

# The Alberta Court of Appeal denies Leave to Appeal the AUC's Decision in the Electricity Line Loss Saga

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One of the Alberta electricity generation line loss proceedings took place shortly before the 2018 winter holidays. We have previously covered aspects of the line loss proceedings relating to Decision 790-D02-2015 on Phase 2 Module A of the proceedings before the Alberta Utilities Commission (AUC) in [a separate blog available here](#), as well as in our [2017 Year in Review blog](#). The Alberta Court of Appeal [denied an application for leave to appeal](#) the AUC's decision that it had jurisdiction to grant a retroactive or retrospective remedy for an unlawful cost recover methodology.<sup>1</sup> This decision has a significant impact on future applications for leave to appeal the decisions of regulatory bodies. It highlights the level of deference shown by the courts towards the expertise of regulatory tribunals even when they engage in questions of law and jurisdiction that do not come directly from their home statutes.

## Background

As brief background to the proceedings, [the AUC determined in 2012](#) that a methodology implemented by the Independent System Operator (ISO) since 2006 to distribute the costs of electricity loss on transmission lines as between contributing electricity generators was unjust, unreasonable, unduly preferential, and arbitrarily and unjustly discriminatory against certain generators. In effect, certain generators were overcharged relative to their contribution to line losses, while others were undercharged. [A further application for review and variance of that decision was denied in 2014.](#)

After determining that the methodology was unlawful, a second phase of the proceedings was held in order to determine what remedy, if any, would be granted. The remedy phase involved three separate questions, broken into "modules": [Module "A"](#) was to determine whether any remedy can or should be granted retroactively or retrospectively; [Module "B"](#) was to develop a new line loss rule, in the event that the AUC decided it had jurisdiction to grant a remedy; and [Module "C"](#) was to determine the actual redistribution of line loss credits.

Under Module "A," the AUC determined that it did have jurisdiction to grant a remedy in order to correct the over- and under-payments that had occurred since 2006. The AUC found that granting such a remedy did not amount to impermissible retroactive ratemaking. This was in part because the AUC found that the ISO's line loss rule was a "negative disallowance scheme" – a scheme where a utility (or in this case, the ISO) has the right to set its own tolls, but with rights reserved for the ratepayers to later challenge the tolls and seek a retroactive variance if the tolls are found to be unjust, unreasonable, or unjustly discriminatory.

A number of affected electricity generators sought leave to appeal the AUC's 2015 Module "A" decision.

## Court of Appeal Decision Denying Leave to Appeal

Under s. 29(1) of the the *Alberta Utilities Commission Act*,<sup>2</sup> parties may appeal a decision of the AUC on a question of jurisdiction or a question of law, if a judge of the Court of Appeal grants permission to do so. The Applicants argued that the AUC's decision raised questions of both jurisdiction and law, as the AUC's finding that it had jurisdiction to grant a retroactive or retrospective remedy was contrary to the general rule against retroactive ratemaking. Further, they argued that amendments made to the *Electric Utilities Act* in 2007,<sup>3</sup> which came into force after the original complaint was filed, indicated a legislative intent to prohibit retroactive or retrospective remedies.

The chambers judge agreed that the AUC's decision was clearly answering a jurisdictional question. However, the judge reasoned that the mere fact that the AUC dealt with a jurisdictional question did not necessarily mean that there is any matter of doubt that required the intervention of the Court. As Justice O'Ferrall put it, "[a] 'question' connotes the raising of a doubt. So a question of law or jurisdiction would be the raising of doubt about a proposition of law or the taking of jurisdiction."<sup>4</sup>

Further, a jurisdictional issue does not necessarily mean that the Court would give less deference to the AUC's decision. In this case, the chambers judge found that the AUC was applying law that was clearly within its expertise and regulatory mandate, even though it included aspects of the common law and legislation outside the AUC's home statute. The judge approached the application on the basis that a deferential standard of review would apply to any appeal.

Ultimately, the chambers judge concluded that issues of ratemaking, and the necessary balancing of competing regulatory interests, fit squarely within the core function of the AUC: "...who better to determine whether the relief or remedy the Commission had in mind constituted impermissible ratemaking than the Board?"<sup>5</sup> According to the chambers judge, the Court is not well-positioned to make the kinds of balancing and public interest decisions that are at stake in this case. Thus, the case "does not raise questions of law or jurisdiction which require an appeal to the Court of Appeal."<sup>6</sup>

### Implications

With leave to appeal being denied, it seems that the retroactive remedy issue in the line loss saga has now been finally resolved. This decision may have a significant impact on future applications for leave to appeal the decisions of the AUC. The reasons show a clear posture of deference towards the AUC's ratemaking function, even when it engages questions of law and jurisdiction that do not come directly from the regulator's own statute. In particular, the chambers judge noted that the common law development of ratemaking principles in the Courts originated from "roughly 100 years of public utility regulation" in Alberta and elsewhere.<sup>7</sup>

Another notable feature in the reasons for decision is the discussion of the meaning of the rule against retroactive or retrospective ratemaking. After noting that there is no blanket statutory prohibition against retroactive ratemaking, the chambers judge opined that this was for good reason that the application of the general principle still depends on balancing a variety of countervailing considerations and regulatory objectives. Ultimately, the purpose is still to achieve sound utility regulation, rather than a rigid application of defined rules. Overall, this decision highlights the important role of the regulator in its quasi-judicial function.

<sup>1</sup> *Capital Power Corporation v Alberta Utilities Commission*, 2018 ABCA 437 (*Capital Power*), [available online](#).

<sup>2</sup> *Alberta Utilities Commission Act*, SA 2007, C A-37.2, [available online](#).

<sup>3</sup> *Electric Utilities Act*, SA 2003, C E-5.1, as amended, [available online](#).

<sup>4</sup> *Capital Power* at para 32.

<sup>5</sup> *Capital Power* at para 55.

<sup>6</sup> *Capital Power* at para 78.

<sup>7</sup> *Capital Power* at para 45.

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