Court of King's Bench of Alberta

Citation: ENMAX Corporation v Independent System Operator (Alberta Electric System Operator), 2023 ABKB 191

Date: 20230421
Docket: 2101 15908
Registry: Calgary

Between:

ENMAX Corporation, ENMAX Energy Corporation and Calgary Energy Centre No. 2 Inc.

Applicants

\- and -

Independent System Operator operating as the Alberta Electric System Operator

Respondent

Memorandum of Decision
of the
Honourable Mr. Justice O.P. Malik

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[1] The issue I must decide is whether ENMAX or the Crown is entitled to receive a credit payment in the amount of $8,343,537.15 ("Credit Amount") payable by the Alberta Electric System Operator ("AESO").

[2] For the following reasons, I find that the Credit Amount is payable to the Crown.

I. Parties and Background

[3] For purposes of this application, the Applicants are referred to collectively as "ENMAX". ENMAX Energy Corporation and Calgary Energy Centre No. 2 Inc. ("CEC2") are wholly owned subsidiaries of the ENMAX Corporation. ENMAX Energy Corporation is a generation and retail business which provides electricity and natural gas. CEC2 was formed through the amalgamation of Calgary Energy Centre No. 1 ("CEC1") and a predecessor entity also known as Calgary Energy Centre No. 2 Inc. In 2008, ENMAX Corporation acquired the shares of Calgary Energy Centre Holdings Inc. ("CEC Holdings") which in turn held all the shares of CEC2.

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[4] Calpine Energy Services Canada Partnership and Calpine Power L.P. ("Calpine") owned a power generation asset known as the Calgary Energy Centre ("The Facility") in the City of Calgary.

[5] AESO operates as the independent system operator ("ISO") established under the *Electric Utilities Act*, SA 2003, c E-5.1 (the "*Act*"). The ISO's statutory mandate is "to provide for the safe, reliable and economic operation of the interconnected electric system and to promote a fair, efficient and openly competitive electricity market for electricity" (section 16(1)). The ISO is the sole provider of system access service on the electric transmission system (section 28). The ISO's duties include managing and recovering the costs of transmission line losses (section 17(e)), providing system access service on the transmission system and preparing an ISO tariff (section 17(g)).

[6] When electricity is transmitted across the electric grid for distribution, a quantity of it is lost or dissipated. The difference between the amount of energy that is initially put onto the system and the lesser amount of energy received for consumption is referred to as a transmission line loss. The AESO uses a methodology to determine transmission line losses for each generating unit (such as the Facility) that is connected to the transmission system. Some generating units are responsible for creating line losses while others are responsible for reducing, saving, or avoiding line losses. Generating units that create transmission line losses may be responsible for paying line loss charges while those that reduce, save, or avoid line losses may be entitled to receive credit payments.

[7] The allocation of transmission line loss charges and credits is managed by the AESO through the ISO rules ("ISO Rules"). The ISO Rules set out the methodology for calculating loss factors which is used to recover the costs of transmission line losses through the ISO Tariff (the "ISO Tariff"). The ISO Tariff consists of the rates, terms and conditions that apply to a market participant receiving access to the electrical transmission system pursuant to system access service agreements including agreements for supply transmission services ("STS Agreements" or "STS Contracts"). Pursuant to the *Act*, compliance by market participants with the ISO Rules (section 20.8) and the ISO Tariff (section 31(b)) is mandatory. In accordance with section 30(1) of the *Act*, the AESO must submit the proposed ISO Tariff for approval to the Alberta Utilities Commission (the "AUC"), Alberta's independent, quasi-judicial agency responsible for regulating electric utilities.

[8] Between 2003 and 2006, Calpine was a party to STS Agreements dated January 10, 2003, May 11, 2004, and June 5, 2006, with the AESO in respect of the Facility. Each of the STS Agreements expressly acknowledges that the parties' obligations thereunder are subject to the terms of the ISO Tariff.

