AUC
Alberta Utilities Commission

TransAlta Corporation

Decision on Preliminary Question
Application for Review of Decision 25369-D01-2020
Direct Assigned Capital Deferral Account for the Edmonton Region Project

April 22, 2021

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Proceeding 26305
Application 26305-A001

April 22, 2021

Published by the:
Alberta Utilities Commission
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Calgary, Alberta T2P 0G5

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Contents

1 Decision Summary 1

2 Decision 25369-D01-2020 background and review request 1

3 The Commission's review process 3

4 Discussion of issues and review panel findings 3
4.1 The Commission breached TransAlta's right to procedural fairness 4
4.2 The Commission misinterpreted or misapplied the prudence test 6
4.3 The Commission erred in law in its consideration of Rule 007, the duty to consult, and the ROW Agreements 9
4.4 The Commission erred in basing the disallowances on the entirety of the cost of the Edmonton Region Project, and not the incremental costs of the delays 11

5 Decision 12

Alberta Utilities Commission
Calgary, Alberta

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Decision 26305-D01-2021
Proceeding 26305

1 Decision Summary

1. In this decision, the Alberta Utilities Commission denies an application by TransAlta Corporation to review and vary the Commission's findings in Section 3.2.10 of Decision 25369-D01-2020.[1] In those findings, the Commission determined that not all of the costs incurred for the construction of transmission line 1043L-Reserve were prudently incurred. It reduced, by 15 per cent, the transmission line costs as well as the legal and related costs attributable to negotiating and concluding a Cooperation Agreement with the Enoch Cree Nation (ECN).

2 Decision 25369-D01-2020 background and review request

2. Decision 25369-D01-2020 (the Decision) concerned applications from TransAlta and AltaLink Management Ltd. for approval and any reconciliation of capital additions related to the D.0213 Edmonton Region 240 kV Upgrades project, including all costs for the 1043L-Reserve component of that project.

3. The construction of the 1043L-Reserve portion of the project progressed through the following stages:

(i) Pre-application stage: June 2009 to June 2010. This stage included consultation with the project proponents as required by the Commission prior to filing a facilities application.

(ii) Facilities application: July 2010. The facilities application was filed in July 2010 and approved on August 12, 2011 in Decision 2011-340.

(iii) Pre-construction stage: June 2010 to October 2011.

(iv) Construction stage: December 2011 to May 2012. Construction on the 1043L-Reserve was approximately 20 per cent complete by the end of this period.

(v) Stop work order and MOU negotiations stage: May 2012 to May 27, 2015. ECN first issued a stop work order in May 2012. Work was recommenced on August 27, 2012, and again stopped three days later. From September 2012 to

[1] Decision 25369-D01-2020: AltaLink Management Ltd. and TransAlta Corporation Direct Assigned Capital Deferral Account for the Edmonton Region Project, Proceeding 25369, December 10, 2020.

May 2015, negotiations stopped and started. No work on the 1043L-Reserve proceeded.

(vi) Cooperation Agreement stage: June 2015 to March 2016. The Cooperation Agreement was signed March 16, 2016.

(vii) Completion of Construction: August 2016 to September 2016.

4. The Commission determined that TransAlta and AltaLink had failed to demonstrate that their actions were prudent, finding:

> 118. As a result, the Commission is unable to find that all of the funds expended on the construction of 1043L-Reserve (including AFUDC attributable to TransAlta) were prudently incurred. The Commission further finds and directs that it would be just and reasonable to reduce by 15 per cent the amount of expenditures eligible for recovery by the applicants. The Commission also finds and directs that it would be just and reasonable for the recoverable amount of legal and related costs incurred by the utilities associated with negotiating and concluding the Cooperation Agreement (as opposed to the costs of the agreement itself) to likewise be reduced by 15 per cent. The basis for doing so is the same, namely, that absent sufficient evidence that the manner in which the applicants conducted their project consultations with Enoch between July 2010 and May 2012 was prudent or reasonable, it is reasonable to conclude that the process of arriving at a Cooperation Agreement was more expensive than it needed to be. The Commission leaves it to the applicants in both cases to determine amongst themselves the appropriate division of the disallowance of funds expended.

5. TransAlta filed its application to review and vary this finding pursuant to Section 10 of the *Alberta Utilities Commission Act* and Rule 016: *Review of Commission Decisions*. The Commission designated the review application as Proceeding 26305.

