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Court of Appeal Confirms ISO Rule on the Allocation of Intertie Capacity

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Case Commented On: *Saskatchewan Power Corporation v Alberta (Utilities Commission)*, 2015 ABCA 183

With the commissioning of the Montana/Alberta intertie – a transmission line for electric energy connecting neighbouring transmission systems and allowing the transfer of electricity between jurisdictions – the Independent System Operator (ISO), operating under the name of the Alberta Electric System Operator (AESO), concluded that its existing last-in-first-out rule for the allocation of available transfer capability (ATC) on interties operated unfairly. It therefore engaged in a rule-making exercise as provided for under ss.20 – 20.4 of the *Electric Utilities Act*, SA 2003, c E-5.1 (*EUA*) resulting in the adoption of a proposed new ISO Rule on Available Transfer Capability and Transfer Path Management. The new Rule adopts a pro-rata methodology for allocating ATC. Section 20.2(1) of the *EUA* requires the ISO to file the proposed rule with the Alberta Utilities Commission (AUC) so as to give market participants (MPs) the opportunity to object in s.20.4(1):

> 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:
>
> (a) that the Independent System Operator, in making the ISO rule, did not comply with Commission rules made under section 20.9;
>
> (b) that the ISO rule is technically deficient;
>
> (c) that the ISO rule does not support the fair, efficient and openly competitive operation of the market;
>
> (d) that the ISO rule is not in the public interest.

Several MPs availed themselves of this opportunity but the AUC ultimately concluded in AUC Decision 2013-025 that (at para 1) it had "not been persuaded that the rule is against the public interest or the fair, efficient and openly competitive operation of the electricity market in Alberta or that the rule is technically deficient." Several MPs thereupon sought and were granted leave to appeal the AUC's decision on two grounds: (1) did the AUC err in law in its interpretation of s.29 of the *EUA* by finding that the Operator was required by statute to provide system access service to intertie operators; and (2) did it err in law in its interpretation of s.16 and/or s.27 of the

Transmission Regulation, Alta Reg 86/2007 (TReg)? In this decision the Court of Appeal dismissed those appeals thereby confirming both the AUC Decision and the ISO Rule. Both grounds of appeal seem to have been argued under s.20.4(d) of the *EUA* and on the basis that an unreasonable interpretation of any of the above provisions would necessarily result in a conclusion that was not in the public interest. There was also a more general public interest argument which is discussed in the final paragraphs of this post.

Statement of the Problem

In order to understand what the issue was it is useful to know a little bit about just what available transfer capacity (ATC) is. An intertie, like any other transmission line, will have a "path rating" which "is generally determined by the physical characteristics of the line or lines, such as the type of material in the wiring, the line capacity, transformer capacity, and other factors" (AUC at para 18). However, the amount of energy than can be safely and reliably transmitted on an intertie will typically be less than the path rating, principally for system reliability reasons in each of the interconnected jurisdictions. As a result the Total Transfer Capacity (TTC) will be less than the path rating. The TTC may be further reduced by a transmission reliability margin (TRM) which is "the amount of transfer capability necessary to ensure the reliably operation taking into account uncertainties in system conditions and the need for operating flexibility" (AUC at para 19). Thus available transfer capacity (ATC) is TTC minus the TRM (AUC, *id*).

Prior to the construction of the Alberta/Montana intertie Alberta was only connected to British Columbia and Saskatchewan. The Saskatchewan intertie differs from the BC and Montana interties in one significant way. Whereas BC, Montana and Alberta are all part of the Western Electricity Coordinating Council (WEEC) and operate synchronously, Saskatchewan is part of the Midwest Reliability Organization (MRO) and operates synchronously with its MRO partners rather than with the WEEC.