[9] Sections 15(2)(1) and 15(2)(2) of the ISO Tariff provide as follows:

> **Assignment**
>
> 2(1) A market participant may assign its agreement for system access service or any rights under it to another market participant who is eligible for the system

access service available under such agreement and the ISO tariff, but only with the consent of the ISO, such consent not to be unreasonably withheld.

2(2) The ISO must apply to the account of the assignee all rights and obligations associated with the system access service when a system access service agreement for Rate DTS, Demand Transmission Service, Rate FTS, Fort Nelson Demand Transmission Service, or Rate STS, Supply Transmission Service, has been assigned in accordance with subsection 2(1) above, including any and all retrospective adjustments due to deferral account reconciliation or any other adjustments.

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[10] In August 2007, the STS Agreements were the subject of an Assignment, Assumption and Novation Agreement (the "AA&N Agreement") between Calpine, CEC1, and the AESO.

[11] Sections 2 and 3 of the AA&N Agreement provide the following:

2. Assumption with Respect to Assigned Interest.

Effective as of the Effective Time, the Assignee accepts and assumes the Assigned Interest and the Assignee hereby covenants and agrees with the Assignor and the AESO that the Assignee shall be bound by and perform each and every covenant, agreement, term, obligation, condition, liability and stipulation on the part of the Assignor contained in the SAS Agreements...from and after the Effective Time, including without limitation, the requirement to provide security acceptable to the AESO on or before the Effective Time and to pay any adjustment received from AESO related to the SAS Agreements...for periods prior to the Effective Time to the same extent and with the same force and effect as if the Assignee had been a party to the SAS Agreements...in the place and stead of the Assignor. Without limiting the generality of the foregoing, and notwithstanding anything in this Agreement to the contrary and the Effective Time, the Assignee shall be responsible to the AESO for the settlement of all accounts with the AESO with respect to the SAS Agreements...from and after August 1, 2007, and any adjustment between the Assignor and the Assignee for the period from August 1, 2007, to the Effective Time shall be determined as between the Assignor and the Assignee.

3. AESO's Confirmations. The AESO hereby:

(a) recognizes and consents to the assignment by the Assignor to the Assignee of the [CEC Agreements]; and

(b) recognizes the assumptions of the Assignee with respect to the Assigned Interest and covenants and agrees with the Assignee that, from and after the Effective Time, the Assignee shall be bound by and perform each and every covenant, agreement, term, obligation, condition and stipulation on the part of the Assignor contained in the [CEC Agreements] including the obligation to pay any adjustments received from the AESO related to the [CEC Agreements] for periods prior to the Effective Time and shall be entitled to hold and enforce all of the privileges, rights and benefits of the Assignor

> under the [CEC Agreements], to the same extent as though, and with the intention and purpose that, the Assignee had been a party to the [CEC Agreements] in the place and stead of the Assignor.

[12] In December 2007, shortly after having entered into the AA&N Agreement and having effected the assignment of its interests in the STS Agreements to CEC1, Calpine was dissolved.

[13] In 2005, the AESO proposed a methodology known as the 2005 Line Loss Rule ("2005 Line Loss Rule") to calculate transmission line loss charges and credits that market participants would either pay or receive under the ISO Tariff commencing January 1, 2006.

[14] On August 17, 2005, Milner Power Inc. ("Milner") submitted a complaint to the AUC's predecessor, the Alberta Energy and Utilities Board ("EUB"), alleging the 2005 Line Loss Rule contravened the *Act* and the *Transmission Regulation*, Alta Reg 87/2007. The EUB dismissed Milner's complaint, but that decision was vacated by the Alberta Court of Appeal and the matter was remitted to the EUB in 2010 to determine whether the 2005 Line Loss Rule contravened section 19 of the *Transmission Regulation* (now section 31; ***Milner Power Inc v Alberta (Energy and Utilities Board)***, 2010 ABCA 236).