6. The Commission issued a filing announcement for the review application and, by letter dated February 10, 2021, established a process schedule for the proceeding. AltaLink filed a submission supporting TransAlta's request and, on February 22, 2021, TransAlta advised that it did not intend to file a reply. The Commission considers the record for this proceeding to have closed on February 22, 2021.

7. In reaching the determinations set out within this decision, the Commission has considered all relevant materials comprising the record of this proceeding and those of Proceeding 25369. Accordingly, references in this decision to specific parts of the record in this proceeding are intended to assist the reader in understanding the Commission's reasoning relating to a particular matter and should not be taken as an indication that the Commission did not consider all relevant portions of the record with respect to that matter.

8. In this decision, the members of the Commission panel who authored the Decision will be referred to as the "hearing panel" and the members of the Commission panel considering the review application will be referred to as the "review panel."

3 The Commission's review process

9. The Commission's authority to review its own decisions is discretionary and is found in Section 10 of the *Alberta Utilities Commission Act*. Rule 016 sets out the process for considering an application for review.

10. The review process has two stages. In the first stage, a review panel decides if there are grounds to review the original decision (the "preliminary question"). If the review panel decides to review the decision, it moves to the second stage where it decides whether to confirm, vary, or rescind the original decision (the "variance question").

11. In this decision, the review panel has decided the preliminary question.

12. Section 4(d) of Rule 016 requires an applicant to set out in its application the grounds it is relying on. In its review application, TransAlta relies on section 4(d)(i), the ground that the Commission made one or more errors of fact, law or jurisdiction.

13. TransAlta has requested the Commission exercise its authority pursuant to Section 6(3)(a) of Rule 016, which states:

> 6(3) The Commission may grant an application for review of a decision, in whole or in part, where it determines, for an application for review pursuant to subsections 4(d)(i), (ii) or (iii), that the review applicant has demonstrated:
>
> (a) In the case of an application under subsection 4(d)(i), the existence of an error of fact, law or jurisdiction is either apparent on the face of the decision or otherwise exists on a balance of probabilities that could lead the Commission to materially vary or rescind the decision.

4 Discussion of issues and review panel findings

14. TransAlta raised four grounds in its review:

(i) The hearing panel breached TransAlta's right to procedural fairness.

(ii) The hearing panel misinterpreted or misapplied the prudence test.

(iii) The hearing panel erred in law in its consideration of Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations and Hydro Developments*, the duty to consult and the right of way (ROW) agreements between TransAlta and ECN.

(iv) Alternatively, the hearing panel erred in basing the disallowances on the entirety of the cost of the Edmonton Region Project, and not the incremental costs of project delays.

15. The first three grounds involve interrelated matters.

4.1 The Commission breached TransAlta's right to procedural fairness

16. TransAlta argued that the hearing panel made an error of law because the hearing panel disallowed costs on the basis of the hearing panel's finding in the Decision at paragraph 104 that the parties failed to meet the consultation requirements as set out in Rule 007. TransAlta asserted that it had no way of knowing that the hearing panel was going to rely on Appendix A1 of Rule 007 and pointed to the fact that no information requests (IRs) or notice was provided by the hearing panel during the hearing process that would have alerted TransAlta to the fact that its compliance with Appendix A1 of Rule 007 was an issue that the hearing panel was concerned with. TransAlta asserted that this failure demonstrated an error of law for which a review should be granted. In its review application, TransAlta characterizes the Commission's application of the Rule 007 requirements as it relates to TransAlta's consultation in the June 2010 to October 2011 period as a "New Issue."[2]

17. The Commission owes all parties in its proceedings a duty of procedural fairness. The Supreme Court of Canada's decision in *Baker v Canada (Minister of Citizenship & Immigration)*[3] is the leading authority on issues of procedural fairness as applicable to administrative tribunals. As set out in that decision, the purpose of the participatory rights contained within the duty of procedural fairness is "to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context," with an opportunity for those affected by the decision to "put forward their views and evidence fully and have them considered by the decision-maker."[4] Moreover, the requirements of the duty of procedural fairness are flexible and variable, and are dependent on the context of the particular statute and the rights affected.

