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The Complaint Jurisdiction of the AUC with Respect to the AESO

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Decisions Commented On: (1) AUC Decision, 22367-D01-2017, Enel Alberta Wind Inc. General Partner of the Castle Rock Ridge Limited Partnership Complaint Pursuant to Section 26 of the Electric Utilities Act Regarding Conduct of the Alberta Electric System Operator December 23, 2017; **(2)** AUC Decision 21867-D01-2017, ENMAX Corporation Written Complaint About the Conduct of the Independent System Operator October 23, 2017; **(3)** AUC Decision 2010-104, Lavesta Area Group Written Complaint about the Conduct of the Independent System Operator March 10, 2010

The Alberta Electric System Operator (AESO) (aka the ISO, the Independent System Operator) established by the *Electric Utilities Act*, SA 2003, c E-5.1 (*EUA*) has two principal functions. It is responsible for the operation of the power pool and for the procurement of ancillary services, and it is responsible for engaging in transmission system planning and for providing system access to the transmission system. In furtherance of the latter it must prepare and submit to the Alberta Utilities Commission (AUC) for approval a tariff (*EUA*, s 30) setting out the rates to be charged by the AESO for system access service and the terms and conditions that apply.

The AUC is established by the *Alberta Utilities Commission Act*, SA 2007, c A-37.2 (AUCA). The AUC has all of the responsibilities of a traditional utilities regulator and is responsible for supervising and approving the rates and tariffs of different utilities under the *EUA*, the *Public Utilities Act*, RSA 2000, c P- 45 and the *Gas Utilities Act*, RSA 2000, c G-5. The AUC also has other important responsibilities relating to market oversight under the *EUA* as well as oversight responsibility for the Market Surveillance Administrator (MSA) under the *AUCA* as well as certain adjudicative responsibilities under the *AUCA* with respect to "prosecutions" brought by the MSA. The AUC also has a significant complaint jurisdiction. Thus the AUC can hear complaints about the AESO's fees and rules under ss 25 and 26 of the *EUA*; it can hear complaints about the conduct of the MSA under s 58 of the *AUCA;* and it can consider complaints/appeals against municipal governments and rural gas co-operatives under, respectively the *Municipal Government Act*, RSA 2000, c M-26, s 43 and the *Gas Distribution Act*, RSA 2000, c G-3, s 30. For two decisions relating to the conduct of the MSA see: AUC Decision 2014-135: TransAlta Corporation, TransAlta Energy Marketing Corp., TransAlta Generation Partnership, Mr. Nathan Kaiser and Mr. Scott Connelly Complaints about the conduct of the Market Surveillance Administrator and my post on that decision here and Decision of the Chair of the AEUB (predecessor to the AUC), In respect of a complaint by TransAlta Corporation Pursuant to Section 73 of the *Electric Utilities Act* (predecessor provision of s 58 *AUCA*), September 19, 2006 (referenced on the MSA website and also available here).

These examples (and I am sure that this account is not exhaustive) serve to illustrate the range of regulatory interventions that may be required to discipline the power of monopoly providers

where necessary; and in other cases to try to ensure the fair, efficient and openly competitive operation of the market (the FEOC principle, *EUA*, s 6). In some cases the regulatory model is *ex ante* (e.g. prospective approval of tariffs, *EUA*, s 125) and in other cases it is *ex post* (e.g. the AUC's complaint jurisdiction).

This post deals with one element of the AUC's supervisory jurisdiction; namely the complaint jurisdiction of the AUC with respect to the AESO. It seems appropriate to provide some coverage of this topic because we have recently seen two AUC decisions pertaining to this element of the Commission's jurisdiction. Furthermore, with the increased number of generators within the renewable sector operating under tight budgets and time frames (e.g. the successful bidders in Alberta's first renewable energy procurement will have to be operational in 2019) it does not seem unreasonable to think that we might see more rather than less scrutiny of the AESO by market participants. In addition to the two very recent decisions listed in the header to this post there is one older decision from 2010, AUC Decision 2010-104, Lavesta Area Group Written Complaint about the Conduct of the Independent System Operator March 10, 2010. This was the first AUC/AEUB decision with respect to the AUC's complaint jurisdiction over the AESO.

This post begins by laying out the legislative framework for the AUC's supervisory jurisdiction and then examines each of these three decisions before offering some short conclusions.

The Legislative Framework

Division 3 of Part 2 of the *EUA* entitled "Recourse to the Commission" is comprised of three sections: section 25 entitled "Complaints to the Commission"; section 26 entitled "Complaints about ISO"; and a stand-alone provision (section 27) on security measures (which scarcely seems to fit within the Division).

