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Regulatory Forbearance and the Status of District Energy Systems Under the *Public Utilities Act*

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Decision Commented On: [AUC Decision 24056 D01-2019](#), ENMAX Independent Energy Solutions Inc., ENMAX District Energy Edmonton Exemption Application, August 1, 2019

In this decision, the Alberta Utilities Commission (AUC) had to decide whether a proposed network that would provide a service (in this case steam) to customers and that fell within the definition of a public utility should be granted an exemption under the provisions of the *Public Utilities Act*, [RSA 2000, c P-45](#), (*PUA*). The AUC concluded that an exemption should not be issued.

The *PUA* defines a public utility as follows:

- (i) “public utility” means
- (i), (ii) repealed 2007 c42 s5,
- (iii) repealed RSA 2000 cR-4 s61 (2002 c30 s27),
- (iv) a system, works, plant, equipment or service for the production, transmission, delivery or furnishing of water, heat, light or power supplied by means other than electricity, either directly or indirectly to or for the public,
- (v) an oil pipeline the proprietor of which is declared by the Alberta Energy Regulator to be a common carrier, and
- (vi) an electric utility;

Clause (iv) is the important part of the definition for present purposes. All parties acknowledged (see ENMAX at para 33) that a district energy (DE) system would fall within this clause.

While the definition of ‘public utility’ is an essential condition to trigger the application of the *PUA*, equally if not more important given the essential attribute of agency to trigger responsibility are those provisions of the *PUA* that apply to an ‘owner of a public utility’. The Act defines an ‘owner of a public utility’ as follows:

- (h) “owner of a public utility” means
 - (i) a person owning, operating, managing or controlling a public utility and whose business and operations are subject to the legislative authority of Alberta, and the

lessees, trustees, liquidators of the public utility or any receivers of the public utility appointed by any court, but

(ii) does not include

(A) a municipality that has not voluntarily come under this Act in the manner provided in this Act, or

(B) a regional services commission;

This decision involved an application from ENMAX Independent Energy Solutions Inc. with respect to its proposed District Energy Edmonton System (DE Edmonton) in downtown Edmonton. The scheme involves the use of combined heat and power (CHP) much like a cogeneration facility within the oil sands but at a much smaller scale and with the addition of a distribution network for the steam rather than delivery of the steam to a particular facility or small number of industrial-scale facilities. DE systems are common in densely populated European cities and the technology is one of a number of technologies for achieving increased efficiency in the use of carbon-based fuels thereby reducing greenhouse gas (GHG) emissions. All other things being equal, one would therefore expect government policy to favour the adoption of this technology in areas where there is sufficient density to support it. However, as this decision demonstrates, there are other policy concerns that need be considered (e.g. the viability of competition and market power) as well as other interests including those of the incumbent providers of gas utility services in the area. Case-by-case applications may not be best suited to developing an appropriate policy and regulatory matrix for DE systems in Alberta.

ENMAX's application was, as noted above, an application to have its proposed DE Edmonton system exempted from Part 2 of the *PUA* or, in the alternative, a declaration (at para 1) "that DE Edmonton is not a public utility or that ENMAX is not an owner of a public utility with respect to DE Edmonton." Part 2 of the *PUA* is that part of the Act that provides for the detailed economic regulation of a public utility on the basis of rate base/cost of service regulation. The authority of the AUC to exempt what would otherwise be a public utility from the full extent of economic regulation provided for by Part 2 is s 79 of the *PUA*.

79(1) The Commission, on its own initiative or on the application of a person having an interest, may, or on the order of the Lieutenant Governor in Council shall, declare

(a) that any thing that is a public utility by virtue of [section 1](#)(i)(i), (iii) or (iv) is not a public utility,

(b) that a person is not for the purposes of this Act an owner of a public utility, or

(c) that a provision of this Act does not apply to

(i) a public utility,

(ii) an owner of a public utility, or

(iii) goods or services offered or provided by a public utility.

(2) During the time that a declaration made under subsection (1)(c) remains in force, the provision in respect of which that declaration was made does not apply, as the case may be, to

- (a) the public utility,
- (b) the owner of the public utility, or
- (c) goods or services offered or provided by the public utility.

(3) An order of the Commission made under subsection (1) is subject to those terms and conditions prescribed by the Commission or imposed by an order of the Lieutenant Governor in Council.

(4) The Commission,

- (a) on its own initiative or on the application of a person having an interest, may, after giving notice and conducting a hearing, or
- (b) on the order of the Lieutenant Governor in Council, shall vary or rescind in whole or in part an order made by the Commission under this section.

These are extraordinarily broad powers to refrain or forebear from regulating, with no specific guidance as to how these powers should be regulated.

The DE Edmonton scheme is further described in the AUC's decision as follows:

DE Edmonton will utilize a [CHP] system to provide a centralized thermal heat source through a thermal distribution system (TDS) to interconnected buildings. The TDS will be routed through Edmonton's pedway system and parking garages. The plant will be owned and operated by ENMAX and will use high-efficiency natural gas boilers and [CHP] "to provide a centralized thermal heat source to buildings that are interconnected through a thermal distribution system." The physical components of DE Edmonton will include a standalone central plant, a bidirectional TDS and energy transfer stations at each interconnected building. The [CHP] units will produce electricity and thermal energy, with the electricity to be used on-site and any excess exported to the grid. The City of Edmonton is providing the land for DE Edmonton at the Francis Winspear Centre for Music expansion site in downtown Edmonton, as well as access to its pedway system and parking garages to route the TDS to customer interconnection points.