The problem that arises when adding new intertie capacity is that the new capacity will not itself resolve underlying system reliability concerns; these system reliability concerns continue to limit the full deployment of the rated capacity of all interconnections which operate synchronously, with the result that the ATC will not increase in a linear way with the rated capacity of additional new intertie capacity. The addition of a new player in the intertie market therefore tends to increase competition for the available transmission capacity. Thus the ability to make full use of the rated capacity of interties depends upon the qualities of each of the neighbouring interconnected systems. The AUC put it this way in a crucial passage which clearly informs how one thinks about the ATC "resource"; the last sentence is particularly telling:

> It is clear to the Commission that ATC is a measure of the ability of an interconnected electric system to transfer electric energy from one jurisdiction to another and is the result of the conditions within each of the interconnected electric systems. The Commission concludes that interties do not in and of themselves create ATC, but rather they enable (up to the path rating of the intertie) the transfer of electric energy between neighbouring interconnected electric systems (up to the transfer capability of each of those interconnected electric systems). The Commission concludes that ATC should be treated as a system resource which does not inure to the benefit of any particular market participant or facility owner (AUC at para 69, emphasis added).

The dispute in this case was therefore between the incumbents who argued for preferential access to ATC and those who argued that there could be no vested rights in ATC. One final fact is worth emphasizing. With the exception of the Montana/Alberta intertie (MATL), all transmission in Alberta, while privately owned, is subject to rate regulation by the AUC. This is not the case for MATL, which is a so-called merchant transmission line. This led to the argument that existing ATC capacity had effectively been funded by Alberta ratepayers and therefore should not be shared (for free) with MATL.

It has been well known for years that overall system reliability issues on the Alberta Interconnected Electric System had reduced ATC on the existing interties. The province recognized this when it adopted its Transmission Development Policy in 2003 (at 10). The problem is also recognized in the text of s.16 of the TReg which, as originally adopted in 2007, provided as follows:

> 16 (1) In making rules under section 20 of the Act, and in exercising its duties under section 17 of the Act, the ISO must prepare a plan and make arrangements to restore each intertie that existed on August 12, 2004 to, or near to, its path rating.
> (2) The plan to restore interties to their path ratings must specify how the ISO intends to restore and maintain each intertie to, or near to, its path rating without the mandatory operation of generating units.
> (3) The plan to restore and maintain interties must be incorporated into and form part of the transmission system plan as soon as practicable.

Crucially however, s.16 was amended in 2010 to add a new subsection (4):

> (4) This section shall not be interpreted as meaning that priority should be given to interties that existed on August 12, 2004 over interties existing after that date in respect of the allocation of available transfer capability.

As noted above, there were two grounds of appeal. The first ground dealt with s.29 of the *EUA* and the ISO's duty to provide system access service. The second set of grounds of appeal dealt with issues relating to priority of access and the responsibility for the costs associated with increasing available transfer capacity. All parties agreed (at paras 2 – 23) that the standard of review for all of these questions was reasonableness.

Section 29 of the *EUA* and the Duty to Provide System Access Service

Section 29 of the *EUA* provides that the ISO "must provide system access service on the transmission system in a manner that gives all market participants wishing to exchange electric energy and ancillary services a reasonable opportunity to do so." In interpreting this section and in particular the meaning of "reasonable opportunity", the AUC also took into account the purposes of the *EUA* including s 5(b) which states that access to the power pool should be available on a non-discriminatory basis to all persons wishing to exchange electric energy. This allowed the AUC to conclude (at para 92) that "a reasonable opportunity for system access service constitutes non-discriminatory access and equal treatment of market participants, subject to any … requirements for maintaining safety and reliability of the AIES where there may be insufficient transmission available. The Commission considers this reasonable opportunity for system access applies equally to generators and interties."

The Court of Appeal was clearly of the view that this was a reasonable interpretation and one that was not inconsistent with previous AUC decisions (CA at paras 34 – 47).

Section 16 of the Transmission Regulation and Priority of Access

I have quoted s.16 above and referred to the evolution of the section. The Commission's interpretation of s.16(4) is crucial. The AUC took the view that the office of s.16(4) was to prevent "sections 16(1) through (3) being taken as the basis for giving the interties existing on August 12, 2004 priority in respect of ATC allocation" (AUC at para 226). This interpretation was not inconsistent with the goal of the previous subsections but it meant that "the AESO is required to allocate ATC on a non-priority basis between interties." The Commission recognized that "In certain circumstances this allocation may diminish ATC on the existing interties, but the AESO is in no way relieved of its legislated obligation to eventually restore those existing interties as set out in Section 16(1)" (AUC at para 228). In other words, the duty to restore the capacity of existing interties could not be used as a means of establishing a priority of access of those interties to the ATC.

