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Further Thoughts on The Law and Practice of Grandparenting

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Decision Commented On: AUC Decision 22942-D02-2019, Alberta Electric System Operator, 2018 Independent System Operator Tariff, September 22, 2019.

The term "grandparenting" refers to the decision of a legislator, regulator or utility service provider to exempt existing operations from new terms of service or from new regulatory requirements. The decision to grandparent or not, and the extent of any grandparenting (i.e. the cutoff point), is frequently very contentious. Although we see grandparenting issues in many different areas of the law, including environmental law, land use planning, tax law, royalties (see my earlier post on royalties and grandparenting here), and the criminal law (restricted weapons), this post focuses on grandparenting issues in energy and utility law. In particular, this post examines decisions of the Alberta Utilities Commission (AUC) on grandparenting (or grandfathering as the term is usually written). The impetus to examine this issue arises from the AUC's recent decision on the tariff application of the Alberta Electric System Operator (AESO) (the AESO 2018 Tariff Decision). In that decision, the AUC made two rulings in favour of applying grandparenting. In my view, neither ruling is very well or completely reasoned. That led me to look at the AUC's record to see how it had dealt with this issue in the past. My basic position is that one should always be at least suspicious of grandparenting. It is, on its face, discriminatory and those who favour a grandparenting arrangement in a regulatory context bear the onus of justifying that arrangement. It also may mean that parties do not compete on a level playing field and to that extent is inconsistent with a free, open and competitive market thus requiring further justification.

I begin by examining the usual arguments pro and con grandparenting and then turn to look at the AUC's jurisprudence.

The arguments *in favour* of grandparenting typically start with the proposition that Z (or the class of Z) should be grandparented from the application of new rules because Z made its investment on the basis of the rules as they stood at the time and that it would be in some sense be unfair to those incumbents to subject them to the new rules. The new rules might make Z's operation less profitable, or worse still, unprofitable and stranded. A variation to the incumbent fairness argument is the proposition that a refusal to grandparent will scare-off investment concerned about possible future rule changes. Arguments for grandparenting will be stronger if governments or regulators have made representations or promises of no change: see for example Alberta's Bill 12: Royalty Guarantee Act and my post on that Bill here.

The arguments *against* grandparenting are more varied. They include the argument that nothing will change if all incumbents are protected (see *Ell v. Alberta*, 2003 SCC 35 (CanLII), [2003] 1

SCR 857, at para 49). The strength of this argument may turn on the importance of the issue and the rate of change that one might expect to see. If the issue is a serious health issue (e.g. prohibiting the production and use of persistent organic pollutants) grandparenting arguments will likely be weak. There may well also be a fairness claim against grandparenting, especially if there are system wide costs that the regulatory change is seeking to address and the effect of grandparenting is that Z and non-Z pay different rates for the same service. In some cases, a decision not to grandparent may trigger a claim to compensation. While it will be rare that there is a legal duty to compensate where a government or regulator declines to grandparent there may be political reasons to do so – see the example of the compensation measures that accompanied coal phase-out in Alberta. Another argument against grandparenting may be that an assumption of no-change on the part of an investor is unrealistic – nobody can reasonably have that expectation. A more nuanced version of this argument might reference announcements of anticipated changes or indeed express contractual provisions incorporating any changes in law into the terms of the arrangement (see my post on Crown royalty arrangements, *supra*) of which an investor should be aware. Finally, the line-drawing that is inherent in grandparenting may be both arbitrary (see *The Queen v Beauregard*, 1986 CanLII 24 (SCC), [1986] 2 SCR 56, at para 69) and complex to administer, and will inevitably increase administrative costs. Effectively one will have to run two parallel regulatory regimes.

But these are nothing more than lines of argument which may weigh differently depending on all of the circumstances. We might then ask where we find the law on grandparenting. Is there ever a legal duty to grandparent or a legal duty not to grandparent? Here too the body of relevant law may vary with context and forum. For example, much of international investment law, and in particular the duty of fair and equitable treatment, is concerned with stability and the legitimate expectations of the investor. In the area of utility law in Alberta we find the relevant legal standards in the general prohibition in all utility statutes on unjust discrimination and in the specific provisions in the *Electric Utilities Act*, SA 2003, c E-5.1, (EUA) dealing with the approval of AESO rules.

