

In the Court of Appeal of Alberta

Citation: ATCO Gas and Pipelines Ltd v Alberta Utilities Commission, 2024 ABCA 400

Date: 20241210
Docket: 2401-0170AC
Registry: Calgary

2024 ABCA 400 (CanLII)

Between:

ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd.

Applicants

- and -

**Alberta Utilities Commission and
The Office of the Utilities Consumer Advocate**

Respondents

**Reasons for Decision of
The Honourable Justice Anne Kirker**

Application for Permission to Appeal

Reasons for Decision of The Honourable Justice Anne Kirker

Introduction

[1] ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd. seek permission to appeal a decision of the Alberta Utilities Commission: *AUC-Initiated Review Under the Reopener Provision of the 2018-2022 Performance-Based Regulation Plans for ATCO Electric and ATCO Gas*, AUC Decision 28300-D01-2024 (22 May 2024) (the Reopener Decision). It arises from a Commission-initiated proceeding under the “reopener” provisions of the applicants’ 2018-2022 performance-based regulation (PBR2) plans.

Background

Performance-Based Regulation

[2] Since 2013, the applicants and other distribution utilities regulated by the Commission have been subject to performance-based regulation (PBR), which is different than the traditional cost-of-service regulation (COS). As the Commission explained at paragraphs 20 and 21 of its Reopener Decision:

... under COS regulation, the Commission reviews a utility’s forecast costs and approves rates that provide the utility with a reasonable opportunity to recover those costs that it has determined to be reasonable. This includes approval of a fair rate of return that the Commission establishes through its cost-of-capital proceedings. While the utilities may earn above or below the approved rate of return during the period for which forecasts are approved, any cost reductions achieved are passed on to customers in subsequent rate proceedings, which generally happen every two years. Because of this, it is generally known that under COS regulation there is little incentive for utilities to innovate and engage in long-term cost-cutting behaviours.

The *Electric Utilities Act* and the *Gas Utilities Act* provide the legislative basis for setting just and reasonable rates through PBR. For instance, Section 120 of the *Electric Utilities Act* specifies that “[a] tariff may provide ... for incentives for efficiencies that result in cost savings or other benefits that can be shared in an equitable manner between the owner of the electric utility and customers.” Section 45(1) of the *Gas Utilities Act* empowers the Commission to “fix or approve just and reasonable rates ... that are intended to result in cost savings or other benefits to be allocated between the owner of the gas utility and its customers, or that are otherwise in the public interest.”

The Commission addressed in greater detail how these and other related provisions in the governing legislation authorized PBR and would guide rate setting in *Rate Regulation Initiative Distribution Performance-Based Regulation*, AUC Decision 2012-237 (12 September 2012), a decision establishing the parameters of the first generation PBR plan which was in place from 2013-2017 (PBR1). The Commission subsequently set the parameters for PBR2, which was in place from 2018-2022: *2018-2022 Performance-Based Regulation Plans for Alberta Electric and Gas Distribution Utilities*, AUC Decision 20414-D01-2016 (Errata) (6 February 2017), and for the PBR plan intended to be in place from 2024-2028 (PBR3): *2024-2028 Performance-Based Regulation Plan for Alberta Electric and Gas Distribution Utilities*, AUC Decision 27388-D01-2023 (4 October 2023) (PBR3 Decision). At the transition point between PBR terms, the regulated utilities' costs and revenues are realigned or "rebased" for the next PBR term. The year 2023 was an intervening COS year where utility revenue requirements were rebased for the purposes of setting the going-in rates for PBR3: see, *2023 Cost-of-Service Review*, AUC Decision 26615-D01-2022 (28 July 2022) (ATCO Electric 2023 COS Decision) and *2023 Cost-of-Service Review*, AUC Decision 26616-D01-2022 (1 September 2022) (ATCO Gas 2023 COS Decision); see also, *Process to Establish 2023 Rates for Alberta Electric and Gas Distribution Utilities*, AUC Decision 26354-D01-2021 (18 June 2021).

[3] Reopener provisions in PBR plans "act as a safeguard or check against unexpected results, including results that would have a material impact on a utility or its customers, if and when a problem arises in the design or operation of the plan": Reopener Decision at para 28. Prior to the Reopener Decision underlying this application, reopener proceedings had been triggered on just two occasions: first, where a utility achieved a return on equity that fell below the generically approved reopener threshold for two consecutive years under its formula-based ratemaking plan (a form of PBR); and second, when the applicants achieved returns on equity that exceeded the reopener threshold in 2016 and 2017 under their PBR1 plans.

