January 27, 2015

Providing an Effective Remedy for the ISO's Unlawful Line Loss Rule

By: Nigel Bankes

Decision Commented On: AUC Decision 790-D02-2015, Milner Power Inc. and ATCO Power Ltd, Complaints re the ISO Transmission Loss Factor Rule and Loss Factor Methodology, Phase 2 Module A, January 20, 2015

In this decision the Alberta Utilities Commission (AUC) has decided that it has the jurisdiction to grant tariff-based relief in a case where a rule of the Independent System Operator (ISO) is found to be unlawful on the basis that it was unjust, unreasonable, unduly preferential, arbitrarily and unjustly discriminatory and inconsistent with various provisions of the *Electric Utilities Act* (*EUA*) (now SA 2003, c. E-5.1) and the *Transmission Regulation* (now Alta Reg 86/2007). Such relief may involve retrospective or retroactive adjustments to the ISO tariff going back to the date when the Rule first entered into force (January 1, 2006, Milner Power having originally filed its objection to the ISO Line Loss Rule in August 2005 before the rule came into force).

In AUC Decision 2014-110, the AUC confirmed its earlier conclusion in Decision 2012-104 to the effect that the ISO's Line Loss Rule was unjust, unreasonable, unduly preferential, arbitrarily and unjustly discriminatory and inconsistent with various provisions of the *Electric Utilities Act* and the *Transmission Regulation* on the grounds that the rule disadvantages generators that are loss savers and does not properly charge loss creators for their losses. The AUC's Decision 2014-110 is the subject of an ABlawg post by Sean Bullen here.

Having made that determination the AUC then had to assess what remedy might be available. This decision comprises the first step in that procedure. The AUC's comprehensive 80 page decision sets out the basis on which the Commission concluded that it had the jurisdiction to grant tariff-based relief. In doing so the Commission had to grapple with two principal issues. First, there was the reality that the terms of both the both the *EUA* and the *Transmission Regulation* had changed over the time period in question. Second, there is a long standing principle that a utility commission generally does not have the jurisdiction to engage in retroactive or retrospective rate making.

As to the first issue the Commission concluded that while there had been changes in the *Act* and Regulation these were not such as to deprive the complainants of their right to a remedy (at paras 221 and 239).

As to the second issue, the Commission concluded that there were a number of established exceptions to the principle that a utilities commission cannot engage in retroactive or retrospective rate making and that the present case fell within a number of these exceptions. The exceptions are as follows (at paras 153-212):

1. A Utilities Commission can always adjust interim rates back to the date of the interim order: *Bell Canada* v. *Canada (Canadian Radio-Television and Telecommunications Commission),* [1989] 1 SCR 1722; *Re Coseka Resources Ltd. and Saratoga Processing Co.,* 1981 ABCA 180, 126 DLR (3d) 705 (Alta CA).

2. A Utilities Commission can use deferral accounts to adjust rates: *Bell Canada* v. *Bell Aliant Regional Communications*, [2009] 2 SCR 764, 2009 SCC 40; *Calgary (City) v Alberta (Energy and Utilities Board)*, 2010 ABCA 132.

3. A complaint based statutory scheme (referred to here as a negative disallowance scheme) as opposed to a scheme that requires prospective approval of rates by a Utilities Commission necessarily contemplates that the Commission has the jurisdiction to set just and reasonable rates in substitution for those set unilaterally by the Utility (or in this case ISO) back to the date of the complaint: *Nova, An Alberta Corporation* v. *Amoco Canada Petroleum Company Ltd.,* [1981] 2 SCR 437, 1981 CanLII 211 (SCC).

4. The knowledge exception: a Utilities Commission can change the rates where affected parties knew or ought to have known that rates were subject to change.

5. The nullity exception: a Utilities Commission can (re)establish a new set of rates on a retrospective or retroactive basis when a set of rates has been shown to be a nullity.

The Commission relied on the first four exceptions in concluding that it had the jurisdiction to proceed with tariff-based relief. That said, the knowledge exception seems to function more as overarching principle that connects the first three exceptions rather than as an independent source of authority. Furthermore it should be noted that while the version of the legislation in force at the time of Milner Power's original complaint was a negative disallowance scheme the current provision is (at para 219) "strictly prospective in application".

This is a well-crafted decision which reaches a practical and just conclusion; any other conclusion would have rendered the entire complaint process (at least as it originally stood) completely hollow. It is true that there will be challenges ahead in working out the details of "tariff-based relief" but, as the Commission noted (at para 167), the Supreme Court's 1989 decision in *Bell Canada* makes it clear that perfection is not required in crafting a set of retrospective or retroactive rates designed to rectify what would otherwise be unjust and unreasonable rates (the earlier version of the *EUA*) or which fail to support the fair, efficient and openly competitive operation of the market (the FEOC principle which now animates the test for a valid rule – see para 258).