This post examines the general provisions on the duty not to discriminate and the relevant AUC decisions on grandparenting. It then looks at the AESO rule provisions and one related AUC decision, and finally it examines the treatment of grandparenting in the AESO 2018 Tariff Decision.

The General Duty not to Discriminate When Setting Utility Tariffs or Establishing the Terms of Access

All utility statutes contain one or more provisions prohibiting unreasonable, undue, or unjust discrimination. The duty not to discriminate is front and centre in the EUA with six different references addressing issues such as system access (s 33), rate setting (s 105(1)(a) and s 121) as well as a general duty of owners of electric utilities and the AESO (s 127(c)) not to "act in a manner that is unjust, unreasonable, unduly preferential, arbitrarily or unjustly discriminatory …". There are fewer references to discrimination or discriminatory behavior in the *Gas Utilities Act*, RSA 2000, c G-5, (GUA) and the *Public Utilities Act*, RSA 2000, c P-45, (PUA) but each of them references the duty not to discriminate in both the complaint investigation section of the Act (PUA, s 80 and GUA s 16) as well as in the main rate setting provisions (PUA s 100(a) and

GUA s 25). The duty not to discriminate also makes an appearance in s 43 of the *Municipal Government Act*, RSA 2000, c M-26, (MGA) dealing with the AUC's supervisory jurisdiction over municipally owned utilities. So far as relevant, s 43 provides that:

> (1) A person who uses, receives or pays for a municipal utility service may appeal a service charge, rate or toll made in respect of it to the Alberta Utilities Commission …
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> (2) If the Alberta Utilities Commission is satisfied that the person's service charge, rate or toll
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> …
>
> (c) is discriminatory,
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> the Commission may order the charge, rate or toll to be wholly or partly varied, adjusted or disallowed.

While this provision does not qualify the word 'discriminatory', the AUC and its predecessors have uniformly held that since rate setting frequently requires the adoption of different rate classes (because members of the class incur and share similar costs) and that this is not only legitimate but a key objective of rate design, the term must be qualified by an adjective such as undue or unjust.

AUC Decisions Using Unjust Discrimination as the Prism to Examine Grandparenting

The AUC has drawn on s 43(2)(c) of the MGA in several decisions dealing with grandparenting municipal rates and has held such practices to amount to unjust discrimination. In these decisions the Commission takes the view that grandparenting is inherently discriminatory since the result is that different classes of similarly situated customers pay different rates for the same service, or have different eligibility for the same service or tariff, simply on the basis of the date of connection or disconnection. It therefore falls to the municipal utility to seek to justify that distinction and the Commission has not been impressed by efforts to do so: see AUC Decision 24678-D01-2019, Village of Delia, Appeal of Utility Charges by Heide Peterson and Yvon Fournier October 1, 2019, and post by Dana Poscente here. The Commission has also withheld its approval (under s 45 of the MGA) of franchise agreements that provide for grandparenting on the grounds that such arrangements are inherently discriminatory: see AUC Decision 24257-D01-2019, Evergreen Gas Co-op Ltd., Franchise Agreement with the Town of Drayton Valley, May 2, 2019 noting that (at para 25) "the Co-op has failed to persuade the Commission that the point in time at which a customer takes service from a natural gas supplier, on its own, affords sufficient justification for the differential imposition of the franchise fee".

Board\Commission practice outside the context of the MGA is more equivocal. For example, in a 1999 decision the Alberta Energy and Utilities Board (AEUB or Board) had under consideration a proposed change to an irrigation rate so as to better reflect the costs attributable to irrigation service: see Alberta Energy and Utilities Board, Decision U99035, 10 August 1999, TransAlta Phase II. The new rate would represent an increase of 70% over the existing rate. The Board

approved the new rate but also agreed to a special arrangement for customers on the existing rate. New customers would be ineligible for that rate since (at 81) "new customers who are assessing whether or not to invest in electric irrigation pumping equipment should be given the appropriate price signal", but existing customers needed to be protected from rate shock:

> To avoid rate shock to existing customers while providing a proper cost signal to new customers, existing customers will be grandfathered through a closed rate which will, over time, be brought up to the level of the rate available to new customers. The Board notes that this is not the only instance where existing customers are grandfathered on a closed rate and considers this to be an example where discrimination between customers is not unjust. (at 81)

