

## The Regulation of the Construction and Operation of Electric Distribution Systems in Alberta

By: Nigel Bankes

**Decision Commented On:** AUC Decision [20799-D01-2016](#), Finlay Group, Complaint Regarding FortisAlberta Inc, Distribution Line Rebuild Project, February 3, 2016

This decision of the Alberta Utilities Commission (AUC) involves the rebuild of a short 25 kV distribution by FortisAlberta Inc. Other than from the perspective of the landowners who owned property adjacent to the distribution line this could hardly be a matter of great moment, but the decision deserves a post because of what it tells us about what seems to be a gap in the regulatory rules governing the construction and operation of distribution lines in the province. The Commission does its best to fill that gap but it does seem odd that while a homeowner needs to “[pull a permit](#)” from the relevant municipal authority before doing electrical work in their home, there is no AUC permitting requirement that a distribution utility must satisfy prior to constructing new distribution lines or changes thereto. The absence of such a permitting requirement may make sense for a sophisticated entity operating a “behind the fence” generation and distribution system for a designated industrial system under s. 4 of the *Hydro and Electric Energy Act (HEEA)*, [RSA 2000, c H-16](#) (see generally, Nigel Bankes, Giorilyn Bruno and Cairns Price, “The Regulation of Cogeneration in Alberta” (2015) 53 *Alberta Law Review* 383) but it makes less sense when the distribution utility is providing an essential public service. On the other hand, the absence of a history of high profile complaints or adverse publicity for electric distribution utilities for their construction operations suggests that, in general, they have been doing a good job – and “if it ain’t broke don’t fix it.”

### The Facts

The Finlay Group objected to the way in which FortisAlberta was proposing to go about rebuilding the distribution line which was the subject of this inquiry, largely on the basis that the method of construction would involve cutting down trees which provided both privacy and noise reduction qualities for the Finlay Group landowners. The Finlay Group proposed other alternatives all of which were more expensive and would have involved disruptions in service. The Finlay Group brought their complaint to the attention of the Alberta Utilities Commission (AUC) which ultimately dismissed the complaint. My interest in the decision lies in the AUC’s assumption of jurisdiction and the basis of that jurisdiction.

### The Law Pertaining to the Construction of Distribution Networks

Most electric distribution systems in Alberta are operated by utilities which have the exclusive franchise to operate those systems within a designated service area approved by the AUC under s. 25 of the *HEEA*. However, while the *HEEA* (ss. 14 & 15) requires AUC approval in the form of a permit and licence for the construction and operation of a transmission line, no similar AUC authorization is required for the construction, rebuild or operation of a distribution line, provided

that the distribution line is within the utility's designated service area. FortisAlberta therefore did not require AUC approval for its proposed rebuild. In fact as stated at para 32 "the AUC has no direct oversight or approval role for the routing, abandonment, removal or reclamation of distribution lines."

How then did the AUC obtain jurisdiction to even consider the complaints of the Finlay Group? According to Commissioner Anne Michaud, the AUC has this jurisdiction by virtue of some combination of s. 8 of the *Alberta Utilities Commission Act (AUCA)*, [RSA 2000, c. A-37.2](#), ss. 85 and 87 of the *Public Utilities Commission Act (PUA)*, [RSA 2000, c. P-45](#), s. 6 of the *HEEA* and s. 105 of the *Electric Utilities Act (EUA)*, [SA 2003, c. E-5.1](#).

Section 8 of the *AUCA* provides as follows:

8(1) The Commission has all the powers, rights, protections and privileges that are given to it or provided for under this Act and under any other enactment and by law.

(2) The Commission, in the exercise of its powers and the performance of its duties and functions under this Act or any other enactment, may act on its own initiative or motion and do all things that are necessary for or incidental to the exercise of its powers and the performance of its duties and functions.

(3) In addition to the powers, duties and functions conferred or imposed on the Commission by this Act or any other enactment, the Commission may carry out any other powers, duties and functions determined by the Lieutenant Governor in Council.

....

(5) Without restricting subsections (1) to (4), the Commission may do all or any of the following:

(a) hear and determine all questions of law or fact;

(b) make an order granting the relief applied for;

(c) make interim orders;

(d) where it appears to the Commission to be just and proper, grant partial, further or other relief in addition to, or in substitution for, that applied for as fully and in all respects as if the application or matter had been for that partial, further or other relief.