Section 25

Section 25, Complaints *to* the Commission, is divided into complaints by a "market participant" (MP) and complaints by the MSA. MP is a defined term in the *EUA* and means (i) any person that supplies, generates, transmits, distributes, trades, exchanges, purchases or sells electricity, electric energy, electricity services or ancillary services, or (ii) any broker, brokerage or forward exchange that trades or facilitates the trading of electricity, electric energy, electricity services or ancillary services. A leading decision on the meaning of a MP is AUC Decision 3110-D01-2015, Market Surveillance Administrator allegations against TransAlta Corporation et al., Mr. Nathan Kaiser and Mr. Scott Connelly Phase 1 July 27, 2015.

A MP may complain to the AUC about an ISO fee, or about an ISO rule on the grounds that the rule is technically deficient, that it does not support FEOC or that the ISO rule is not in the public interest. The MSA may complain about an ISO rule on the basis that "it may have an adverse effect on the structure and performance of the market", or on the basis of FEOC or public interest. In sum, only a MP can complain about a fee or about a rule on the basis of technical deficiency. Under s 25(4) the AUC may decline to take up the issue if it is of the opinion that the complaint is frivolous, vexatious, trivial or otherwise does not warrant a hearing or other

proceeding; or if the complaint or the substance of it has been referred to, should be referred to, or is the subject of investigation by, the MSA; or, if the substance of a complaint relates to the AESO following Commission-prescribed rules for rule-making. Each of the MSA and the MP has the burden of proof when making a complaint.

For an example of a decision by the Commission (in this case its predecessor) to reject a complaint under s 25(4) that was subsequently reversed by the Court of Appeal see *Milner Power Inc v Alberta (Energy and Utilities Board)*, 2010 ABCA 236 (CanLII). The Court held that the AEUB/AUC had to be correct in its interpretation of s 25(4) since (at para 30) "Absent proper supervision, the market structure, which seeks an open and fair playing field for participants, cannot function if an incorrect threshold test is applied." The Court concluded (at para 40) that:

> Section 25(4)(a) should not be interpreted as permitting the Board to refuse to investigate or hear complaints on a wide discretionary basis for any reason it deems fit. Rather, it should be interpreted as conferring a right to refuse further investigation or hearing where the complaint is lacking in merit because it is frivolous, vexatious, trivial or otherwise warrantless in the sense of being without merit. Both the ordinary sense of the words and the statutory purpose and context support a reading that provides an effective means of complaint for meritorious appeals, and thus the discretion to summarily dismiss a complaint without investigation or hearing is not without limit.

And further at para 44 (and focusing on the "or otherwise does not warrant" language):

> While arguably all words could be said to have slightly different meanings, all are similar in the sense that it is obvious the complaints have no arguable merit. In short, the section as a whole contemplates an investigation or hearing of a complaint which, on its face, has arguable merit. Moreover, an interpretation that provides for an effective complaint process is preferable, when one considers the significance of an ISO rule or fee. Those rules and fees are imposed without right to a hearing, and the threshold for the complaint process should not be narrowly construed.

The Court was of the view (at para 48) that "if the material raises a doubt whether a rule or order or act was unjust, unreasonable, unduly preferential, arbitrary, or unjustly discriminatory or in breach of the legislation or regulations, it would be arguably meritorious." And in that case (at para 60) "Milner's complaints about subsections 19(1)(a) and 19(2)(d) of the [Transmission] Regulation, the locational signal and stability, and the inclusion of TMR generation for purposes of determining loss factors, were all grounds for complaint which meet the test under section 25(4)."

The Commission's powers following a hearing on a complaint in the case of an ISO fee are, by order, to determine the justness and reasonableness of the fee and confirm, change or revoke the fee, and to direct the AESO to reimburse an MP where necessary. In the case of an ISO rule the AUC may confirm the rule, disallow the rule, or direct the AESO to change the rule or a provision of the rule. The most important (and ongoing) example of a section 25 proceeding (the

proceeding was also launched under s 26) is the complaint by Milner Power Inc regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology, see most recently AUC Decision 790-D06-2017, December 18, 2017 and post here.

Section 26

Section 25 is thus quite specific in terms of subject matter jurisdiction. By contrast, section 26 is very general insofar as it permits (and affords the AUC jurisdiction over) complaints "about the conduct" of the AESO at the instance of "any person". As with s 25 (but with somewhat stronger language) the statute directs the AESO to dismiss the complaint (with reasons) where the matter is or should be handled by the MSA, where the matter is already being (or has been) dealt with by the AUC or any other body, or if it is frivolous, vexatious or otherwise does not warrant an investigation or a hearing.

The AUC "in considering a complaint" may dismiss all or part of the complaint; direct the AESO to change its conduct in relation to a matter that is the subject of the complaint; or direct the AESO to refrain from the conduct that is the subject of the complaint. A decision of the Commission under section 26 (but not section 25) is protected by a privative clause which stipulates that "A decision of the Commission under subsection (2) or (3) is final and may not be appealed under section 29 of the Alberta Utilities Commission Act." There is an identical provision in s 58(4) of the *AUCA* in relation to AUC jurisdiction with respect to complaints as to the conduct of the MSA.