DE Edmonton will initially provide service to 10 buildings consisting of commercial, institutional and government customers with a total demand of 27 megawatts of thermal heat. Charges for these services are proposed to be recovered from customers by ENMAX through a thermal energy services agreement (TESA). ENMAX is requesting that customers enter into 20-year TESAs for the services. Pricing will be established through

negotiation between parties consisting of a fixed capacity charge for the TDS and a variable charge for hot water heat.

Additionally, ENMAX has proposed to enter into an exclusive franchise agreement with the City of Edmonton for the district energy system and district energy service in a defined area in the downtown district (the franchise area). ENMAX added that it expected that the ultimate owner and operator of the TDS will be EPCOR Utilities Inc. (at paras 3-5; references omitted)

ENMAX would export excess energy to the grid but since it only expected to generate between 2 and no more than 5 MW, ENMAX anticipated being able to take advantage of the Micro-generation Regulation, [Alta Reg 27/2008](#), and thus exempt itself from the must offer, must exchange rules of the *Electric Utilities Act*, [RSA 2003, c E-5.1](#), and thus avoid the AUC's [Smith Decision](#) (for a string of posts on the Smith Decision see [here](#), [here](#) and [here](#)).

ENMAX filed its standard form TESA as part of its application but claimed confidentiality for the filing. When AUC denied that request, ENMAX asked the Commission to proceed on the basis of the summary discussion of the TESA found in its application.

The Purpose of the Exemption Provision

The silence of s 79 with respect to the statutory purpose of regulatory forbearance led all of the parties involved in the hearing to make observations with respect to the purpose of the exemption rules within the broader context of public utility regulation generally and the AUC's public interest mandate.

ENMAX took the view that utility regulation was only necessary when competition was absent and where a provider could assert market power. ENMAX argued that it was not in a position to exercise market power, and that its customers were sophisticated parties who could withdraw from the TESA at any time.

ATCO, the incumbent gas distribution utility, took the view (at para 18) that under the *Stores Block Decision*, *ATCO Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board)*, [2006] 1 SCR 140, [2006 SCC 4 \(CanLII\)](#), the “regulation of public utilities includes, but is not limited to, pure rate setting. It added that the state of the regulated market and the interaction of regulated and non-regulated entities within it are central to the Commission's oversight role.” ATCO illustrated that interaction in argument as follows:

... DE Edmonton would be in competition with its distribution system because both provide a service that allows end-use customers to heat their buildings. In ATCO's view, potential DE Edmonton customers will view service from DE Edmonton as a substitute for gas distribution service. ATCO stated that its obligation to serve all customers upon request, regardless of size, contrasts with ENMAX's proposal to “cherry-pick” only the most economically attractive loads while protecting itself with exclusive franchise rights against competition to serve the balance of those customers. In ATCO's view, “ENMAX

is requesting the benefit of an exclusive monopoly franchise agreement as well as the benefits of a competitive market.” (at para 19; references omitted)

The position of the Consumers’ Coalition of Alberta (CCA) was more nuanced (at paras 20 – 24). On the one hand, the CCA seemed to consider that the service that ENMAX proposed to provide would be a negotiated service that did not require detailed utility regulation since heat could be generated by other means. On the other hand, the CCA also considered that the record was incomplete to fully explore the necessary issues and that ENMAX was not entitled to a blanket exemption from Part 2.

The Commission itself concluded that ENMAX had not discharged its onus to show that (at para 35) “sufficient competition will exist such that regulation of ENMAX in its provision of thermal energy within the exclusive franchise area is unnecessary; or, stated in another way, that it would be in the public interest to exempt DE Edmonton and ENMAX (as its owner and operator) from Part 2 of the *Public Utilities Act*. Rather, the evidence suggests the contrary.”

The evidence to the contrary was as follows. First, the proposed franchise agreement between Edmonton and ENMAX would afford ENMAX a legal monopoly on the provision of DE service within the franchise area. Second, while as a matter of theory, customers might be able to revert to providing their own heat, the whole purpose of signing up for DE Service was to avoid making investments in new boilers. Once existing boilers had been removed, and perhaps the space they used to occupy repurposed, the customers would become captive. Third, the Commission was not persuaded that ENMAX’s customers could achieve the same level of protection through negotiations as they would through regulatory oversight under the *PUA*. The proposed TESA was effectively a standard form contract.

That led the AUC to explore whether ENMAX should be exempted from specific provisions of the *PUA* rather than the entirety of Part 2. But here the AUC noted that ENMAX’s position was essentially an all-or-nothing position and as such the Commission was not in a position to make a more limited order:

ENMAX asserted that any form of regulation would render the project uneconomic. It also represented throughout the proceeding that its decision to proceed with the project is contingent on approval of this application as well as a number of outstanding matters including: negotiation and approval of the franchise agreement; satisfactory negotiation of the TESA with Edmonton and approval of the facilities application for the construction and operation of the combined heat and power units. In light of all of the foregoing, the Commission considers that it is premature to consider the extent of regulatory oversight required for DE Edmonton. (at para 42)

The Commission also found it unnecessary (at 43) to rule on ATCO’s position that “DE Edmonton’s franchise would inappropriately infringe upon ATCO’s natural gas franchise.” That said, it does seem to me that there are some analogies between the scenario portrayed here and the North East British Columbia gas pipeline scenario. In that context, the National Energy Board has acknowledged that it must take care to ensure that regulated services are not used to provide a

competitive advantage where there is the possibility of pipe-on-pipe competition. See earlier ABlawg posts [here](#) and [here](#).

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