Once again the Court of Appeal was not persuaded that the AUC's decision was an unreasonable interpretation of these apparently conflicting policy objectives (restoring path capacity and no vested rights). The Court put it this way (at para 59):

> Although some of the appellants' suggested interpretations are not outside the realm of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*), none of their arguments persuade us that the Commission's interpretation of section 16 was unreasonable. Section 16(4) was enacted when knowledge of the Montana intertie can be inferred. The Legislature stated that the restoration requirements should not be read so as to confer a priority on the existing interties. The Supreme Court's decision in *McLean* makes it clear that we are not to interfere with the decisions of an expert tribunal when it interprets its home statute unless the interpretation is one the statutory language cannot bear. That has not been demonstrated here.

Section 27 of the Transmission Regulation and the Duty to Cover Intertie Costs

Section 27 of the TReg deals with the duty of proponents to cover the amounts associated with the cost of planning, designing, constructing, operating and interconnecting an intertie. In particular, s.27(4) provides that:

> 27(4) The cost of planning, designing, constructing, operating and interconnecting an intertie to which this section applies must be paid by
> (a) the person proposing the intertie, and
> (b) other persons to the extent that they directly benefit from the intertie, based on the use described in the needs identification document approved by the Board, and then only to the extent permitted by the ISO tariff.

Several MPs argued that the proposed ATC rule was inconsistent with s.27 and therefore not in the public interest insofar as it effectively reallocated ATC from incumbents to the Montana/Alberta intertie which was a merchant proposal. This would require ratepayers to fund

the cost of grid reinforcements that the ISO would be required to undertake in order to restore capacity as required by s.16 of the TReg (AUC at paras 231 – 243). The AUC's response was really two-fold. First, it concluded that "there is no evidence persuading it that the costs described in [s.27(4)] ….. have not been paid by the operator of the MATL intertie" (AUC at para 244). The Court of Appeal noted that this finding was not disputed on appeal (at para 65). Second, the Commission was of the view that since ATC was a system resource the cost of increasing ATC should be a system cost rather than a cost allocated to any particular intertie proponent (AUC at paras 246 – 248). This too was not an unreasonable conclusion in the opinion of the Court of Appeal (at para 70).

General Public Interest Considerations

In addition to the more specific statutory interpretation arguments examined above there was also a more general public interest argument to the effect that a scheme that shared rate-payer funded ATC with a merchant line could not possibly be in the public interest. The Court of Appeal summarized the argument as follows (at para 73):

> The appellants assert that given the undisputed facts, it cannot be in the public interest (i.e., in the interest of Alberta ratepayers) to allocate ATC to the privately owned and for-profit Montana intertie as proposed by the ATC Rule. Doing so would unfairly deprive Alberta ratepayers of the benefit of ATC, which their rates indirectly funded. Linked to this submission is that the decisions approving the Montana intertie mandated that it not have an adverse financial impact on Alberta ratepayers and any incremental costs associated with it were required to be borne by its owner, Montana Alberta Tie Ltd. They say the ATC Rule *will* have an adverse financial impact on ratepayers, which is inconsistent with previous Commission decisions. A further submission is that the Commission did not squarely address the public interest consideration until after it concluded that section 29 obligated it to give the Montana intertie equal treatment. This, the appellants submit, is backwards. In summary, the appellants argue that ATC is a public good, paid for by Alberta ratepayers, and should not be shared with or allocated to a private, for-profit entity on the same terms as it is allocated to the existing ratepayer-funded intertie operators.

It is not clear to me that the issue was expressly framed this way before the AUC but the Court dismissed the argument summarily (CA at para 74) largely, I think (and to some extent reading between the lines), on the basis that this was simply a different (and perhaps rhetorically more powerful way) of putting the earlier arguments based on a vested entitlement. That argument had already been disposed of largely on the basis of the ISO's overriding duty of non-discriminatory access.