In its Lavesta Area Group Decision the AUC described this (at para 87) as "a very strong privative clause" which (at para 88) is "added to the strong privative clause in section 30 of the *Alberta Utilities Commission Act*, which prohibits judicial review of the Commission's decisions, thereby effectively creating a 'double-privative clause' which prevents losing parties from seeking judicial review from the Court of Queen's Bench or seeking leave to appeal from the Court of Appeal."

As this last point demonstrates, it bears emphasising that while these two sections of the *EUA* have a parallel structure (and in some cases use identical language), there are some subtle and important differences between them. It is perhaps also worth recalling that no privative clause can be iron-clad: *Crevier v A.G. (Québec) et al*., [1981] 2 SCR 220, 1981 CanLII 30 (SCC). Section 26(4) undoubtedly prevents a party from pursuing the appeal process to the Court of Appeal with permission, but it cannot completely preclude judicial review in the Court of Queen's Bench: see *Milner Power Inc. v Alberta (Energy and Utilities Board)*, 2007 ABCA 265 (CanLII) (judicial review may be available to the extent that the statutory remedy is inadequate; since there is no statutory remedy, judicial review should therefore be available on what we might traditionally think of as jurisdictional grounds).

The Lavesta Complaint

The first complaint to come before the AUC under section 26 was brought by the Lavesta Area Group in the context of the bitter debate about the need for and construction of WATL and EATL (respectively Western Alberta and Eastern Alberta Transmission Lines). The debate

resulted in amongst other things a public inquiry into the AEUB's conduct of the proceedings, contributed to the break-up of the AEUB, triggered the so-called critical infrastructure legislation, and occasioned numerous trips to the Court of Appeal including *Shaw v Alberta (Utilities Commission)*, 2012 ABCA 378 (CanLII).

In this particular contribution to the "debate", the Lavesta Area Group, through spokesperson Joe Anglin, alleged (AUC Decision 2010-104 at para 9) that

> the AESO is not in compliance with section 34(1) of the *Electric Utilities Act* and the Transmission Regulation[;] … that this non-compliance has led to public confusion over the necessity and urgency for approving new transmission infrastructure for the Province of Alberta[; and that] …. the AESO's non-compliance with section 34 of the *Electric Utilities Act* has affected the ability of the public and elected officials to make decisions on Bill 50 [the Critical Infrastructure Bill]. Lavesta also referenced section 16 of the *Electric Utilities Act*.

In the end, the AUC dismissed the complaint but the resulting decision is a curious combination of dismissal on preliminary or jurisdictional grounds and dismissal on the merits. Nevertheless, the decision is significant insofar as the AUC is careful to place the AUC's complaint jurisdiction under s 26 in the context of both its own role under the *EUA* and the role of both it and the MSA under the *AUCA*. For example, it suggests that the s 26 complaint process is more of a summary process when compared to the MSA process under the *AUCA*. The Commission concluded (at para 90) "that the MSA investigation process was intended by the legislature to address allegations regarding the conduct of the AESO that have the potential to directly affect substantive rights associated with the fair, efficient and openly competitive operation of Alberta's electricity market." It went on to say that in its view (at para 91) the types of complaints that

> … section 26 was intended to address include, but are not limited to the following:
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> - complaints about the AESO's compliance with Commission rules;
> - complaints about the AESO's consultation with interested parties; and
> - complaints about the AESO

The AUC "therefore" concluded that the Lavesta Complaint was (at para 93) "not the type of matter that was meant to be dealt with by section 26." It is not clear how this follows, and perhaps the AUC was not completely convinced by its own reasoning either, since it went on to provide two additional grounds for concluding that it should not proceed with the complaint. First, the AUC concluded it had no jurisdiction under s 26 of the *EUA* (at para 106)

> The remedies available to the Commission under section 26 are to direct the AESO change the conduct that was the subject matter of a complaint or to refrain from conduct that is the subject matter of the complaint. The Commission does not accept that these general remedies were intended by the legislature to displace the specific reservation of authority over NIDs to the AESO found in section 34 of the *Electric Utilities Act*. Had the legislature intended the Commission to exercise

> such supervisory authority the Commission is satisfied that such a provision would have been included in the legislation.

Second, Bill 50, the Critical Infrastructure Bill rendered the Lavesta complaint moot insofar as Bill 50 dispensed with the need for a NID with respect to designated infrastructure. "Given this clear direction, it would be improper for the Commission to direct the AESO to do something that the legislature has specifically stated it is no longer required to do" (at para 115).

Finally, and again a comment that goes more to merits than admissibility, the AUC concluded that the AESO had not misled or attempted mislead the public or elected officials. It was true that the AESO had expressed an opinion about the need for the Calgary/Edmonton upgrades but that (at para 122) was not "misleading or otherwise confusing. Forecasting transmission need is one of the AESO's primary functions."