[15] Following extensive litigation before the AUC and the Alberta Court of Appeal, the AUC found that the 2005 Line Loss Rule contravened the *Act* and the *Transmission Regulation* and must be discontinued (see AUC Decision 2014-110: April 16, 2014). This meant the AUC had to retroactively re-calculate those transmission line loss charges and credits that had been unlawfully imposed in accordance with the 2005 Line Loss Rule and further, that it had to administer adjusted line loss charges and credits. These, and other issues, were the subject of further litigation before the AUC in modules A, B and C in Phase 2 of Proceeding 790.

[16] In the Module A Decision (Decision 790-D02-2015: January 20, 2015), the AUC concluded that the unlawful transmission line loss charges and credits that had been imposed pursuant to the 2005 Line Loss Rule were interim rates which the AUC had the jurisdiction to retroactively adjust.

[17] In the Module B Decision (Decision 790-D03-2015: November 26, 2015), the AUC approved a go-forward methodology for calculating new, adjusted transmission line loss charges and credits under the ISO Tariff commencing January 1, 2017.

[18] One of the key issues for the AUC to decide in the Module C Decision (Decision 790-D06-2017: December 18, 2017), was who would receive the revised invoices in respect of these adjustments: "whether these should be issued to the party that held the STS contracts with the AESO at the time the losses or credits were incurred or whether the charges or credits should be borne or received by the current holder of the STS contracts" (para 81). This question was obviously pertinent where, as here, Calpine ordinarily would have been responsible for paying charges or receiving credits in respect of the STS Agreements but ostensibly had assigned these rights to CEC1 pursuant to the terms of the AA&N Agreement.

[19] The AUC directed the AESO to provide it with iterations of Recital B and assignment terms set out in section 2 of all AA&N agreements that the AESO and market participants had entered

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into since January 1, 2006. A redacted reproduction of section 2 of the AA&N Agreement was entered as an Exhibit in the proceedings before the AUC.

[20] At para 121 of the Module C Decision the AUC agreed with the AESO and ENMAX that STS Contracts or STS Agreements, are explicitly subject to the terms and conditions of the ISO Tariff. This conclusion was subsequently confirmed by the Court of Appeal in an application for leave to appeal the Module C Decision in ***ENMAX Energy Corporation v Alberta Utilities Commission***, 2019 ABCA 222 at para 18 [***ENMAX***].

[21] At para 109 of the Module C Decision, the AUC found that the ISO Tariff "is part of the overall statutory scheme that governs the provision of electricity to Albertans from generation to distribution" and must be read in accordance with the objectives of the governing legislation set out in section 5 of the *Act*:

> **Purposes of the Act**
>
> **5** The purposes of this Act are
>
> ....
>
> (c) to provide rules so that an efficient market for electricity based on fair and open competition can develop in which neither the market nor the structure of the Alberta electric industry is distorted by unfair advantages of government owned participants or any other participant.
>
> (d) to continue a flexible framework so that decisions of the electric industry about the need for and investment in generation of electricity are guided by competitive market forces.

[22] The AUC noted at paras 119-120 of the Module C Decision that the purpose of section 15(2) of the ISO Tariff is to "provide the AESO and market participants with certainty about the effects of assignments in the normal course" and that this provision "appears to make assignees responsible for the rights and obligations of predecessor STS contract holders including 'retrospective adjustments due to deferral account reconciliations' or any other adjustments...necessary to true up or update lawful rates that are just and reasonable."

[23] The AUC noted that AA&N agreements do not help in determining whether current or original STS Contract holders should be invoiced because these agreements are subject to the terms of the ISO Tariff which "in turn, is subordinate to the Commission's statutory obligations to safeguard the fair, efficient and openly competitive operation of the market and to ensure that rates are just and reasonable" (para 121).

[24] The AUC's key conclusions in its Module C Decision are set out at paras 122-127. The AUC concluded: the invoices for final rates to replace interim rates must be assigned to the "original cost causers and cost savers" in furtherance of "the fair, efficient and openly competitive operation of the market and to ensure that rates are just and reasonable" (para 122); section 15(2) of the ISO Tariff "only contemplates adjustments to a lawful tariff in the normal course" and therefore does not apply to the "transferring [of] fundamental rights with respect to interim rates"

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(paras 122 and 123); "but for the unlawful [2005 Line Loss Rule], the predecessor STS holders associated with historical line losses would have been responsible for the costs of those line losses" (para 125), and; invoicing current holders of STS contracts rather than their predecessors "would be contrary to the principle of cost causation and unjust and unreasonable" and "could create unfair advantages for some market participants that could potentially distort both the market and the structure of the industry" (para 125).