That was the extent of the reasoning. Some parties suggested that TransAlta itself (i.e. shareholders) should be responsible for the difference between the new and old rates presumably on the basis that TransAlta had some responsibility for the gross imbalance that had arisen between costs and the rate. The Board rejected that proposal noting that (at 81) "Such differences are more appropriately offset by other rate groups." There were some implementation issues with the grandparenting proposal that were identified in TransAlta's refiling. As the Board noted in AEUB Decision 2000-11 (at 82), "in this case as is so often true, the imposition of a date where customers are considered to be grandfathered on a more favourable rate leads to questions of whether other customers should be eligible to receive the grandfathered rate." In the end, the Board made a series of individual decisions as to eligibility. In sum, we might say that rate shock might provide a reason for grandparenting but that in such a case the grandparenting should be phased out over time. It was probably reasonable to allow for cross-subsidization over this period and to conclude (as the Board expressly did) that the discrimination was not unjust since the amounts involved, while significant for the individual ratepayers, were insignificant in terms of the overall revenue requirement of the utility.

In a 2007 decision the AEUB had to deal with a proposal from ATCO Electric to change the parameters of eligibility for a particular class of oilfield service: AEUB Decision 2007-086. A number of existing customers would not be eligibile for that class of service under the new rules but ATCO proposed to grandparent them on two grounds. First, grandparenting was ATCO's general approach to these issues. And second, forced conversion (at 47) "could be extremely disruptive for customers, as well as the utility. Customers would be required to buy-down remaining contracts and AE would have to determine an appropriate investment amount applicable to the new contract under the new price schedule." The Board accepted that argument (at 49) even though it seemed to be entirely uncertain how big the grandparented class was. Furthermore, it is unclear from the decision whether the grandparenting was time limited or not – would it naturally wither away as the contracts referenced in the previous quotation reached their expiry dates? There was no discussion of unjust discrimination as a standard against which to evaluate the grandparenting, simply the Board's conclusion (at 49) that "grandfathering existing oilfield customers that do not meet the 75 kW minimum is preferable to the disruptions and administrative difficulties of forced conversion." How do we know that it is preferable, absent some transparent discussion of the costs and benefits?

It is perhaps important to observe that in both cases the utility proposed the grandparenting and, although there were objections from other parties, in both cases the Board essentially deferred to the proposing utility.

The EUA Requirements for Assessing Rules as a Prism Through Which to Examine Grandparenting

The EUA contains its own framework for challenging new market rules proposed by the AESO. That framework was examined by the AUC in the context of grandparenting in AUC Decision 2011-226, Alberta Electric System Operator Objections to ISO Rule Section 502.1, Wind Aggregated Generating Facilities Technical Requirements, May 31, 2011. This decision contains, so far as I am aware, the most sustained and sophisticated discussion of grandparenting by the AUC. At the time of the decision the AESO rule challenge provision established that:

> 20.4(1) A market participant may object to an ISO rule that is filed under section 20.2 on one or more of the following grounds:
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> (a) that the Independent System Operator, in making the ISO rule, did not comply with Commission rules made under section 20.9;
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> (b) that the ISO rule is technically deficient;
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> (c) that the ISO rule does not support the fair, efficient openly competitive operation of the market;
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> and
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> (d) that the ISO rule is not in the public interest.

The onus is on the market participant to make its case. It follows that a challenge, pro or con grandparenting in relation to the application of an AESO rule, has to be based on, and framed within, one or more of the four grounds listed in this section and the burden will fall on the party objecting to the rule (whichever way application of the rule cuts on the grandparenting issue).

The decision concerned a proposed ISO Rule, the Wind Technical Rule, that would impose new requirements on the operators of wind power facilities. Section 25 of the proposed rule required generating facilities to have a meteorological collection tower (or met tower) and devices to measure, on a ten-minute average basis, instantaneous wind speed, wind direction, temperature and barometric pressure. In addition, section 29 required wind aggregated generating facilities to retain and provide the data collected under Section 25 to the AESO. These "wind forecasting requirements" would apply not only to new facilities but also to existing facilities, including facilities built under a standard known as the 1999 Standard.

In addition, the proposed Rule would impose wind power management (WPM) requirements dealing with such things as ramp rate limiting and frequency control (the WPM requirements).