The ENMAX Complaint

ENMAX filed a complaint against the conduct of the AESO arguing that the AESO's application of Section 11 of its tariff dealing with Ancillary Services was inconsistent with its payment obligations with respect to a service denoted as "unforeseen transmission must run" (UTMR). As a remedy, ENMAX sought an order requiring the AESO to make additional payments to ENMAX in the order of $14 million. In a subsequent process announcement (September 21, 2016) the AUC *inter alia* asked registered parties for their views with respect to the following question:

> Because the Commission's decision on the interpretation of Section 11 of the ISO tariff could have material implication for other market participants, is it consistent with the spirit and intent of the statutory scheme that such a decision would be shielded from an appeal by Section 26(4) of the *Electric Utilities Act*?

While none of the then-registered participants expressed a concern with respect to the AUC proceeding on the basis of s 26 ATCO did, and apparently as a result of that objection the AUC issued a jurisdictional ruling (November 2, 2016) in which it stated as follows:

> … the central issue raised in ENMAX's complaint is whether the ISO correctly interpreted Section 11 of the ISO tariff when it calculated the payments owing to ENMAX for the transmission must-run services its affiliates provided in 2013. Inherent in these issues is whether the ISO's interpretation has rendered the ISO tariff unduly preferential, or arbitrarily or unjustly discriminatory. Given the nature of the issue to be decided, the Commission is of the view that it cannot, as ATCO suggested, confine its consideration to the specific payments made by the ISO for the specific services provided by ENMAX's affiliates. The Commission's decision on this application will not only have ramifications for ENMAX and the ISO, it has the potential to directly and adversely affect the rights of all those who are subject to the ISO tariff and all those who pay the ISO tariff.

> 11. The Commission is satisfied that it has the jurisdiction to consider and decide this issue under Section 26 of the *Electric Utilities Act*. However, the Commission has decided that the better approach in these circumstances is to initiate its own inquiry into whether the payments made by the ISO to ENMAX are consistent with the ISO tariff. The Commission's jurisdiction to address the issue in this manner is found in Sections 8 and 23 of the *Alberta Utilities Commission Act* and is also founded in its obligation under Section 121 of the *Electric Utilities Act* to ensure that the tariffs it approves are just and reasonable and not unduly preferential, or arbitrarily or unjustly discriminatory.

Accordingly, the AUC issued a second notice of proceeding indicating, as above, that it was reconstituting the process as an application by ENMAX for the interpretation of Section 11 of the ISO Tariff. Amongst other things this meant that it did not need to rule on the position taken by the UCA (Utilities Consumer Advocate) in response to the questions asked of registered parties, to the effect that while the Commission had jurisdiction to order the AESO to change its conduct on a go forward basis it could not order the ISO to make additional payments to ENMAX for the must-run services because that would be retroactive and retrospective ratemaking.

The AUC did not expressly "dismiss the complaint" under s 26(2) but arguably it must have done so. The Commission's decision (at para 7) confirmed the statement in its jurisdictional ruling to the effect that it was proceeding under sections 8 and 23 of the *AUCA* and section 121 of the *EUA*.

The Enel Complaint

In this, the most recent complaint and AUC decision, Enel complained of the AESO's conduct with respect to AESO's classification of certain costs under the AESO tariff as participant related costs rather than as system costs under the ISO tariff. Section 29 of the *EUA* requires the AESO to 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." As part of that obligation the AESO must file a tariff with the AUC for its approval and must include (under the Transmission Regulation, Alta Reg 86/207 (TReg), section 47) provisions for the recovery of local interconnection costs from owners of generating units. The AESO tariff thus distinguishes between system costs and market participant costs. The basic idea is that system costs should be the responsibility of load while the incremental costs of connecting new generation should be the responsibility of the party applying for connection. But there will always be a grey area between construction that it is required for the interconnection of a particular facility and the construction that may be required for regional system reinforcement.

As noted in the introduction, the AESO is responsible for transmission system planning and expansion (*EUA*, section 33; TReg, Part 2). New transmission will only be built (with the exception of grandparented critical infrastructure) following preparation of a needs identification document (NID) by or on the direction of the AESO and its subsequent approval by the AUC under ss 34-35 of the *EUA* and with the necessary permits and licences under the *Hydro and Electric Energy Act*, RSA 2000, c H-16.

In this case, Enel and its predecessor Wind Power had been seeking system access for the Castle Rock Ridge Wind Farm. The CRR Wind Farm was first approved in 2002. A preliminary interconnection proposal and construction commitment agreement based on a 138kV interconnection was entered into in 2005/2006. Construction of the CRR wind farm was completed in March 2011 but it was not connected to the AIES until May 2012. Along the way there were various changes in the interconnection proposal mandated by the development of the South Alberta Transmission Reinforcement plan (SATR) which altered the proposed interconnection voltage in CRR's area from 138kV to 240kV double circuit. See AUC Decision, 2009-126, Alberta Electric System Operator Needs Identification Document Application Southern Alberta Transmission System Reinforcement September 8, 2009.