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[25] However, the AUC recognized that "this is not to say that market participants are not free to contractually shift liabilities for past unlawful rates they were charged" (para 126) and that, while it was "only determining which market participants the AESO must invoice...the ultimate responsibility for payment may rest with others pursuant to separate commercial agreements" (para 127).

[26] An application (in which ENMAX participated) was brought seeking leave to appeal the AUC's Module C Decision to the Alberta Court of Appeal. In ***ENMAX***, the Justice hearing the leave to appeal application agreed with the AUC that the rights and obligations that could be assigned pursuant to section 15(2) of the ISO Tariff contemplated only "adjustments to a lawful tariff in the normal course (para 63) or other like adjustments that comprised "obligations that can be readily assigned or deemed to have been assigned on an assignment of transmission system access service" (para 64). The Justice further agreed with the AUC that "it could only order to whom the invoice would be sent but could not dictate ultimate liability if assignees and assignors had contracted otherwise" (para 56).

[27] The Justice dismissed the application following two full days of argument, finding that the appeal did not raise questions of law or jurisdiction that warranted the Court's consideration, that the AUC had granted the parties a full opportunity to make submissions, and that the AUC's decision was "fully explained, rationalized and justified in accordance with the law governing its regulatory decision-making" (para 70). Notably, the leave to appeal decision predates the Supreme Court of Canada's decision in ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65, which revised the standard of review analysis. Whereas in ***ENMAX*** the applicable standard of appellate review was reasonableness (para 34), the outcome of ***Vavilov*** and the relevant statutory appeal mechanism at section 29(1) of the *Alberta Utilities Commission Act*, SA 2007, c A-37.2, would now prescribe a correctness standard of review. In the result, applying a reasonableness standard of review in ***ENMAX*** detracted from the merits of the application for permission to appeal. The reasonableness standard also informed the Justice's deferential approach to the AUC's interpretation of its prior decisions (para 46) and the AUC's determination that the Module C Decision would promote the fair, efficient and open competition principles required under section 5 of the *Act* (para 67).

[28] As a result of having re-calculated the retroactive adjustments to the 2005 Line Loss Rule, the AESO determined that the Credit Amount is owing to Calpine for the period of February 1 to December 31, 2006, when Calpine was the holder of STS Agreements. However, Calpine is dissolved and cannot receive the Credit Amount. Consequently, the AESO argues that the Credit Amount must escheat to the Crown in accordance with the *Unclaimed Personal Property and Vested Property Act*, SA 2007, c U-1.5. ENMAX disagrees and asserts that it is the lawful assignee of the Credit Amount pursuant to the assignment terms of the AA&N Agreement.

[29] On December 13, 2021, the AESO filed an application with the AUC requesting guidance as to whether the Credit Amount should escheat to the Crown and, if not, how payment should be made (the "Request for Guidance").

[30] At para 27 of its Request for Guidance decision (Decision 27048-D01-2022: June 8, 2022), the AUC found that, while parties are free to enter into private commercial agreements to "contractually shift liabilities for past unlawful rates they were charged", "such transactions fall outside the statutory scheme and the Commission's purview" and should be "resolved through normal legal process between claimants" (para 27). The AUC noted that it had not received a request to review or vary its Module C Decision (para 29) and that any effort to do so now "could potentially lead to one or more unintended consequences of indeterminate magnitude, scope and direction" (para 33). In the result, the AUC declined to answer the specific questions put to it in the Request for Guidance.