Facilities built under the 1999 standard would be exempted (grandparented) from the WPM requirements but these requirements would apply to facilities built on the 2004 standard.

No parties objected to the fact that the AESO was proposing some grandparenting; the objections were all from incumbents on the basis that the proposed grandparenting arrangements were not generous enough.

TransAlta objected to the imposition of the *wind forecasting requirements* on two grounds. First, (at para 33) it relied "on the principle that power plants built and invested in under existing and earlier standards should be exempt from changed and increased technical requirements proposed in new technical standards or rules" and that "the costs of compliance with such changes are material and significant." Second, it relied upon a written representation made by the AESO to the effect that its facility would be exempt from a wind forecasting requirement. As a result, TransAlta argued that the rule did not support a fair, efficient and openly competitive market (FEOC) and was not in the public interest.

There seems to have been no doubt that the AESO had made the representation referenced above but also that this was a singular representation and inconsistent with all of the AESO's other wind forecasting communications – in other words it was a mistake that should have been identified as such. As a result, the AUC was not persuaded that TransAlta has relied on the AESO's error or that there was cost or operational unfairness. The AUC considered the issue of fairness from a number of different perspectives: it took into account TransAlta's interests but it also questioned the fairness of having only new generation bear the costs of wind forecasting. Similarly, it noted that wind forecasting was required to allow the AESO to respond to wind ramping issues and thus noted that (at 62) "other forms of generation, which are subject to MOMC (Must offer, must comply), could perceive any lack of forecasting requirements by wind power facilities as unfair, particularly when the units subject to more stringent MOMC rules bear the wear and tear costs associated with increased dispatches because of wind ramping." Finally, the Commission noted that section 2(2) of the proposed AESO rule would allow the AESO to consider whether existing met facilities would be adequate. The AUC put that clarification on the record and indicated its expectation "that the process for obtaining an exemption [under section 2(2)] will be clarified by the AESO." (at 69) And with that observation, the Commission concluded that TransAlta had not met its onus. The Commission did, however, revert to section 2(2) later in its reasons (at para 122) and expressed the expectation that "the AESO will adopt a reasonable approach to granting exemptions" under this section, failing which a market participant might be able to avail itself of the AUC's complaint jurisdiction under ss 25 or 26 of the EUA (and for an earlier post on the AUC's complaint jurisdiction with respect to the AESO see here).

Three parties (TransAlta, Suncor and NextEra) objected to the imposition of the *WPM requirements* on facilities built under the 2004 Standard on both FEOC and public interest grounds. The AESO took the position that there were several indications in the 2004 Standard that facilities built on that standard might be subject to future technical requirements. The objections to the failure to grandparent included: costs, fairness and concerns as to an unstable regulatory environment. The Commission rejected all of these objections. It noted that the materiality or significance of the alleged costs was unclear; it concluded (at para 103) that "the

2004 Standard contains a sufficiently clear warning to market participants or prospective wind developers that certain WPM requirements were being reviewed and considered for application to any units that would be approved under the 2004 Standard"; it noted that the AESO might have to acquire additional operating reserves if the WPM requirements were not mandated and that this would impose a cost on all load; it concluded that (at para 112) "predicting and managing wind ramps is an increasingly serious issue for the safe and reliable operation of the AIES as wind penetration increases"; and, while the Commission shared the view (at para 111), "that an unstable regulatory or unstable investment climate is something Alberta should try to avoid. The Commission was not persuaded that the Wind Technical Rule would cause a chilling effect on potential wind investors or that an approval of the Wind Technical Rule signals that Alberta is an unstable regulatory and investment climate. The Commission understands that this is the only rule that has required retrofits to facilities built in the past."

In sum, the Commission concluded that the applicants once again had not met the onus imposed on them by the EUA; the AESO's decision to provide some (but only some) grandparenting did not breach the FEOC standard and neither was it contrary to the public interest. The Commission must therefore have been persuaded that the AESO's decision as to what to grandparent and what not to grandparent was rational (or at least, given the applicable onus rule, the applicants had not shown that it was irrational in the context of either FEOC or public interest). Interestingly, there was also some discussion, as in Decision U99035 above, that the AESO should be responsible for any retrofit costs incurred by an incumbent generator; but the Commission was entirely unresponsive to this argument (at paras 126 – 130), taking the view that this would have effectively socialized these costs to load (i.e. all consumers). The Commission did not offer much in the way of reasons for this conclusion, it simply observed (at para 130) that "TransAlta had not established that "the requirement for generators to bear the cost of the retrofits associated with the Wind Technical Rule does not support the fair, efficient and openly competitive operation of the market nor the onus necessary to prove that bearing the cost of the retrofits is not in the public interest." (Emphasis added).