Following the SATR approval the AESO proposed various NID amendments including Proceeding 690 for the Fidler transmission development. That application would have provided interconnection for the CRR wind farm but it was withdrawn (Enel Decision at para 12(p)). The CRR interconnection was ultimately approved by the AUC on November 1, 2011 and the relevant permits and licences (P&L) issued: AUC Decision 2011-439, Alberta Electric System Operator and AltaLink Management Ltd. Castle Rock Ridge 205S and Transmission Line Development Needs Identification Document Application and Facility Application November 1, 2011.

Enel was on record as supporting both proceedings 690 and 778. Filed material in proceeding 778 contained some general cost classification material and Enel was advised that the $25.2 million interconnection would be a participant related cost. However, Enel specifically reserved its rights to challenge the cost estimates and classification (at para 12(l)). Ultimately, an amended SATR NID application (filed December 14, 2012) was approved by AUC Decision 2014 -004, Alberta Electric System Operator Goose Lake to Chapel Rock Southern Alberta Transmission Reinforcement Needs Identification Document Amendment January 27, 2014. The AESO acknowledged (Enel at para 155) that its amended application in this matter "included looped transmission facilities to the CRR Wind Farm substation." In its Decision 2014-004 the Commission ruled in favour (at para 77) of "Alternative 2, in which the transmission line runs from Goose Lake 103S substation to Chapel Rock 491S substation via Castle Rock Ridge 205S substation. *The Commission recognizes that the first portion of this transmission line, from Goose Lake 103S substation to Castle Rock Ridge 205S substation, has already been constructed*" (emphasis added).

As noted above, Enel had reserved its position with respect to the classification of costs and entered into dispute settlement proceedings under the AESO's rules (Rule 103.2 Dispute Resolution). The Rules contemplate both informal dispute resolution and then submission of a written dispute. In this instance the informal dispute resolution process resulted in the re-classification of some $5.7 million. No further changes resulted from the written proceedings: see Decision of the AESO, August 29, 2016. The AESO declined (September 30, 2016) to send the matter to arbitration under section 103.2(5)(3) of the Rules advising instead that the AUC over "ISO tariff-related issues and to determine complaints made pursuant to section 26 of the *Electric Utilities Act*." Enel filed its complaint with the AUC on January 24, 2017.

The Commission concluded that Enel's complaint was admissible but rejected it on the merits. In this decision the AUC does a much better job of maintaining a clear separation between the issues of admissibility/jurisdiction and the merits than it had in its earlier Lavesta decision,

Admissibility/Jurisdiction

Both Enel and the AESO offered arguments in support of the AUC's jurisdiction but the AUC concluded that it had to satisfy itself as to jurisdiction under s 26(2). For the AUC the principal issue was whether this was a situation under s 26(2)(b) where "the complaint relates to a matter the substance of which is before or has been dealt with by the Commission or any other body". It also seems fair to say that the complaint raised exactly the same sort of issue that had worried the AUC in the ENMAX complaint, namely that the AUC would necessarily have to opine as to the correct interpretation of the AESO's tariff. This would have implications for the entire sector, and the possibility of judicial review was seemingly limited.

This time however that concern seemed secondary or even of no concern. Much more important was the possible argument that the AUC had already opined on the question of cost classification and allocation in the earlier NID decisions referenced above. This was particularly front and centre for the AUC because of AUC Decision 21306-D01-2016, Canadian Natural Resources Limited Determination of Compensation for 9L66/9L32 Transmission Line Relocation August 16, 2016. This was not a complaint decision. Rather it was a decision in a proceeding in which CNRL had effectively asked the AUC to tear up a cost allocation agreement between CNRL and ATCO relating to the costs associated with relocating a transmission line to permit CNRL to maximize oil sands recovery from its Horizon Property. The AUC declined to do so and in particularly trenchant terms. The AUC emphasised that CNRL could not blow hot and cold. It could not come into the relocation application promising to pay the full costs of the relocation and then, having pocketed that decision, make the argument under s 17 of the *HEEA* that the public interest demanded that the relocation costs be borne by ATCO as system costs.

A significant issue for the AUC was whether or not Enel could or should be painted into the same corner with the result that the AUC should simply dismiss the complaint on the basis of s 26(2)(b). To determine if the substance of the matter had already been decided the AUC adopted (at para 49) a two-step analysis:

> The Commission must first identify the substance or essence of the complaint and then consider whether that substance or essence has some reasonable or logical connection to that of another matter previously determined by the Commission or some other body.

As to the first question, the AUC took the view that (at para 57) while

> … the relief sought by Enel in this proceeding includes a request for a direction requiring the AESO to comply with the terms of the Commission-approved ISO Tariff and reclassify certain costs associated with the CRR Wind Farm interconnection …[that was not the real] substance or essence of this complaint.