The key subsection here must be subsection 2 which refers to other statutes which confer jurisdiction on the AUC and then refers to "all things that are necessary for or incidental to the exercise of its powers and the performance of its duties and functions." But this cannot resolve the issue itself since, as already conceded, there is no express conferral of jurisdiction under the *AUCA* or the other statutes listed above with respect to distribution lines.

Sections 85 and 87 of the *PUA* provide as follows:

85(1) The Commission shall exercise a general supervision over all public utilities, and the owners of them, and may make any orders regarding extension of

works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

(2) The Commission shall conduct all inquiries necessary for the obtaining of complete information as to the manner in which owners of public utilities comply with the law, or as to any other matter or thing within the jurisdiction of the Commission.

87(1) The Commission may, on its own initiative, or on the application of a person having an interest, investigate any matter concerning a public utility.

(2) When in the opinion of the Commission it is necessary to investigate a public utility or the affairs of its owner, the Commission shall be given access to and may use any books, documents or records with respect to the public utility and in the possession of any owner of the public utility or municipality or under the control of the Alberta Energy Regulator or a board, commission or department of the Government.

(3) A person who directly or indirectly controls the business of an owner of a public utility within Alberta and any company controlled by that person shall give the Commission or its agent access to any of the books, documents and records that relate to the business of the owner or shall furnish any information in respect of it required by the Commission.

The *PUA* is a rate-making statute. It is certainly conceivable that the AUC could have the jurisdiction to order a regulated utility like FortisAlberta not to engage in more expensive re-build operations in order to meet the concerns of a small group of rate payers (unless they were prepared to cover the costs themselves). While this sort of issue might ordinarily arise in the context of disallowing costs at a rate hearing on the basis of a prudence analysis, the combination of these provisions plus s. 8 of the *AUCA* perhaps justifies the AUC inquiring into the matter on the basis of a complaint as to the utility refusing to incur certain costs; although if word gets out as to this possible avenue of complaint the Commission may be inundated! Section 6 of the *HEEA* allows the AUC, of its own motion, to “inquire into, examine and investigate any matter referred to” in s. 2 which establishes the purposes of the Act. Those purposes are:

(a) to provide for the economic, orderly and efficient development and operation, in the public interest, of hydro energy and the generation and transmission of electric energy in Alberta,

(b) to secure the observance of safe and efficient practices in the public interest in the development of hydro energy and in the generation, transmission and distribution of electric energy in Alberta,

(c) to assist the Government in controlling pollution and ensuring environment conservation in the development of hydro energy and in the generation, transmission and distribution of electric energy in Alberta, and

(d) to provide for the collection, appraisal and dissemination of information regarding the demand for and supply of electric energy that is relevant to the electric industry in Alberta.

Both paragraphs (b) and (c) expressly refer to generation and ss. 2 and 6 read together must therefore allow the AUC to examine a matter relating to distribution if such a matter is drawn to its attention and the AUC concludes that it merits further inquiry.

Section 105 of the *EUA*, so far as relevant (and as quoted in the AUC Decision) provides as follows:

105(1) The owner of an electric distribution system has the following duties:

....

(b) to make decisions about building, upgrading and improving the electric distribution system for the purpose of providing safe, reliable and economic delivery of electric energy having regard to managing losses of electric energy to customers in the service area served by the electric distribution system;

(c) to operate and maintain the electric distribution system in a safe and reliable manner;

....

(m) to respond to inquiries and complaints from customers respecting electric distribution service;

While this section standing on its own can hardly be read as conferring any jurisdiction on the AUC (since it simply imposes duties on a utility), it can perhaps do so when read in conjunction with ss. 85 and 87 of the *PUA* quoted above.

All of this is to say that Commissioner Michaud is likely correct to conclude that the AUC has some complaint jurisdiction in relation to distribution lines by virtue of its general supervisory authority under these various statutes – but it sure is complicated! And it is also worth bearing in mind that the AUC’s general supervisory jurisdiction will only get it so far. Jurisdiction might have been far more contested if in this case the AUC had ordered FortisAlberta to adopt one of the solutions proposed by the Finlay Group. A set of cases that illustrates the distinction between general supervision and concrete relief is the line of AUC and Court of Appeal decisions dealing with the extent of the Commission’s regulatory authority over the Ventures pipeline: see posts [here](#) and [here](#).

The current provincial government has lots on its agenda but in the course of crafting rules to encourage a diversity of generation to help the province meet its greenhouse gas emission reduction targets some thought might be given to re-writing the *Hydro and Electric Energy Act* and clarifying the relationship between this Act and the province's main utility statutes. I made a similar comment in an earlier [post dealing with the regulation of cogeneration in Alberta](#).

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