[4] On the first occasion, the Commission determined that adjustments to the ratemaking plan were warranted to address the circumstances that triggered the reopener. On the second occasion, the Commission considered whether there was sufficient evidence to substantiate a problem with the applicants' PBR1 plans that could not be resolved without reopening and reviewing the plans. It ultimately concluded there was no evidentiary basis to find that the applicants' earnings above the approved return on equity resulted from a problem with the design or operation of the PBR1 plans. In doing so, the Commission rejected an intervener's argument that the PBR1 plans should be reopened and reviewed if there was a "reasonable apprehension" the applicants' earnings were not exclusively due to the operation of the PBR's incentive properties. The Commission noted that due to the complexity of PBR, "it would be difficult, if not impossible" for the utilities "to isolate the impact of earnings resulting from changes directly related to" certain projects or utility decisions from other contributing factors: *AUC-Initiated Review Under the Reopener Provision of the 2013-2017 Performance-Based Regulation Plan for the ATCO Utilities*, AUC Decision 23604-D01-2019 (27 February 2019) at paras 64-66.

[5] A similar direction was communicated by the Commission in its 2023 COS decisions. It recognized that the utilities did not “have a documented process to which they could point in evidence, for tracking whether the projected efficiencies or cost savings associated with a particular initiative were indeed realized”: ATCO Electric 2023 COS Decision at para 90; see also, ATCO Gas 2023 COS Decision at para 102. The Commission also said it was “not inclined, at this time, to require the utilities to begin tracking all individual initiatives and programs that may result in efficiencies and the associated cost savings”: ATCO Electric 2023 COS Decision at para 90; see also, ATCO Gas 2023 COS Decision at para 102. It instead expected that “utilities can and should be tracking and measuring whether the programs and large-scale initiatives that they implement are achieving the intended goals, including efficiency gains and related cost savings”: ATCO Electric 2023 COS Decision at para 90; ATCO Gas 2023 COS Decision at para 102.

[6] In 2021 and 2022, the applicants again achieved returns on equity that exceeded the approved reopener threshold, this time under their PBR2 plans. This caused the Commission in July 2023 to initiate another reopener proceeding, to be conducted in two phases as had become typical. In Phase 1, a determination would be made as to whether there was a problem with the design or operation of the applicants’ PBR2 plans that could not be resolved without reopening and reviewing the plans. If such a problem was determined to exist, the plans would be reopened, and the appropriate remedy would be determined in Phase 2.

[7] On October 4, 2023, before Phase 1 of the PBR2 reopener proceeding was completed, the Commission issued its PBR3 Decision, setting the parameters for the PBR3 plan. Under the heading “Quantification and tracking of efficiencies”, the Commission noted that “the utilities were not able to adequately link projected efficiencies and costs savings to particular initiatives”: PBR3 Decision at para 407. It directed PBR utilities to track efficiencies using certain metrics¹ to “help avoid the challenges in identifying the achieved efficiencies and calculating realized savings at the next rebasing”: PBR3 Decision at paras 412-413.

The Decision Sought to be Appealed

[8] On May 22, 2024, following Phase 1 of the reopener proceeding, the Commission ordered the applicants’ PBR2 plans reopened. Notwithstanding what the Commission had said about utilities tracking and measuring how their programs and initiatives were achieving the intended goals of PBR, the Commission explained that it was “troubled by the lack of quantification and explanation of savings by the [applicants] attributable at any level (i.e., specific amounts, ranges, estimates) to specific programs, projects or initiatives”: Reopener Decision at para 95. The Commission acknowledged the applicants’ evidence that they “had a challenge quantifying the impact of various initiatives” because they did not previously know the information sought would

¹ Described to include: “(i) Controllable O&M per customer. (ii) Controllable O&M per km of line (pipe). (iii) Total cost per customer, broken out by Total O&M per customer and Total capital additions per customer separately. (iv) Total cost per km of line (pipe), broken out by Total O&M per km of line (pipe) and Total capital additions per km of line (pipe) separately reported.”

be required: Reopener Decision at para 62. Nevertheless, because substantial amounts of the applicants' savings "were neither quantified nor attributed to particular projects, programs or initiatives", the Commission decided to reopen the PBR2 plans: Reopener Decision at para 111. Because the applicants had failed to demonstrate that the cost savings they realized were attributable to utility driven efficiency gains resulting from the incentives intended under PBR, the Commission decided that such savings were the result of factors other than more efficient utility service; namely, a problem with the operation of the applicants' PBR2 plans. According to the Commission, in each of 2021 and 2022 the plans did not operate as intended because customers paid rates (including the rates of return achieved by the applicants that exceeded the approved return and the threshold for reopener) without receiving the benefit of more efficient utility service. In reaching this conclusion, the Commission referred to the *Canada Evidence Act*, RSC 1985, c C-5 and found it "appropriate to adopt principles related to negative inferences; in particular, that a decision maker can draw a negative inference from the absence of relevant information on the record and may conclude that the matter that was not recorded did not occur or exist": Reopener Decision at para 110.

[9] The Commission also decided that the problem with the operation of the PBR2 plans could not be resolved without reopening the plans. In this respect, the Commission said it was not satisfied that the cost savings shared with customers through the rebasing process that established the applicants' PBR3 plans was "sufficient to exonerate a utility from demonstrating that the savings achieved during the PBR term were the result of efficiencies in response to the incentives of PBR": Reopener Decision at para 117.