Instead (at para 58), "the substance of this complaint concerns the conduct of the AESO in its interpretation and application of the ISO Tariff provisions and whether the AESO's conduct is inconsistent with the legislation, the ISO Tariff or otherwise amounts to improper, unfair or discriminatory treatment of Enel."

With that first conclusion in hand the AUC felt comfortable in concluding that this specific issue had not been addressed in the NID proceedings referenced above. These were simply not matters dealt with in those proceedings. That said, the AUC did indicate (as it had but much more forcefully in its CNRL Decision) that (at para 59) it expected that "parties in a proceeding should raise all matters, including matters related to the conduct of the AESO, that are relevant and which may help inform the Commission on the matters before it". But in this case (at para 59) it was "prepared to accept Enel's explanation that it [Enel] did not raise these concerns given that the AESO was aware of its concerns at the time of the CRR Wind Farm NID proceeding and [because of] Enel's understanding that it was required by the ISO Tariff to utilize a dispute resolution process that could result in a change to the cost classification for the CRR Wind Farm interconnection project." In the result therefore (at para 59) "it cannot be concluded that the substance or essence of this complaint has some reasonable or logical connection to that of another matter previously determined by the Commission."

Merits

Economic duress?

The AUC began its discussion of the merits of Enel's complaint by examining, largely of its own motion, whether this was a case in which Enel was entitled to plead the tort of economic duress in support of its complaint. The AUC raised the issue because on the facts as noted above the windfarm completed construction in March 2011 but was not connected to the grid until May 2012. Did this delay create an opportunity for undue pressure to be asserted by the AESO? The AUC (referencing *Attila Dogan Construction & Installation Co. v AMEC Americas Ltd* , 2014 ABCA 74 (CanLII), did not think so (at para 65):

> …. Enel's desire to connect the CRR Wind Farm to the AIES as quickly as possible and to agree with proposals made by the AESO to facilitate that desire does not alone constitute economic duress. There must also be evidence of illegitimate pressure by the AESO. The Commission finds that Enel has failed to satisfy that evidentiary burden.

Section 47 of the Transmission Regulation

Enel sought to rely on a very literal interpretation of s 47(a) of the TReg which emphasised that load is responsible for most transmission costs – not generation. The AUC was not convinced by this submission since s 47(b) equally contemplates that "owners of generating units are charged local interconnection costs to connect their generating units to the transmission system, and are charged a financial contribution toward transmission system upgrades and for location-based cost of losses." Earlier AUC tariff approval decisions had endorsed a methodology that classifies interconnection costs as participant related costs unless clearly demonstrated otherwise. Enel

had not demonstrated that the AESO's classification of costs, necessarily a "shades of grey" exercise, was contrary to the principles laid out in s 47 of the TReg.

Subsections 2, 3(3)(c) and 4 of Section 8 of the ISO Tariff

Enel argued that AESO's decision to require it to pay for the cost of 240 kV facilities rather than 138 kV facilities would yield a discriminatory, arbitrary, and unjust result on the grounds that the decision to utilize 240 kV facilities was largely driven by, or based on, the AESO's assessment of system planning requirements and considerations. Once again, the AUC was not convinced (at paras 98-99):

> The primary principle that the Commission relies upon in determining if the AESO cost contribution decision was discriminatory or unjust is the principle of cost causation. The Commission considers that at present, the CRR Wind Farm is the only project using the contested facilities and these facilities were constructed after the AESO received an interconnection request from Enel. In other words, the Commission in assessing the AESO's interpretation of the ISO Tariff, relies on whether the transmission facilities proposed are radial as the key factor in determining whether the AESO's cost contribution decision was reasonable. In this case, the AESO followed an established classification framework that started with the assumption that the CRR Wind Farm interconnection costs were participant-related, which is consistent with the fact that the CRR Wind Farm interconnection facilities would not have been built but for the construction of the CRR Wind Farm.

Subsection (3)(3)(b) of Section 8 and subsection 2 of Section 9 of the ISO Tariff

Enel's argument here was based on two cost classification provisions in the AESO tariff. First, Enel argued that its situation fit within Section 8(3)(3)(b) which provided that costs associated with a connection project should be classified as system related costs rather than participant related if the cost were costs associated with:

> (b) radial transmission facilities which, within five (5) years of commercial operation, are planned to become looped as part of a critical transmission development or regional transmission system project:
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> (i) in the ISO's most recent long-term transmission system plan;
> (ii) in a needs identification document filed with the Commission; or
> (iii) as the ISO reasonably expects will be required in the future;

Enel argued that the provisions of this paragraph were satisfied.
Enel's second argument proposed to take advantage of the provisions of section 9 of the tariff which allowed for adjustments to construction contributions in light of a non-exhaustive list of "events".

I will examine these arguments in turn.