18. As noted by the hearing panel, at all times, the onus was on TransAlta and AltaLink to demonstrate the prudence of their costs.[5] Procedural fairness requires the Commission to provide the utilities with a sufficient opportunity to present their case. The review panel notes that the process established by the hearing panel for its consideration of the matters in Proceeding 25369 included information requests to each of AltaLink, TransAlta and ECN, filing of intervener evidence, information requests on intervener evidence, rebuttal evidence from TransAlta and AltaLink, and written argument and reply argument.

19. Moreover, TransAlta and AltaLink are sophisticated parties and understand the legislative scheme and Commission rules applicable to their regulated operations.

20. As set out in paragraph 107 of the Decision, the documentation requirements of Appendix A[6] to Rule 007 include a requirement to document consultation commitments made and to have a process in place to monitor and follow-up on commitments (Appendix A, page 40).

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2 TransAlta characterized the New Issue as "the application of Commission Rule 007: Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations and Hydro Developments (Rule 007) and the content of the duty to consult in the June 2010 to October 2011 period." The review panel's findings regarding the content of the duty to consult are addressed at paragraph 40 of this decision.

3 *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699.

4 *Baker*, paragraph 22.

5 Decision 25369-D01-2020, paragraph 99.

6 Rule 007 Appendix A, in force at the time of TransAlta's participant involvement program, is equivalent to Rule 007 Appendix A1, in force at the time of the original proceeding.

This expectation is found in Appendix A1 of the version of Rule 007 in force in 2019 (at page 56), and continues to be included in the current version of Rule 007 (at page 56).

21. Notwithstanding these requirements, the hearing panel determined from the record that "there is no record of communication with Enoch from a month prior to the facilities application (June 2010) to just two months before AltaLink restarted construction on the reserve (October 2011), a period of one year and four months."[7] Moreover, the hearing panel noted in paragraphs 112 and 113 of the Decision, the absence of any documentary evidence to support the requirement to document its commitments.

22. The review panel has reviewed the Proceeding 25369 record and notes that the Commission asked information requests seeking information specifically on consultation, including the commitments made, to ECN during the period in question. Further, evidence and reply argument submissions from TransAlta also indicate that TransAlta was aware that the nature of its commitments to ECN were in issue.

23. The review panel notes that the record of the original proceeding indicates that:

- The Commission's IRs contained 115 requests related to consultation (79 to AltaLink, 36 to TransAlta)
- The CCA's IRs contained 36 requests related to consultation (39 to AltaLink, 36 to TransAlta)
- TransAlta's rebuttal evidence submission addressed consultation, noting that it "understood that the ECN needed to be consulted before, during, and after the Project was completed."[8] [emphasis added]
- TransAlta addressed its responses to the above noted IRs in its reply argument,[9] stating:

  > 15. TransAlta has met its onus to substantiate the reasonableness of its Project execution and incurred costs. *TransAlta has also fully answered all information requests made of it, and made genuine efforts to find all Project-related documents.* That a certain document no longer exists, or that TransAlta and AltaLink have been unable to find a document after multiple searches, does not take away from this fact. Nor does it mean that TransAlta has buried documents. [emphasis added]
  >
  > …
  >
  > 20. *TransAlta has exhaustively searched its records to produce all records it has been able to find that relate to this matter and the issues raised by the Commission and the CCA.* TransAlta has previously explained that, because the events in the current Proceeding occurred 8-10 years ago, and because of normal staff turnover and document retention issues, TransAlta has been unable to find any further documentation responsive

[7] Decision 25369-D01-2020, paragraph 111.
[8] Exhibit 25369-X0195, Rebuttal Evidence of TransAlta Corporation, August 28, 2020, paragraph 14.
[9] Exhibit 25369-X0215, TransAlta Final Reply Argument (September 25, 2020), September 25, 2020, paragraphs 15, 20.

> to the CCA's requests. The scope of source documents that TransAlta has been unable to find is narrow. [emphasis added] [footnote omitted]

24. The record of the original proceeding suggests that not only did the hearing panel make known that the consultation commitments made by TransAlta to ECN were of interest, it provided several opportunities for TransAlta to provide the evidence it was relying on in support of its applied-for relief. However, TransAlta, by its own admission, had nothing further to provide in evidence. The review panel finds that the process established provided TransAlta with a full opportunity to present its case to support the prudence of its costs.

