

May 6, 2021

The Regulation of District Energy Systems in Alberta: Part 2

By: Nigel Bankes

Decision Commented On: [AUC Decision 26163-D01-2021](#), ENMAX Corporation and Calgary District Heating Inc., Applications for Disposition of the Downtown District Energy Centre and Transfer of the Combined Heat and Power Generating Unit (19 April, 2021)

This is a short but useful decision by the Alberta Utilities Commission (AUC or Commission) dealing with a district energy system as a public utility, the relevant considerations for granting exemptions and approving dispositions, and the regulatory consequences of moving from an exempt status to a regulated status.

The decision deals with a proposed sale by ENMAX of its Downtown District Energy Centre (DDEC) to Calgary District Heating Inc (CDHI) – a newcomer to Alberta’s electricity sector. ENMAX describes the DDEC in a [2016 application to the AUC](#) as follows:

2. The DDEC is a facility owned by ENMAX Corporation that provides District Energy to downtown Calgary commercial and residential buildings. Hot water is produced in boilers at the DDEC and circulated through pipes to various heating loads in the downtown area. The DDEC was completed in 2010 and consists of 55 MWt of thermal boilers, pumps and a connection to the thermal distribution system that provides heat to up to 6 million square feet of floor space in the Downtown Calgary, East Village and Victoria Park districts. (at 16)



Credit: <https://businessincalgary.com/month-and-year/april-2017/district-energy-centre/>

ENMAX provides this service under the terms of thermal energy services agreements (TESAs). As discussed in a previous post, [“Regulatory Forbearance and the Status of District Energy Systems Under the Public Utilities Act”](#) the provision of district energy services (DES) falls within the definition of a public utility within the meaning of s 1(i) of the *Public Utilities Act*, [RSA 2000, c P-45](#) (*PUA*). ENMAX is wholly owned by The City of Calgary and operates the DDEC on an unregulated basis pursuant to s 78(2) of the *PUA*. Section 78 opens Part 2 of the *PUA* which applies the principles of cost of service regulation to regulated utilities. However, s 78(2) provides that “[t]his Part does not apply to a public utility owned or operated by a municipality unless the public utility is brought under this Act by a bylaw of the municipality as provided in this Part.” There being no such bylaw, the DDEC is exempt from the detailed regulation contemplated by Part 2 of the *PUA*. The premise for the exemption is that it is the responsibility of the municipality itself to provide any necessary economic regulation of a municipally owned utility. See Nigel Bankes & Dana Poscente, [“The Supervisory Jurisdiction of the Alberta Utilities Commission Over Municipally Owned Utilities”](#) (2020), 57 Alta L Rev 853.

However, this is subject to two caveats. The first caveat is that while the DDEC is not itself subject to regulation under Part 2 of the *PUA*, s 78(2) does not relieve a municipal owner of a public utility of those responsibilities that it may have as owner of that public utility. These duties include the duties under Division 2 of Part 2 with respect to those owners who are designated by way of regulation under the *Public Utilities Designation Regulation*, [Alta Reg 194/2006](#). Designated owners of public utilities are obliged to seek the prior approval of the AUC for a range of decisions and activities, including the disposition of utility property outside the ordinary course of business (*PUA*, s 101(2)(d)) unless the Commission declares otherwise under s 101(4). ENMAX is designated under s 1(1)(1) of the Regulation.

That designation led ENMAX to make an application to the AUC requesting a declaration under s 101(4) of the *PUA* that the proposed disposition is exempt from the requirement of prior approval, or in the alternative, an order approving the disposition.

The second caveat is that if a municipality or a municipally owned utility sells the utility to a non-municipal party, then the previously exempt utility becomes subject to the entirety of Part 2 and cost of service regulation under the *PUA* (at paras 27 and especially 41 of the Decision). All parties recognized that reality, but CDHI indicated that “it intended to bring an application before the Commission in the future seeking exemptions from certain provisions of the *Public Utilities Act*, so as to obtain regulatory treatment consistent with complaint-based regulation” (at para 8). Under complaint-based regulation, a utility has the right to set rates without prior approval, but, in the event of a complaint, the utility regulator may consider the justness and reasonableness of any rates on a retrospective basis: *Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989 CanLII 67 \(SCC\)](#), [\[1989\] 1 SCR 1722](#), *Nova, An Alberta Corporation v Amoco Canada Petroleum Company Ltd*, [1981 CanLII 211 \(SCC\)](#), [\[1981\] 2 SCR 437](#).

In the Decision, Doug Larder, serving as an acting Commissioner, dealt with three principal issues (as well as the transfer of certain approval under the *Hydro and Electric Energy Act*, [RSA 2000, c H-16](#), which I do not comment on here): (1) the threshold question as to whether or not the disposition was a disposition “outside the ordinary course of business”; (2) the jurisdiction to grant a

declaratory exemption from the requirement of prior approval; and (3) if no exemption were available, the relevant considerations for granting an approval and the application thereof. The principal intervenor in the matter was ATCO Gas, the distribution system operator for the natural service area overlapping with DDEC's area of operations. ATCO Gas' interest in the matter related to the potential for competition (and hence potential loss of customers) between those receiving natural gas service and those that DDEC might seek to attract for central energy service.

A Disposition Outside the Ordinary Course of Business?