The Section 8 issue

The principal issue for the AUC in assessing the section 8 question was the critical date and in particular whether the plan to loop the radial transmission facilities had to exist at the time that the facilities were "permitted and licensed" (P&L) – in this case that date was November 1, 2011. The AUC acknowledged that the tariff did not expressly address the issue of whether there was a critical date and if so what that date might be. That said, section 8(7) of the ISO Tariff did provide that:

> 7(1) The construction contribution will be calculated in accordance with the construction contribution provisions of the ISO tariff in effect on the date on which the Commission issues permit and license for the connection project.

Accordingly, it was necessary to adopt a more purposive approach to the interpretation of the tariff, consistently (at para 126) with the principles of statutory interpretation which principles could be applied to the tariff. That led the AUC to consider previous decisions dealing with the underlying policy objectives of cost classification. In doing so, the AUC noted that the allocation of some costs to new generation imposed economic discipline on siting decisions. It also identified four principles from these previous decisions. First, (at para 139) "a balance must be struck between certainty of classification and having effective price signals." Second, in dealing with the "shades of grey" problem (at para 140), "the initial presumption is that costs should be classified as participant-related, unless clearly demonstrated otherwise." Third, the classification should be established "in advance" (at para 141, a particularly difficult paragraph to follow). Fourth, the scheme does and should provide for some flexibility but (at para 142) "on a practical level, at key points in the cycle of project development and execution, major decisions of the AESO and the transmission facility owner become irreversible."

In light of these principles the AUC reached the following conclusion (at para 143):

> … in combination, subsections 3(3)(b) and 7 of Section 8 require the determination of cost contribution under subsection 3(3)(b) to be made on the facts and circumstances known to the AESO as at the date of the P&L for the interconnection project. Stated another way, to avoid participant-related costs, the evidence must establish that, at the date of the P&L, there was a plan to loop the radial transmission facilities within five years of commercial operation.

The implications of this included the following (at para 146):

> Under this interpretation, the AESO has the flexibility to alter system plans that affect system-related costs up until the P&L interconnection proceeding. Changes to the allocation of participant-related versus system-related costs can be made before that time by the AESO as they feel necessary and a market participant must accept this. However, at the time of the P&L, the ISO Tariff provisions fix the classification, but only in one direction. The AESO must provide information that generators, at some point are able to rely on to make their business decisions. One of the business decisions that connecting generators need to make is whether to

> support or contest the NID application put forward by the AESO which includes the facilities required and how the costs of those facilities is to be allocated. As a practical matter, this information must be provided when the P&L application is being considered by the Commission. If determined to be system-related costs at the time of the P&L, the costs will remain system-related. However, if determined participant-related, that classification can be changed to system-related, resulting in the possibility of refunds. Before the P&L is issued, the interconnection customer bears the risk in relying on the AESO's information, while after the P&L is issued, the market participant's situation can only improve. After that point (the date of the P&L), if the AESO states that a project will be system-related and subsequently, a long-term plan changes and the costs would be participant-related the market participant is insulated against this type of reclassification. Conversely, a market participant may get a refund if some costs that were originally classified as participant-related are reclassified as system-related costs.

Having articulated that position and interpretation, the AUC concluded that the evidence did not support Enel's assertion that the criteria laid out in section 8(3)(3)(b) had been met when the AUC issued the P & L for the CRR windfarm. In particular (at paras 148-149): the AESO's most recent Long Term Transmission Plan did not expressly include a looping plan for the CRR windfarm interconnection; and the only current NID applications did not contemplate that the CRR Wind Farm interconnection would be looped.

In sum, the AUC was of the view (at para 152) that "Enel's construction contribution was not determined contrary to subsection 3(3)(b) of Section 8 of the ISO Tariff."

The Section 9 issue

As noted above, Section 9(2) of the tariff affords the AESO the discretion to re-classify construction contributions after "energization" (which the AUC treats as equivalent to P&L). At the relevant time the provision read as follows:

> Section 9, Changes to System Access Service After Energization Event Resulting in Adjustments to Construction Contributions
>
> 2(1) The ISO may decide that certain events warrant an adjustment to the construction contribution that had previously been determined by application of the ISO's construction contribution provisions to a connection project.
>
> (2) Events which may result in construction contribution adjustments include:
>
> (a) a market participant materially increasing or decreasing contract capacity or investment term or terminating system access service, prior to the expiry of the investment term for a connection project;
>
> (b) one or more additional market participants using facilities originally installed for any existing market participant, resulting in sharing of facilities as provided for in subsection 3 below;

(c) facilities previously classified as system-related being reclassified as participant-related to meet changes in market participant requirements;
(d) facilities previously classified as participant-related being reclassified as system-related;
(e) a material error in the original construction contribution determination;
(f) a material variance in the estimated or actual cost of the connection project compared to the original estimate; or
(g) a material reduction to the period of advancement of transmission facilities included as part of a critical transmission development or regional transmission system project under the provisions of subsection 3(2)(k) of section 8 of the ISO tariff.