25. For all of the above reasons, the review panel finds that TransAlta has not demonstrated that an issue of procedural fairness has arisen either on the face of the Decision or on a balance of probabilities that could lead the Commission to materially vary or rescind the Decision.

26. The review panel dismisses TransAlta's request for a review on this ground.

4.2 The Commission misinterpreted or misapplied the prudence test

27. TransAlta argued that the hearing panel correctly held that it would apply the prudence test to the Edmonton Region Project costs but then modified or ignored components of the test in its application thus committing an error of law. TransAlta stated that this error is exemplified in the hearing panel's determination that TransAlta and AltaLink failed to adequately demonstrate compliance with Rule 007, and that this lack of compliance led to a more acrimonious, expensive and potentially longer interregnum before agreement could be reached on the issues dividing the transmission facility owners (TFOs) and ECN.

28. More specifically, TransAlta noted that the hearing panel ignored uncontroverted evidence that TransAlta and AltaLink met multiple times with ECN between October 2011 and May 2012, arguing that the hearing panel incorrectly concluded that TransAlta and AltaLink's conduct was imprudent by failing to live up to commitments made to ECN. TransAlta also stated that the hearing panel's analysis was predicated on what actions could have been taken to hypothetically reduce the delay caused by the work stoppage which, it asserted, was impermissible hindsight. It argued that there was no evidence before the hearing panel that the work stoppage was a foreseeable consequence of TransAlta or AltaLink's consultation activities.

29. TransAlta further argued that the hearing panel ignored relevant evidence including meetings between the ECN liaison and TransAlta and AltaLink on October 14, 2011, December 8 to 10, 2011, January 3, 5, 6, and 24 to 25, 2012, and February 1 to 7, 2012, that it claimed demonstrated that monthly construction meetings took place and that it had met its commitments.

30. The onus to demonstrate that the costs incurred are prudent falls on the applicant.[10] Issues of onus, standard of proof, and prudence have all been addressed repeatedly by the Commission in previous decisions. In particular, in Decision 3585-D03-2016,[11] the Commission provided extensive direction and guidance on the test for prudence and the burden of proof required to be

[10] Section 121(4) of the *Electric Utilities Act*.

[11] Decision 3585-D03-2016: AltaLink Management Ltd., 2012 and 2013 Deferral Accounts Reconciliation Application, Proceeding 3585, Application 1611090-1, June 6, 2016.

met by a utility seeking to recover capital costs in a deferral account, such as the application before the hearing panel in the original proceeding. The Commission stated:

> 110. The Commission previously defined the test for prudence or reasonableness of costs in Decision 2001-110:
>
> > In summary, a utility will be found prudent if it exercises good judgment and makes decisions which are reasonable at the time they are made, based on information the owner of the utility knew or ought to have known at the time the decision was made. In making decisions, a utility must take into account the best interests of its customers, while still being entitled to a fair return. [footnote omitted]
>
> …
>
> 114. Recently, the SCC, in two parallel decisions, one involving the Ontario Energy Board and one involving this Commission provided guidance regarding the role of the tribunal in determining prudence and the burden of proof. Justice Rothstein, writing for the court, in *ATCO Gas and Pipelines Ltd v. Alberta* (Utilities Commission), commenting on the Alberta legislative scheme, stated:
>
> > The prudence requirement is to be understood in the sense of the ordinary meaning of the word: for the listed costs and expenses to warrant a reasonable opportunity of recovery, they must be wise or sound; in other words, they must be reasonable. Nothing in the ordinary meaning of the word "prudent" or the use of this word in the statute as a standalone condition says anything about the time at which prudence must be evaluated. Thus, neither the ordinary meaning of "prudent" nor the statutory language indicate that the Commission is bound by the legislative provisions to apply a no-hindsight approach to the costs at issue, nor is a presumption of prudence statutorily imposed in these circumstances. In the context of utilities regulation, there is no difference between the ordinary meaning of a "prudent" cost and a cost that could be said to be reasonable. It would not be imprudent to incur a reasonable cost, nor would it be prudent to incur an unreasonable cost. Further, the burden of establishing that the proposed tariffs are just and reasonable falls on public utilities, which necessarily imposes on them the burden of establishing that the costs are prudent.[12]
>
> 115. The burden of proof to establish prudence is on the applicant. The Commission has no obligation to presume prudence when no evidence is provided to the contrary and must evaluate all costs on the merits of the evidence (or lack of evidence) before it.