The AUC's wind decision is also notable for Commissioner Yahya's thoughtful separate opinion. Yahya's opinion covers a lot of ground but for the purposes of this post three points stand out. First, Yahya cautions parties against focusing on "fairness" as a distinct concept within FEOC. He suggests that FEOC should be considered as a whole and that the primary value underlying FEOC is that of economic efficiency – and further that a level playing field for all market participants will support economic efficiency. Referencing Minister West's remarks in the Legislature, Yahya commented that:

> All market participants will be treated equally, so that new investors will want to invest in Alberta. The spirit of [Minister West's] comments, if applied in today's context, show that fairness means that any ISO rule should apply equally to all market participants regardless of vintage. To do otherwise would favour incumbents and prejudice new entrants. (at para 183)

It follows from this that FEOC-based arguments on grandparenting will need to be grounded in economics if they are to succeed and Yahya offers several examples of possible lines of

argument. One that seems particularly compelling is the argument from an incumbent that the increased costs of new rules will result in stranding. Yahya frames the argument this way:

> Another argument that firms could have made from an efficiency perspective is that the new fixed costs are so high that the generating units will be unable to cover their fixed costs and will shut down. The closing of generating units will then deprive society of production resulting in higher marginal costs and hence prices for all. (at para 191)

Second, he emphasizes (at para 193) that objections to a rule based on public interest must be directed at establishing the *societal* disadvantages of new rules as opposed to the *private* disadvantages of such a rule. Finally, Yahya was much more sympathetic to TransAlta's argument that the AESO should compensate it for the costs of compliance than was the main opinion – but only of course (and referencing Kaldor-Hicks efficiency) if TransAlta could establish that such an outcome would be economically efficient. In sum, Yahya's opinion offers a rich source of ideas for those interested in grandparenting issues and provides some useful references to the literature. He notes (at para 194) that "economists are very skeptical of any grandfathering, in general" although at the same time he also references literature outlining the conditions under which grandfathering might be socially beneficial.

Both Yahya's opinion and the main opinion authored by Commissioners Beatty and Dahl Rees offer detailed reasons as to why the complainants had not been able to establish their case. While the criteria against which the Rule was being measured were public interest and FEOC rather than undue discrimination, the opinions do offer useful guidance as to how to address the issue of grandparenting.

The AUC's 2018 AESO Tariff Decision

This recent decision of the AUC contains two discussions of grandparenting, one in the context of changes to the power factor deficiency charge and the second in the context of changes to metering practices for distribution connected generation (DCG).

Power Factor Deficiency Charges

There are two types of power on a transmission system, real power and reactive power. Real power is the power that does the work; reactive power moves between the source and load on the circuit and does not do any useful work. The power factor of a load is the ratio between active power and reactive power. Even though reactive power does no useful work the transmission system must be able to serve both needs. However, in order to incent load to manage its reactive power needs the AESO's Rate DTS (demand transmission service) provides for a power deficiency charge where the power factor falls below 90%. This requirement has been in place in Alberta since 1996. The charge is justified on the basis that:

> … the delivery of reactive power represents an obligation of the AESO, regardless of what causes the downstream requirements for that reactive power and this obligation results in a cost that should be borne by the "causer" of the reactive power. The AESO submitted that because it is providing reactive power to support a DFO's system, the cost

> of providing this support should be recovered from the DFOs whose system is being supported by the provision of reactive power from the transmission system. (at para 215)

In the past, however, the AESO granted waivers of that charge in two circumstances. First, it granted waivers to market participants who might face additional costs to address the power factor deficiency compared to connections of new facilities on the grounds that "the cost of addressing power factor deficiencies after facilities have been constructed could remain significantly higher than the cost of doing so when initial decisions regarding configuration were being made." In this application, the AESO proposed to "grandfather" market participants who held these waivers from the proposed changes and to allow those waivers to continue in effect indefinitely. Second, the AESO had granted waivers of the power deficiency charge to load sites that had downstream generation (i.e. distribution connected generation (DCG)). The AESO proposed to abolish that waiver. In response, some market participants argued for the continuation of the waiver for dual use sites principally on the basis that the AESO could not accurately measure reactive power at dual use sites. On the other hand, another intervenor urged that (at para 220) "the AESO consider arrangements to phase out all power factor waivers within a reasonable time period because no evidence had been provided to support the view that the cost of addressing power factor deficiencies after facilities have been constructed are significantly higher than the cost of doing so when initial decisions regarding facility configurations are made."