(3) The market participant, the ISO or the owner of the transmission facilities may initiate a determination of an adjustment to a construction contribution as a result of an event described in subsection 2(2) above.

(4) No adjustments to construction contribution will be made more than twenty (20) years after commercial operation of a connection project.

(5) Where an event requires the addition of new equipment at an existing point of delivery or point of supply, the construction contribution will be determined under the provisions of section 8 of the ISO tariff rather than this section 9.

Enel took the view (at para 154) that since the amended SATR NID application expressly contemplated looping the CRR windfarm interconnection, that was sufficient to immediately trigger reclassification of most of the interconnection costs as system related. The AESO on the other hand argued (at para 155) that the filing of a new NID application was not itself a change of circumstances that permitted application of section 9(2).

The AUC rejected the AESO's interpretation (at para 156) but also emphasised that section 9(2) was permissive and discretionary and not mandatory. Given that discretionary character, Enel (at para 169) had failed to satisfy the Commission that "the AESO's decision not to exercise its discretion to adjust the construction contribution was arbitrary, unfair, discriminatory or otherwise inconsistent with the governing legislation, ISO Tariff provisions or applicable regulatory principles." Accordingly, the complaint must be dismissed.

I am not sure that this follows. While it might be true that the AUC did not have the jurisdiction to direct the AESO to re-classify the costs, the AUC has surely established a problem with the conduct of the AESO, namely that it exercised its discretion not to reclassify costs on the basis of a misunderstanding as to the proper interpretation of its tariff. Now that the AUC has clarified that interpretation, surely a more appropriate conclusion would have been for the AUC to direct the AESO (under s 26(3)(b) of the *EUA*) "to change its conduct in relation to a matter that is the subject of the complaint" – namely to reconsider the matter in light of the AUC's interpretation of section 9(2) of the tariff.

Conclusions

1. The AUC's complaint jurisdiction with respect to the conduct of the AESO is one example of the broad range of regulatory responsibilities that the AUC has within the electricity sector.
2. To this point, parties have not made much use of this review power; but this may change given the significant changes occurring within the electricity sector including the commitment to expand renewable generation and the addition of a capacity market.
3. The phrase "conduct of the AESO" is very broad and open-textured and consequently the scope of the complaint jurisdiction of the AUC in relation to the AESO must also be broad.
4. The AUC has indicated that *examples* of what may be considered under the heading of "the conduct of the AESO" include complaints about the AESO's compliance with Commission rules; complaints about the AESO's consultation with interested parties; and complaints about the AESO; but it is also clear from *Enel*, for example, that the AUC considers that the complaint process is a way of raising the proper interpretation of the AESO tariff and its application in concrete circumstances. Since there are many provisions in the *EUA* that describe how the AESO must discharge its duties and responsibilities (e.g. ss 16, 17, 29) and no doubt many provisions in the regulations as well, it seems reasonable to think that any and all of these might help breathe content into *the conduct* expected of the AESO.
5. A complaint may be initiated by "any person"; that person does not have to be a market participant.
6. The AUC has permitted other parties to intervene and file statements of intention in complaint proceedings in accordance with its usual practice.
7. The structure of s 26 of the *EUA* suggests that the AUC must first determine admissibility/jurisdiction and then, if admissible, determine the merits of the dispute.
8. The determination of admissibility/jurisdiction may involve consideration of whether this is a complaint about the conduct of the AESO and also consideration of the factors listed in s 26(2): are these issues for the MSA; are these matters that have been dealt with already by the AUC or another body; is the complaint frivolous, vexatious or trivial; or does it otherwise "not warrant an investigation or hearing". The leading decision on this latter phrase is *Milner Power Inc v Alberta (Energy and Utilities Board)* 2010 ABCA 236 (CanLII). While that is a decision under s 25 of the *EUA* it should be at least persuasive under s 26 as well. In its *Milner* decision the Court of Appeal suggested that the phrase should take its flavour from its neighbours; it is not a free-standing additional source of broad authority to summarily dismiss a complaint.
9. Dismissal on the basis of an alternative forum (other than the MSA) is principally an empirical inquiry. Has the issue already been dealt with? It is not a normative inquiry i.e. *should* the issue be dealt with in another forum. In the case of a FEOC matter however, s 26(2)(a) suggests that the inquiry may be both empirical and normative. This distinction perhaps calls into question the manner in which the AUC dealt with the ENMAX complaint.
10. The AUC must give reasons for any dismissal. Those reasons need to be cogent.
11. While s 26(4) of the *EUA* certainly precludes appeal with permission to the Court of Appeal it should, in an appropriate case, be possible to commence an application for

judicial review with the Court of Queen's Bench. The first such application will require the Court to establish the appropriate standard of review. This will be an interesting discussion, especially in light of the correctness standard that the Court of Appeal established for dismissal under the related but distinct s 25 of the *EUA*. AUC decisions under s 25 are not protected by a similar "double-privative" provision.

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