31. The review panel finds that the hearing panel did not err in law or fact when it disallowed costs on the basis that TransAlta failed to meet its onus to establish the prudence of all of its costs.

32. As discussed in Section 4.1 above, Rule 007 states that commitments made as part of consultation prior to the filing of an application are expected to be documented and the applicant is expected to have a process in place to monitor and follow-up on such commitments. This requirement under Rule 007 is ongoing under the Participant Involvement Program (PIP). Inherent in this ongoing requirement is an expectation that an applicant will meet any

[12] *ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd. v Alberta Utilities Commission and the Office of the Utilities Consumer Advocate of Alberta*, 2015 SCC 45, page 2.

commitments made in the PIP. This requirement, among others, was referenced by the hearing panel in the Decision, at paragraph 107.

33. The hearing panel found that TransAlta and AltaLink made specific commitments to the ECN as noted in the Decision, at paragraph 110:

> As described more fully in paragraph 52 above, AltaLink documented two commitments to Enoch in its July 28, 2010, facilities application: to "continue discussions with First Nations regarding the Project" and "prior to construction and maintenance of the Project," it would "notify Enoch and provide them with information regarding construction and maintenance activities and available contracts."

34. TransAlta argued that the hearing panel ignored the uncontroverted evidence that it had met repeatedly with ECN. TransAlta has pointed to meetings with the ECN liaison as the evidence that it claims the hearing panel ignored. A review of paragraphs 55 to 57 of the Decision reveals that the hearing panel was aware of this evidence and further, the hearing panel noted the evidence that was lacking and which would have been reasonably expected to be provided. Additionally, as stated by the hearing panel in paragraphs 62 and 63 of the Decision, the record showed that the role of the ECN liaison was not intended to explore employment opportunities, one of the principle commitments made to the ECN. Moreover, the time spent by the liaisons on site was limited.

35. The Court, in *ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd. v Alberta Utilities Commission and the Office of the Utilities Consumer Advocate of Alberta*, 2015 SCC 45, stated that the Commission has no obligation to presume prudence when no evidence is provided to the contrary and must evaluate all costs on the merits of (or lack of) evidence before it. The review panel agrees with the hearing panel findings that it would have been reasonable to expect that evidence "such as meeting dates beyond October 27 or action items, […] a written evidential record to support this assertion, such as emails arranging the meetings, calendar invites, meeting notes or invoices for catering"[13] would have been produced to demonstrate the basis on which TransAlta was meeting its commitments to ECN. The hearing panel found that this gap in the evidence prevented TransAlta from establishing prudence with respect to the documented commitments to the ECN noted above. The hearing panel was entitled to rely on the representations made by TransAlta, particularly the representations that it had no further information regarding consultation to provide on the record (see paragraph 24 above), in coming to its findings.

36. In Decision 2012-124,[14] the Commission addressed the role of a review panel and established principles for its consideration of review applications. Included among those principles is that it is not the review panel's task to second guess the weight assigned by the hearing panel to various pieces of evidence. Findings of fact and inferences of fact made by the hearing panel are entitled to considerable deference, absent an obvious or palpable error.[15] The review panel finds no basis to question the hearing panel's assessment of the evidence – or lack

[13] Decision 25369-D01-2020, paragraph 57.
[14] Decision 2012-124: AltaLink Management Ltd. and EPCOR Distribution & Transmission Inc., Decision on Request for Review and Variance of AUC Decision 2011-436 Heartland Transmission Project, Proceeding 1592, Applications 1607924-1, 1607942-1, 1607994-1, 1608030-1, 1608033-1, May 14, 2012.
[15] Decision 2012-124, paragraph 31.

of evidence – leading to the finding that TransAlta failed to meet its onus to establish the prudence of all of its costs.

37. The review panel dismisses TransAlta's argument that the hearing panel applied impermissible hindsight when the hearing panel concluded that the work stoppage was a foreseeable consequence of TransAlta or AltaLink's consultation activities. As set out in paragraph 101 of the Decision, the hearing panel understood that the prudence test required an analysis of the evidence of the conduct at the time and not after the fact looking at the work stoppage in hindsight. The hearing panel did not assess prudence applying hindsight. Rather, the Decision reveals on its face that the hearing panel assessed the actions of TransAlta as against a reasonable person making a decision at the time and on the basis of the evidence provided (or the lack thereof) on the record of the proceeding.[16] The methodology employed by the hearing panel is not an error of law and is consistent with the application of the prudence test.