The Commission concluded that the delivery of reactive power to a point of delivery represented a real cost that should generally be attributed to those responsible. That in turn led the Commission to conclude that granting a general waiver to distribution connected generation on an ongoing basis could (at para 250) "frustrate the DFOs' ability to manage net reactive power requirements on their systems." On the other hand (at para 251), the AESO's grandparenting proposal was reasonable:

> 251. The Commission also understands that the AESO had previously made a determination to waive the application of the power factor deficiency charge to a limited number of market participants, nine out of more than 500, with previously built facilities. The AESO determined that, on a go forward basis, "the cost of addressing power factor deficiencies after facilities have been constructed could remain significantly higher than the cost of doing so when initial decisions regarding configuration were being made." The Commission considers that it is reasonable for the AESO to continue to grandfather the waivers for these market participants indefinitely. This is because to do otherwise would unfairly treat market participants who had relied on the AESO's prior determination to grant a waiver when making investment decisions. (at para 251; emphasis added.)

This reasoning is not fully convincing. If the AESO's rationale for grandparenting applies to facilities that are already constructed, how then was a market participant's investment decision based upon reliance on a waiver? Furthermore, the decision is measured against the criterion of reasonableness; there is no discussion of whether or not grandparenting in these circumstances contravenes the legal test i.e. discrimination or undue discrimination.

Changes to the AESO's Metering Practice – Gross Metering Instead of Net Metering

The second discussion of grandparenting related to changes to metering practices for distribution connected generation (DCG). In the past the AESO based charges under its DTS (demand transmission service i.e. load) and STS (supply transmission service i.e. generation) at a point of delivery (POD) based on *net* flows. This effectively provided a distribution facility owner (DFO) or other market participant holding the contracts with the opportunity to reduce charges that would otherwise be payable on a DTS contract. It also created opportunities for distributed generation to reduce the contribution that it would have to make to connect (these charges are known as the generating unit owner's contributions (GUOC)) *and* the opportunity to have the DFO flow back to it the DFO's savings due to net billing. The AESO proposed to change its approach and to adopt gross metering rather than net metering. It gave a number of reasons to support this change. These reasons included (at para 620): the need to treat transmission connected generation and distribution connected generation consistently and fairly; the need to avoid cross subsidies (i.e. to the extent that the AESO is not recovering costs as a result of net billing it must recover those foregone revenues from load generally); and, it would allow more accurate allocation of costs as between generation and load at each POD.

However, the AESO also proposed to grandparent this change in interpretation and practice. That is to say, it proposed to continue to apply net metering to (at para 788) "projects that are energized or for which a permit and licence has been issued and construction has commenced prior to the effective date of the 2018 ISO tariff." Significant amendments to a generating project would result in the loss of the waiver.

A number of parties voiced objections to the grandparenting proposal. Some argued that it created intergenerational inequity and that market participants did not have a vested right to be exempted from all future changes in AESO requirements or practices. Others noted that grandparenting would be difficult to apply to substations with multiple DCGs connected, some before the cutoff date and others after that date. The AUC was not convinced by these objections and indeed dismissed them quite summarily as follows:

> As with any change in practice, prior parties will receive different treatment than future entities. Consequently it is reasonable for the AESO to propose a transition period for the implementation of its adjusted metering practice. The Commission finds the AESO's implementation and grandfathering proposal to be a reasonable approach. It allows existing DCG proponents to continue to operate under the regime under which these proponents initially brought forward their generation projects. Further, it is not unjust or unreasonable to treat new DCG proponents who have yet to receive a permit and licence and begin construction in the same way as an existing DCG proponent who is seeking to substantially change its [project configuration]. In both circumstances, the DCG proponent is aware of the costs it would be subject to, prior to proceeding with its project. (at para 796)