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II. The Parties' Arguments

[31] ENMAX argues that it is entitled to receive the Credit Amount pursuant to section 2 of the AA&N Agreement. It asserts that the AESO "expressly recognized and consented" to the assignment of the STS Agreements from Calpine to (now) ENMAX pursuant to the AA&N Agreement. It does not dispute the Module C Decision and points out that the AUC has decided who should receive any final invoice at first instance but has declined to decide who should receive the Credit Amount. At para 37 of its written submissions, ENMAX states:

> The [Credit Amount] is an "adjustment received from the AESO in respect of the STS Agreements that would have been paid to Calpine *but for* the clear terms of the [AA&N Agreement] assigning that interest to ENMAX. As the assignee, ENMAX is entitled to "all of the privileges, rights and benefits of Calpine under the" STS Agreements.

[32] ENMAX further argues that the AA&N Agreement is precisely the type of "separate commercial agreement" referred to by the AUC in the Module C Decision that permits parties to allocate benefits and liabilities as they see fit pursuant to private agreement and this is what they intended to do with the assignment of the Credit Amount.

[33] ENMAX relies on a recent Arbitration decision, *ENMAX Cavalier LP and ENMAX Balzac LP v Ovintiv ULC* (the "ENMAX-Ovintiv Arbitration Decision"), in which ENMAX was awarded certain AESO payments ("AESO Credits") issued by the AESO for historical line credits in connection with two power stations previously owned by Ovintiv's predecessor, Encana Corporation, that were sold to ENMAX pursuant to asset purchase agreements ("ASAs"). An Arbitral Tribunal found at para 124 that pursuant to the terms of the ASAs the parties intended for ENMAX to acquire all of Ovintiv's interests in the power stations, including, "to the extent it was capable of being transferred at that time, any contingent interest in AESO Credits or, for that matter, contingent liability for underpaid line losses".

[34] The arbitral tribunal recognized at para 108 that its task was to interpret the parties' rights and obligations flowing under the ASAs and that "the AESO's decision in its Module C Decision to invoice some market participants rather than other market participants for its own regulatory

reasons is not directly relevant to the task of interpreting the ASAs". The tribunal further recognized at para 113 that the allocation of the AESO Credits amongst the parties "is a function of interpreting the ASAs" and not a consequence flowing from the "AUC's direction that the AESO Credits be paid in the first instance to Ovintiv as the historical holder of the STS Agreements". The ASAs undoubtedly constituted commercial agreements "separate" from the Assignment Agreements entered into between Ovintiv, ENMAX, and the AESO. Though the Arbitral Tribunal considered the parties' rights and obligations in relation to line loss credits primarily as reflected in the ASAs, it found that the assignment provisions of the Assignment Agreements transferring all the rights and obligations to and under the SAS Agreements supported ENMAX's assumption of all Ovintiv's interests in the generating assets, including the interest in the line loss credits (paras 126-128, 131). At para 131, the tribunal concluded that pursuant to the ASAs, "ENMAX acquired all of Ovintiv's interests in and to the power stations, including "any contingent interests in the AESO Credits, to the extent it was capable of being transferred at this point."

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[35] The AESO argues that the Module C Decision provides a full answer to ENMAX's application and that the principles of *res judicata* and issue estoppel apply. It says that in accordance with the Module C Decision, the assignment of Calpine's rights to receive adjustments from the AESO under AA&N agreements must comply with the requirements of section 15(2) of the ISO Tariff. These are limited to adjustments made to lawful rates that were, at the time they were first issued, just and reasonable and do not include adjustments made to unlawful rates such as those issued pursuant to the 2005 Line Loss Rule. The AESO says that ENMAX is repeating similar arguments previously made before the AUC in the Module C proceedings and the Court in ***ENMAX*** and that there is no reason why I should not exercise my residual discretion to apply issue estoppel. For these reasons, AESO characterizes ENMAX's application as an abuse of process.