38. For all of the above reasons, the review panel finds that TransAlta has not demonstrated that the hearing panel erred in law or in fact and misinterpreted or misapplied the prudence test. The hearing panel applied the prudence test correctly and there is no error of law or fact on the face of the Decision or on a balance of probabilities that could lead the Commission to materially vary or rescind the Decision. The review panel dismisses TransAlta's request for a review on this ground.

4.3 The Commission erred in law in its consideration of Rule 007, the duty to consult, and the ROW Agreements

39. As noted in Section 4.1 above, in the context of procedural fairness, TransAlta stated that the hearing panel erred in law by scrutinizing TransAlta's engagement with the ECN in the period that followed the facilities application through the lens and documentary requirements of Rule 007. TransAlta argued that the stated purpose of Rule 007 is to guide applicants preparing a participant involvement program as part of and in contemplation of a facilities application. TransAlta noted that Rule 007 does not impose freestanding consultation requirements for all phases of a construction project, but dictates how to prepare a facilities application and consult with affected stakeholders in advance of filing and potentially going forward where changes in project scope or circumstances necessitate re-engagement. As described in Section 4.1 above, the review panel considers that the ongoing nature of consultation commitments made by an applicant to a stakeholder such as ECN is evident in Rule 007. Further, when commitments are made by an applicant to stakeholders in the context of Rule 007 consultation, the Commission's expectation is that they will be met. As a result, it is foreseeable that an applicant's actions with respect to those commitments may be tested by the Commission in a subsequent prudence review. Accordingly, the review panel disagrees with TransAlta's narrow characterization of Rule 007 and dismisses TransAlta's request for a review on this ground.

40. TransAlta also asserted an error of law arose because the hearing panel "determined the scope and content of the duty to consult owed by TransAlta and AltaLink to the ECN, and the adequacy of such consultation, solely on the basis of Rule 007 without regard to the *Constitution Act* or notice to the Attorney General of Canada."[17] The review panel finds that TransAlta appears to conflate references to consultation under Rule 007 with the Crown's duty to consult

[16] Decision 25369-D01-2020, paragraphs 102 and 103.
[17] Exhibit 26305-X0001, RV Application re Decision 25369-D01-2020, February 8, 2021, paragraph 50.

affirmed by the Supreme Court of Canada, which considers consultation and accommodation of Indigenous groups when conduct might adversely impact potential or established Aboriginal or treaty rights. The review panel considers that the hearing panel's examination of TransAlta's and AltaLink's consultations with the ECN was conducted in the context of reviewing the actions of these utilities for prudence, in particular, with respect to their follow up on commitments made to ECN: to "continue discussions with First Nations regarding the Project" and that "prior to construction and maintenance of the Project," to "notify Enoch and provide them with information regarding construction and maintenance activities and available contracts."[18] Accordingly, TransAlta has failed to demonstrate that an error of law exists on this ground.

41. TransAlta, in support of its contention that the hearing panel overlooked TransAlta's legal right to access the ROWs, including how the ROW agreements circumscribe the scope and content of the duty owed by TransAlta and AltaLink to consult with the ECN, referred to paragraph 114 of the Decision in which the hearing panel stated:

> … notwithstanding TransAlta's legal rights to access the ROW on the reserve, had the applicants simply lived up to the written and oral commitments they made to Enoch after the initial set of consultations (between June 2009 and June 2010), there are reasonable grounds to believe that such an approach would have led to a less acrimonious, less expensive and potentially much shorter interregnum before agreement could be reached on the issues dividing the applicants and Enoch.