This reasoning is not convincing. First, it is not true to say that any change of practice necessarily results in prior parties receiving different treatment than future entities. For example, I cannot see why the AESO could not apply gross billing on a go-forward basis at all PODs and

for all DCG. Second, the AUC speaks of a transition for implementation but there is no transition here to bring grandparented facilities into gross billing; there is simply a line, a line that will remain fuzzy for some months (and will undoubtedly cause a race to obtain permits and to commence construction) until the effective date of the AESO 2018 tariff, but still, a line. Third, the Commission finds it to be "reasonable" to grandparent existing DCGs and to allow them to operate under the regime that applied when they brought their projects forward. But this merely an assertion. There is no convincing explanation as to why this is "reasonable". The record suggests that net metering has the result that existing DCGs have not been paying an appropriate share of the costs of (and the benefits associated with) a transmission connection – in other words, other parties are cross subsidizing DCGs. While it would be retrospective rate making to seek to rectify that situation historically, it is not obvious to me that the AESO or the AUC should be perpetuating this cross subsidization - apparently in perpetuity. There is no evidence that a change to net metering would cause existing assets to be stranded or the degree to which they would be rendered less profitable, and, as with the earlier discussion of power factor deficiency, there is no assessment here of the AESO's grandparenting proposal against the legal duty not to discriminate. Fourth, the AUC simply does not address the difficulties associated with implementing the grandparenting proposal; a job that will surely become more difficult and seem increasingly arbitrary over time. And finally, the first sentence sends entirely the wrong message because it suggests that grandparenting is now the rule (or at least the presumption) and not the exception. That cannot be the case. Grandparenting is inherently discriminatory; it should be up to the proponent of grandparenting in each and every case to demonstrate (subject to the reverse onus rules respecting ISO Rules – but not the ISO tariff as here) why that discrimination is justified. Nor is the sentence consistent with the oft-stated principle of level-playing fields and treating all generation consistently. Given the disruption that the industry expects to see over the coming decades with the increased penetration of distributed generation, we can expect to see additional changes to the tariff – both interpretive changes and express amendments. Any preference for grandparenting in this dynamic environment will rapidly result in a patchwork tariff that is anything but consistent and non-discriminatory.

Conclusions

It appears from the above review that the AUC does not have a consistent or principled approach to the question of whether or not to grandparent incumbents. I appreciate that any decision to grandparent will be context specific and may involve different statutory prisms that must be applied when deciding whether or not to grandparent and the extent of any grandparenting. In some cases the prism is the duty not unjustly discriminate, in other cases the prism will be the FEOC principle or public interest. That said, the Commission could establish a common approach to its decision-making on grandparenting understanding that it would need to be tailored to the relevant statutory prism. Grandparenting is likely to become a more rather than less contentious issue as the AESO adjusts rate designs to accommodate a grid that increasingly flows power multi-directionally rather than in a single direction and it will be important for all market participants to have consistent guidance from the AUC as to its approach to grandparenting.

The elements of a common approach might include the following: a clear discussion of the relevant statutory framing for considering grandparenting proposals (unjust discrimination or

FEOC\public interest - conclusory references to "reasonable" as a criterion are not adequate); an assessment of the degree of cross-subsidization that will occur, or continue to occur, if grandparenting is permitted; an assessment of the impact of refusing to grandparent incumbents on those incumbents and others – is the issue increased costs and reduced revenues, or is it actual stranding; if grandparenting is favoured there might be consideration of the complexity of administering grandparented arrangements and a consideration of whether grandparenting should be phased out over time. In the context of FEOC there should be some discussion of efficiency and the (anti) competitive effects of grandparenting. Finally, and perhaps most importantly, the Commission might be clearer about what it thinks is the preferred default position. I think that the duty not to discriminate should create a presumption against grandparenting and thus (except in AESO Rules cases) require those proposing grandparenting to justify that proposal or decision. The level-playing field idea that underlies FEOC would also seem to militate in favour of not grandparenting.

A Note on Method

I identified the above Board and AUC decisions using a full text search for the word 'grandfather' on the AUC website. That search produced a manageable number of hits - indeed far few than I anticipated. This suggests that I am missing Board\AUC discussions of protecting incumbents from rule changes that do not use the language of grandfathering or grandparenting. I would be pleased to hear by email from any readers who know of other AUC\Board discussions of these ideas.

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