[10] The Commission went on to say that "an adjustment to the PBR2 plans on a go-forward basis [was] not a possible remedy" and that "an appropriate remedy may be in the nature of refunds" to the applicants' customers: Reopener Decision at para 177. The Commission concluded that the Phase 2 proceeding would address the "quantum of the remedy and the mechanism by which the remedy is to be implemented" and prohibited the filing of further fact evidence: Reopener Decision at paras 181-182.

Proposed Grounds of Appeal

[11] The applicants take issue with the Reopener Decision on several grounds. Their fundamental concern is that the Commission imposed a new onus and evidentiary requirements the applicants could not and should not in the circumstances have had to meet to avoid having their PBR2 plans reopened. The applicants recognize the Commission has discretion in its ratemaking responsibilities but say, relying on *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 108, the Commission fell into reviewable error by exercising its discretion unfairly and in a way that could not have been intended by the Legislature. They also argue the Commission erred in law in drawing negative inferences from what it identified as the evidentiary gap. Although the Commission is not bound by the rules of evidence, the applicants argue the Commission chose to rely on a statutory provision and was required to apply the law

correctly. Finally, they argue that the Commission’s statement that an appropriate remedy may be refunds to customers amounts to impermissible retroactive ratemaking.

Decision

[12] Section 29 of the *Alberta Utilities Commission Act*, SA 2007, c A-37.2, provides an avenue of appeal from Commission decisions on “a question of jurisdiction or on a question of law”, with permission of a judge of this Court. All jurisdictional errors are errors of law. The distinction in the statute is merely a historical anomaly: *ATCO Electric Ltd v Alberta Utilities Commission*, 2023 ABCA 129 at para 15 and footnote 3, citing *JH Drilling Inc v Alberta (Natural Resources Conservation Board)*, 2014 ABCA 378 at para 15.

[13] An applicant seeking permission to appeal must demonstrate that the proposed question raises a “serious arguable point”: *Equus Rea Ltd v Alberta (Utilities Commission)*, 2022 ABCA 61 at para 25, citing *Atco Electric Ltd v Alberta (Energy and Utilities Board)*, 2003 ABCA 44 at para 17. Subsumed in this test are five factors the court generally considers:

- 1) Whether the point on appeal is of significance to the practice.
- 2) Whether the point raised is of significance to the action itself.
- 3) Whether the appeal is *prima facie* meritorious.
- 4) Whether the appeal will unduly hinder the progress of the action.
- 5) The standard of appellate review that would be applied if permission to appeal is granted.

Equus Rea at para 26.

[14] The Office of the Utilities Consumer Advocate opposes this application. It submits there are no questions of law raised by the applicants and that their arguments are, in any event, without merit. The Consumer Advocate argues that the applicants have misrepresented the Commission’s reasoning process and are merely seeking to have this Court reweigh the evidence and make new findings in the applicants’ favour. I disagree.

[15] It is clear that “by enacting a statutory appeal route the Legislature did not intend that the Court would take over the management of the [utility distribution and transmission] system in Alberta”: *ATCO Electric 2023* at para 16. I am mindful this means “the Court should not be quick to identify extricable questions of law in what are more properly categorized as mixed questions of fact and law, questions of policy, or matters of discretion”: *ATCO Electric 2023* at para 16, citing *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32.

[16] However, I am satisfied the applicants raise meritorious questions about whether the Reopener Decision is consistent with the applicable provisions and overriding purpose of the legislation that grants the Commission discretion to set just and reasonable rates through PBR (*ATCO Electric 2023* at para 60; see also *Vavilov* at para 108), whether the Commission considered

irrelevant factors or failed to consider relevant factors (*ATCO Electric 2023* at paras 20, 60; *AltaLink Management Ltd v Alberta (Utilities Commission)*, 2021 ABCA 342 at para 11), and whether the required standard of fairness was, in the circumstances, met. There are also arguable questions raised by the Commission's apparent reliance on section 30(2) of the *Canada Evidence Act* to draw negative inferences about how the applicants' 2021 and 2022 returns on equity were achieved. While the Commission is not bound by the rules of evidence applicable to judicial proceedings, if its impression of the law it purports to apply is erroneous, that is an error of law: *ATCO Electric 2023* at para 21.

[17] The parties agree that an appeal will not unduly hinder the progress of the underlying Commission proceeding. The issues raised are not just of significance to the parties. They are also significant to the practice in relation to reopening PBR plans, which is not yet well developed. The nature of the questions and the statutory right of appeal with no prescribed standard of review mean appellate standards of review apply: see *ATCO Electric 2023* at para 15; *Battle River Power Coop v Alberta Utilities Commission*, 2024 ABCA 259 at para 22; *Edmonton (City of) Library Board v Edmonton (City of)*, 2021 ABCA 355 at para 28.

[18] For these reasons, permission to appeal is granted on the grounds referenced in paragraph 16 above.

[19] The Commission has not yet determined remedy. It is therefore premature to consider whether allowing for recovery of past earnings based on purported overcompensation may constitute impermissible retroactive ratemaking. Permission to appeal on this proposed ground of appeal is denied.

Application heard on October 31, 2024

Reasons filed at Calgary, Alberta
this 10th day of December, 2024

Kirker J.A.

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