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# The Implications of the AUC's *Smith* Decision

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**Decisions commented on:** AUC Decision 23756-DOI-2019, Advantage Oil and Gas Ltd. Glacier Power Plant Alteration, April 26, 2019; and AUC Decision 24393-D01-2019, International Paper Canada Pulp Holdings ULC Request for Permanent Connection for 48-Megawatt Power Plant, June 6, 2019.

In its *Smith* decision earlier this year, the AUC concluded that a self-generator could only avoid the general must offer, must exchange obligations imposed by the Electric Utilities Act, SA 2003, c E-5.1, (*EUA*; and regulations) and the Hydro and Electric Energy Act, RSA 2000, c H-16, (HEEA) if it fell within one of the prescribed exceptions in the legislative scheme. ABlawg commented on the *Smith* decision here: Opening a Can of Worms.

In these decisions, two AUC panels have confirmed the *Smith* decision, and in doing so further explore the implications of *Smith* for both new generation and for existing generation.

In the Advantage Oil and Gas decision, the applicant sought orders approving the alteration of the configuration of its power plants as well as an order connecting the power plants to the Alberta Interconnected Electrical System (AIES) through ATCO's electric distribution system. The AUC granted the re-configuration order but rejected the interconnection application on the grounds that Advantage was proposing to use its generating units to both self-supply and export to the grid. That fell afoul of the must exchange and must offer rules of the *EUA* and the Fair, Efficient and Open Competition Regulation, Alta Reg 159/2009, (FEOC Regulation) and the duty to take service from the local distribution utility under section 101 of the *EUA*. Advantage was unable to show that it could bring itself within any of the legislated exceptions to these obligations and discussed in the *Smith* decision. In making that ruling, the AUC treated all of Advantage's interconnected generation on the site as a single unit. The AUC concluded as follows:

> … the Commission finds that the exemption in Subsection 2(1)(b) of the *Electric Utilities Act* does not apply to the excess electric energy Advantage proposes to export to the AIES because this electric energy will not be consumed solely by Advantage and solely on Advantage's property. Accordingly, sections 18 and 101 of the *Electric Utilities Act* and Subsection 2(f)(i) of the Fair, Efficient and Open Competition Regulation apply to the electric energy produced by the power plant. The Commission is not satisfied that, as proposed, the configuration of the connection and power plant would be able to operate in accordance with the duties and obligations set forth in the *Electric Utilities Act*. Accordingly, the Commission denies Advantage's interconnection application. The power plant, including the alterations approved in this decision, may continue to operate

> and provide electric energy to the Glacier Sour Gas Processing Plant. However, Advantage cannot connect and export electric energy to the interconnected electric system in the manner proposed.
>
> …..
>
> The Commission's denial of the interconnection application is without prejudice to any future application in which Advantage proposes to interconnect the power plant in a manner consistent with the statutory scheme. (at paras 36 and 38)

The decision in International Paper is perhaps the more significant of the two since it relates to a power plant first approved for operations in 1995. International Paper applied for a permanent connection order for its cogeneration unit or in the alternative an extension of its temporary connection order to allow it sufficient time to apply for an industrial system designation order under section 4 of the *HEEA*. The power plant in question provides both steam and a portion of the electricity it produces to the on-site Grand Prairie Kraft Pulp Mill and exports the excess electricity to the AIES. The plant is connected to the AIES at the transmission level through ATCO's Proctor & Gamble A808S Substation. For reasons apparently related to transmission and telecommunications, and to system performance issues (at para 12), the AESO had not previously supported a permanent connection order. AESO was now of the view that these issues had been or could now be addressed. Hence the current application - which the AESO supported.

In response to information requests (IR) from the AUC directing the applicant's attention to its *Smith* decision, International Paper seems to have accepted that it could not distinguish itself from *Smith* subject to two possible arguments. The first was that its continuing practice of self-supply combined with the export of the surplus to the AIES should in this case be grandparented. The second argument or submission was that if its current operations could not be grandparented, International Paper sought to extend its existing temporary connection order so as to allow it to bring itself into compliance by making an application for an industrial system designation order (presumably on the assumption that such an order would allow it to both self-supply and deliver any surplus to the grid). Another compliance alternative that International Paper hinted at (at para 14) was to enter into power purchase agreements (PPAs) with itself.

