infrastructure)
4. Will the utility remain sufficiently legally, financially and operationally separate from the acquiring party? (Which may be addressed through conditions dealing with ring-fencing, code of conduct etc)
5. Will the Commission maintain sufficient regulatory oversight of the utility?
6. Will the management and operational expertise remain in place post transaction?
7. Will the transaction result in any cost impacts for customers relating to such things as tax and pension funds?
8. Observations on the reality that the acquiring party wishes to be in the utility business in Alberta whereas the divesting party does not.
9. Customers should, to the maximum extent possible, be protected against any negative ramifications arising from the transactions.
10. Customers are not entitled to a level of post-transaction regulatory certainty they would not have realized if the transaction had not been approved.
11. Customers are at least no worse off after the transaction is completed after consideration of the potential positive and negative impacts of the proposed share transactions.
(edited and abridged)

In applying these considerations the Commission follows a two-step analysis: first does the transaction result in harm? And second, if the Commission identifies harm, can that identified harm be mitigated by imposing conditions? I do not propose to review the Commission's detailed assessment of these various considerations. The Commission's overall assessment was as follows (at para 111):

The Commission finds that customers will be at least no worse off after the transaction is completed, and that the proposed transaction satisfies the no harm test without the need to impose any additional specific conditions on the sale, apart from changes to the ring-fencing measures and Inter-Affiliate Code of Conduct to reflect the new ownership structure. Accordingly, as noted in the sections that follow, the Commission has directed AIML/AML to file an updated affidavit on the revised ring-fencing measures, and to provide, if necessary, any changes to its Inter-Affiliate Code of Conduct to reflect the new ownership structure.

Conditions

As noted above, the Commission declined to impose a number of terms and conditions that some of the intervenors requested that the Commission impose. One of the more interesting discussions concerned a proposal that the Commission condition its approval on performance of the commitments that Berkshire Hathaway (BH) had already made to Industry Canada (IC) as part of IC's foreign investment review. The Commission declined to do so (at para 291) on the basis on the basis that the Commission has no jurisdiction to compel BH to comply with its commitments to IC. Furthermore it also observed that it would be vigilant to ensure that

fulfillment of commitments with respect to staffing for example would not result in staffing levels which were beyond those required to deliver appropriate levels of service (at paras 309 – 311) (a.k.a no gold plating). The Commission would monitor these matters as part of its ongoing regulation of AltaLink.

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>
Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