III. Analysis

[36] In my view, a plain reading of the Module C Decision is dispositive of ENMAX's application. It is my opinion that ENMAX's application must be dismissed on the grounds of *res judicata* (issue estoppel) as per the tri-partite test set out in ***Danyluk v Ainsworth Technologies Inc***, 2001 SCC 44 at para 25: (1) the question before me, namely which party is entitled to receive the Credit Amount has already been decided by the AUC in its Module C Decision; (2) the Module C Decision is a final decision that has not been successfully appealed; and (3) this hearing involves the same parties that were the subject of the Module C Decision. Given the extent to which the issues before me have been thoroughly canvassed by the AUC and the Alberta Court of Appeal, I cannot identify any compelling reason why I should not exercise my discretion to apply the principle of *res judicata*: ***Booth v Christensen***, 2019 ABQB 878 at paras 63-70.

[37] In the Module C Decision, the AUC found that STS Agreements are subject to the ISO Tariff. The ISO Tariff does not allow for the assignment of invoices for final adjustments made to interim rates. The AUC further found that the assignment of invoices for final adjustments in respect of interim rates contravenes the legislative purpose of the regulatory scheme, as set out in section 5 of the *Act*.

[38] In my view, the AUC concluded in its Module C Decision that to promote the objectives of the *Act* namely, to "safeguard the fair, efficient and openly competitive operation of the market

and to ensure that rates are just and reasonable" (para 122), only original STS Contract holders can be issued final invoices for charges or credits relating to past unlawful line loss rates.

[39] The policy reasons for this approach were explained by the AUC throughout its Module C Decision:

> ...invoices for final rates to replace interim rates must be issued to the original cost causers and cost savers, not only because they were competitors of each other, but because they were the parties unjustly and unduly advantaged or disadvantaged by the unlawful rates (para 122).
>
> ....
>
> The Commission cannot emphasize enough that, but for the unlawful Line Loss Rule, the predecessor STS holders associated with historical line losses would have been responsible for the cost of those line losses. From the Commission's perspective, it would be contrary to the principle of cost causation and unjust and unreasonable, to allow predecessor STS contractor holders to avoid responsibility for the losses they caused by not invoicing them for lawful final rates (para 125).
>
> The Commission finds that invoicing current STS holders for charges or credits for the line losses of predecessor STS holders would create unfair advantages for some market participants that could potentially distort both the market and the structure of the industry. The Commission notes, in this regard, that the effect of invoicing current STS holders would potentially do that which the Commission previously found to be impermissible, i.e., to bestow on a group of competitors financial benefits to which they may have no just claim. In the Commission's view, this could potentially interfere with the efficient market for electricity based on fair and open competition as required by section 5 of the [*Act*] (para 126).

[40] The AUC's conclusions were understood by the Justice in ***ENMAX*** at paras 19 and 56 of his decision to mean that original cost causers and savers must pay (or receive payment) resulting from final invoices and that only such a conclusion was consonant with the policy objectives of the *Act*.

[41] Notwithstanding that the original STS Contract holders are to be invoiced for historical unlawful rates relating to line losses, the AUC's Module C Decision clearly states that the rights and liabilities for historical unlawful rates may be shifted to current STS Contract holders by way of separate commercial agreements (paras 126-127). I agree with the AESO that the AUC intended the word "separate" to mean a commercial agreement separate from AA&N agreements based on the plain meaning of the word and its use in relation to AA&N agreements in the Module C Decision. In my view, this interpretation was confirmed by the AUC's subsequent refusal to provide the AESO's requested guidance on the treatment of the line loss credits on the basis that this would require the AUC to "determine a private contractual matter over which the [AUC] has no jurisdiction" (Decision 27048-D01-2022 at para 22).

[42] Simply put, the final adjustments to the interim rates made in accordance with the 2005 Line Loss Rule are not capable of being invoiced to anyone at first instance other than Calpine.

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Pursuant to the Module C Decision, Calpine could have assigned its interest in the Credit Amount to ENMAX via a commercial agreement separate from the AA&N Agreement when ENMAX acquired the Facility through its purchase of CEC Holdings. If Calpine were an ongoing concern, it could also have done so after ENMAX acquired the Facility. But given there is no such separate commercial agreement before me, there is no contractual mechanism (as far as I am aware) which would compel the AESO to pay the Credit Amount directly to ENMAX.