This was not a hard question in this particular case. The Commission noted that its predecessor, the Alberta Energy and Utilities Board, had developed and applied a "frequency and materiality test" to assess this question (at para 10). In this case, the Commission noted that the value of the transaction had been publicly reported as approximately \$27 million and that "the DDEC is the only district energy facility operated by ENMAX" (at para 12). The Commission also observed that "the sale of an asset which itself constitutes a public utility is a relatively unusual occurrence" (at para 12). For all of these reasons, the Commission concluded that this was a disposition outside the ordinary course of business.

The Jurisdiction to Grant a Declaratory Exemption from the Requirement of Prior Approval

Section 101(4) of the *PUA* does not provide any specific statutory guidance to the AUC as to the factors that it should consider when exercising its discretion to exempt a party from the need to seek prior approval. The subsection simply provides that:

The Commission, on its own initiative or on the application of a person having an interest, may... declare that subsection (2) or any part of it does not apply with respect to any transaction or class of transactions specified in the declaration.

Nevertheless, the Commission can draw on its previous practice and did so in this case. The Commission noted that a declaration might be granted where it was in the public interest to do so and if satisfied that "the [exemption] would not undermine the ability of [the public utility] to provide safe and reliable service at just and reasonable rates" (at para 14, reference omitted, brackets in original). It then went on to list the following additional factors:

- The operational and regulatory history of the utility;
- The potential effect of the requested exemption on regulatory oversight;
- The duration and scope of the requested exemption;
- Any objections to the application registered by interveners;
- Other general public interest concerns. (at para 14)

In addition, ATCO Gas emphasized the concerns outlined above and the unique nature of the transaction. The Commission did not work through all of these factors in deciding to deny the request for an exemption but denied the request given the "unique characteristics", notably, "the sale of a public utility to an owner that is a new entrant to the Alberta utility sector", and the concerns cited by ATCO Gas (at para 15). A denial of the exemption would allow the

Commission “to review the transaction to ensure that any potential harm arising from the disposition of the DDEC is understood and considered” (at para 15).

The Relevant Considerations for Granting an Approval

Much as with s 101(4) of the *PUA* dealing with an application for an exemption, s 101(2)(d) dealing with dispositions outside the ordinary course of business also fails to provide any statutory guidance as to how the Commission should exercise its discretion. But once again, the AUC has a rich body of practice on which it can draw in making such decisions. The principal test that the Commission has applied is “a ‘no-harm’ test that considers the disposition in the context of both potential financial impacts and service level impacts, in terms of both quantity and quality, to customers” (at para 16; and for earlier ABlawg commentary on this test see [“Alberta Utilities Commission Approves the Proposed Sale of AltaLink’s Transmission Assets to the Berkshire Hathaway Group”](#)).

The Commission noted that the harm must be related to the transaction in question, including its surrounding circumstances. Generally, the Commission considers the “potential harm to customers served by the property that is the subject of a proposed transaction, as well as customers of any regulated affiliate of a public utility that is a party to the transaction” (at para 19). There is some discussion in this decision as to whether the Commission’s scope of inquiry should be expanded in this case to consider the interests of customers beyond those customers who held TESAs with DDEC as well as ENMAX’s other customers, and to consider the implications of the transfer for ATCO Gas. However, the Commission ruled that ATCO’s concerns were speculative and might be more appropriately addressed, if and when CDHI, as the new owner, brought an application for relief from some or all of the provisions of Part 2 of the *PUA*.

The Commission concluded this discussion as follows:

The evidence before the Commission demonstrates that there will be no impacts to the safety or quality of utility service as a consequence of the transaction. Specifically, the existing TESAs governing DDEC service will be assigned to CDHI, and CDHI will assume the obligations currently held by ENMAX. The Commission is satisfied that CDHI, through its parent company, has sufficient expertise to provide the same level and quality of service to DDEC customers as they currently enjoy. Similarly, the Commission accepts that there will be no impacts to regulated customers of ENMAX Power Corporation, as the DDEC business has been operated by ENMAX on a standalone basis, separate and apart from the core regulated utility function carried out by ENMAX Power Corporation. The Commission also finds that approval of the disposition will not result in any financial harm to customers of the DDEC or ENMAX Power Corporation. ENMAX stated that the transaction will not affect ENMAX’s credit rating or have any adverse impact on the financing costs of ENMAX Power Corporation. Based on the information provided by ENMAX, the Commission notes that the transaction costs will be borne by ENMAX and will not be recovered from ratepayers. (at para 33)

ENMAX therefore had satisfied the no-harm test.

As for the future regulation of CDHI as the new owner of the Downtown District Energy Centre, the Commission’s formal order provides that:

Effective from the time the transaction is closed, Calgary District Heating Inc. is directed to conduct itself as an owner of a public utility to which sections 101, 102 and 109 of the *Public Utilities Act* apply. (at para 42(4))

Conclusion

This decision usefully brings together the law and AUC practice in relation to a number of interrelated issues of utility regulation including: district heating projects as public utilities; the scope and termination of the exemption of municipally owned utilities from AUC regulation; the exercise (or not) of the AUC’s power to grant exemptions; and the AUC’s power to approve (or not) a disposition outside the ordinary course of business.

This post may be cited as: Nigel Bankes, “The Regulation of District Energy Systems in Alberta: Part 2” (May 6, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/05/Blog_NB_Regulation_DES.pdf

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