The AUC rejected the first argument. It noted (at para 17) that International Paper was not able to "provide any evidence to suggest that the applicable legislation contemplates a grandfathering process for facilities that predate it, nor did it provide any precedent for a facility being grandfathered in the manner proposed". The AUC further concluded that International Paper was not able to qualify for any of the exemptions contained in the *EUA*.

The Commission did however grant International Paper the alternative relief that it sought - at least in part. The AUC indicated that it would extend International Paper's temporary connection order but not for the 12-month extension sought by International Paper. Instead, it offered a six month extension but also indicated (at para 21) that it anticipated that "International Paper will file its industrial system designation application by no later than September 16, 2019 to ensure that the Commission has sufficient time to consider the application prior to the expiry of the temporary connection order."

The Commission had nothing to say about Industrial Paper's alternative compliance arrangement of a PPA with itself. My comment on this is that while Industrial Paper certainly could enter into such an arrangement, it is unlikely that such an arrangement would achieve Industrial Paper's objectives. A PPA does not exempt the power subject to the PPA from the must offer, must exchange obligations of the *EUA (*see *EUA,* section 19). Instead, a PPA in Alberta will effectively operate as a financial hedge in the form of a contract for difference with the difference being the delta between the contract price and the prevailing pool price. While such an arrangement may provide bankable stability to a generator and shield an industrial consumer from the volatility of the pool price when the parties to the transaction are at arms-length, it is difficult for me to identify similar advantages when the parties to the PPA are essentially the same.

The Commission's decision prompts some more general observations. First, in both cases the AUC seems to have raised the issue of the duty to comply with the must exchange and must offer rules of its own motion: i.e. the issues were not brought to the attention of the AUC by an intervenor. One can anticipate that the AUC will take the same position with other existing and proposed operations for self-supply as they come to its attention.

Second, while the Commission has extended International Paper's connection order, the legal implications of this are far from clear. Notwithstanding the AUC's reference to the public interest in its decision (at para 21), the Temporary Connection Order (Order) cannot provide a licence to engage in otherwise unlawful behavior. Thus, International Paper's generating unit continues to be subject to the must offer, must exchange rules of the *EUA* and the FEOC Regulation. While the Order itself provides that "This approval is subject to the provisions of the *Hydro and Electric Energy Act* and the *Alberta Utilities Commission Act*, any regulations made under the acts, any orders made under the acts, the Commission rules made pursuant to the *Alberta Utilities Commission Act*", the operation of International Paper's generation unit must also be subject to the must offer, must exchange rules of the *EUA* and the FEOC Regulation.

Third, while the Commission has inferentially indicated that International Paper will be in compliance with the regulatory scheme if it can qualify for an ISD Order, it will be recalled from my post on the *Smith* decision that an ISD can only exempt a facility from the must offer, must exchange rules to the extent that the AUC has made *a rule* to that effect (see *EUA* section 117). There is no such rule – only a boiler plate provision in every ISD Order to the effect that "The electric energy produced from and consumed by the subject industrial system is exempt from the *Electric Utilities Act*." If the AUC is concerned about the legality of existing self-supply arrangements as the International Paper decision suggests, then it also behoves the Commission to clarify its position with respect to ISD exemptions.

Finally, this set of decisions draws attention to the tension or balance between two competing policy considerations. On the one hand there are potential public interest advantages with self-supply operations insofar as co-located facilities reduce the need for transmission, avoid line losses and otherwise facilitate efficiencies in industrial processes and the adoption of new forms of generation. On the other hand, such arrangements pose the risk of free-riding insofar as the exempted generating unit is able to take advantage of both the market and transmission infrastructure without paying its full share of the costs associated with that infrastructure. In

effect, these AUC decisions represent the AUC's considered judgment or interpretation as to where it thinks that the Government of Alberta has drawn that line in the *EUA* and through the available statutory exemptions. If the Government of Alberta considers that the AUC has drawn the line in the wrong place, then it is up the Department to re-craft the exemption provisions of the *EUA* and the regulations.

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