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[43] I am nevertheless mindful that executing a separate agreement with assignment provisions concerning the transfer of interests in the STS Agreements may likely have been unnecessary or redundant in view of the AA&N Agreement. This is because, rather than purchase the Facility outright, ENMAX purchased all the shares of CEC Holdings which in turn owned all the shares of CEC2. So far as I am aware, the only interests that were formally transferred in the overarching transaction were Calpine’s interests in the STS Agreements. That transfer was executed by the AA&N Agreement. Subject to a subsequent amalgamation process, the remaining interests in the Facility continued to be held by CEC Holdings and may not have required a separate assignment to ENMAX.

[44] Conversely, in the Encana-ENMAX transaction that was the subject of the ENMAX-Ovintiv Arbitration Decision, ENMAX purchased the two generating assets from Encana pursuant to the ASAs. Those ASAs had additional assignment provisions that could be considered separate from the assignment agreements between the parties. Though line loss credits were not explicitly mentioned in the ASAs, the arbitral tribunal found that they were included in the assignment provisions.

[45] At this juncture, it is necessary to note that the execution of the AA&N Agreement and ENMAX’s acquisition of the Facility occurred in 2007 when the parties could not have known that (i) the AUC would find the 2005 Line Loss Rule to be unlawful; (ii) the AUC would consider the unlawful transmission line loss charges and credits that had been imposed pursuant to the 2005 Line Loss Rule as interim rates which the AUC had the jurisdiction to retroactively adjust; and (iii) that invoices for final rates to replace interim rates would be issued to Calpine, the original STS Agreement holder. The parties therefore could not have foreseen that a separate commercial agreement would have been required to assign Calpine’s interest in the Credit Amount to ENMAX.

[46] Similarly, the parties to the Encana-ENMAX transaction did not foresee the results of the Module C Decision. Consequently, they did not contemplate that transmission line loss charges and credits would be invoiced to the original STS Contract holders and that a separate commercial agreement would be required to transfer the interests in line loss credits to the current STS Contract holder (at ENMAX-Ovintiv Arbitration Decision at paras 53, 145).

[47] The result of the foregoing illustrates the arbitrary divergence of outcomes between the Encana-ENMAX and Calpine-ENMAX cases. In the Encana-ENMAX case, ENMAX is entitled to the transmission line loss credits because the asset purchase transaction required commercial agreements (the ASAs) with assignment provisions separate from the AA&N agreements. In this case however, the opposite result is achieved where no such separate commercial agreements containing assignment provisions were anticipated or necessarily required.

[48] As unsatisfactory as this result may be, the fact remains that the Module C Decision has not been successfully appealed and is therefore binding. A commercial agreement separate from the AA&N Agreement was required to transfer the interests in the Credit Amount from Calpine to ENMAX, but no such agreement was put before me. While I have expressed my dissatisfaction with the outcome of the Module C Decision to the facts of this case, I do not believe this to be the appropriate forum in which I can reconsider the wisdom or merits of the Module C Decision.

IV. Disposition

[49] Since the Credit Amount can neither be paid to Calpine nor to ENMAX, it escheats to the Crown.

[50] The Respondent is presumptively entitled to its costs. If the parties cannot agree on costs, they may provide written submissions, not exceeding 5 pages each, within the next 30 days. I ask that the parties address ***McAllister v Calgary (City)***, 2021 ABCA 25 in their submissions.

Heard on December 15, 2022, with additional written submissions dated January 31, 2023, and further oral argument heard on February 23, 2023.

Dated at the City of Calgary, Alberta on April 21, 2023.

O.P. Malik
J.C.K.B.A.

Appearances:

Dalton W. McGrath K.C. and Michael O'Brien
for the Applicants, ENMAX Corporation, ENMAX Energy Corporation and Calgary Energy Centre No. 2 Inc.

Kara L. Smyth and Nicole Fitz-Simon
for the Respondent, the Independent System Operator operating as the Alberta Electric System Operator

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