42. However, the review panel considers that the whole of that paragraph shows that the hearing panel was not dismissing or minimizing the weight to be afforded to TransAlta's legal right to access the ROWs. Rather, the hearing panel was considering the detrimental effect of TransAlta's failure to adhere to its commitments during the pre-construction stage, a period of 16 months. The hearing panel explains in its rationale at paragraph 114 that a reduction of expenditures eligible for recovery was directed as a result of TransAlta's failure to demonstrate that it met the written and oral commitments made to the ECN during the "gap" (the entire paragraph is reproduced below):

> To the contrary, the significant 16-month lacuna between consultations of any kind – much less any timely follow-up consultations as promised in writing by the applicants, as well as an additional six months during which some meetings may have taken place but about which little information exists on the documentary record, all speak to a failure to act prudently or, at the very least, to the absence of evidence demonstrating that, notwithstanding this failure, the conduct of the applicants remained prudent and, at all relevant times, reflected sound judgment. In other words, the applicants, by virtue of failing to build upon a robust record of initial consultations, to establish closer working relationships with Enoch when the opportunity presented itself, and to deliver tangible and timely benefits with respect to contract and employment opportunities – contrary to the expectations they had created in this regard with Enoch, find themselves without compelling evidence that their conduct, including their record of consultations with Enoch, was in all material respects prudent over the full duration of the Project. The evidence in this proceeding, as marshalled by the applicants themselves, in fact, suggests the opposite conclusion. That is, notwithstanding TransAlta's legal rights to access the ROW on the reserve, had the applicants simply lived up to the written and oral commitments they made to Enoch after the initial set of consultations (between June

[18] Decision 25369-D01-2020, paragraph 110.

> 2009 and June 2010), there are reasonable grounds to believe that such an approach would have led to a less acrimonious, less expensive and potentially much shorter interregnum before agreement could be reached on the issues dividing the applicants and Enoch.

43. The review panel finds that TransAlta has failed to demonstrate an error on this ground and denies TransAlta's request for a review on this basis.

4.4 The Commission erred in basing the disallowances on the entirety of the cost of the Edmonton Region Project, and not the incremental costs of the delays

44. TransAlta submits that the hearing panel contradicted its own findings in paragraph 116 of the Decision because the disallowance made by the hearing panel appeared to apply to the entirety of the costs of the 1043L-Reserve portion of the Edmonton Region Project. TransAlta submits that a disallowance of 15 per cent of all of its costs associated with the 1043L-Reserve portion of Edmonton Region Project is tantamount to a finding that the costs associated with the 1043L-Reserve portion of the Edmonton Region Project itself were imprudent from the outset, despite an absence of evidence or argument that any of these prior expenses were imprudent or unreasonable. TransAlta submits that a determination made on this basis is an error in law and is particularly the case when the Commission sought and obtained evidence in respect of these incremental costs during the IR process only to then decline to make use of it.

45. The review panel finds that the argument advanced by TransAlta does not demonstrate an error of law or fact. When the Decision is read in its entirety, it is evident that the hearing panel considered the prudent conduct of the parties during all phases of construction of the Edmonton Region Project. The hearing panel concluded that the parties failed to provide sufficient evidence demonstrating prudent behavior and, in particular, failed to demonstrate that the commitments made to ECN had been met. It was this failure that supported the hearing panel's findings. Paragraphs 115 and 116 acknowledge that other factors contributed to the work delay and, for this reason, the hearing panel did not apportion complete responsibility of the work stoppage to the parties. The fact that the hearing panel did not refer to evidence provided in a specific information request is not an error of law. The hearing panel was free to consider and weigh all of the evidence before it. As noted by the Supreme Court of Canada in *Newfoundland Nurses Union v Newfoundland and Labrador (Treasury Board)*:"[19]

> Courts must be careful not to confuse a finding that a tribunal's reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it.

46. Regarding the hearing panel's assessment that 15 per cent of the project costs reasonably represented the extent of the imprudent conduct, the *Electric Utilities Act* grants the Commission broad discretion to determine what costs are prudent or reasonable. The exercise of this discretion does not require a line by line evaluation and apportionment of each cost incurred by the parties on the 1043L-Reserve portion of the Edmonton Region Project to determine what portion of those costs should be disallowed as a consequence of the failure of the parties to demonstrate prudence. The hearing panel was entitled to exercise their discretion based on their

[19] *Newfoundland Nurses Union v Newfoundland and Labrador (Treasury Board)*, 2011 3 SCR 708, paragraph 21.

interpretation of the evidence before them and the weight they assigned to that evidence. As stated by Justice Fruman in *Epcor v Alberta (Energy and Utilities Board)*, 2003 ABCA 374, at paragraph 23:

> The Board is free to accept or reject evidence presented by the parties and, as an expert tribunal, it is entitled to use its expertise to arrive at different conclusions than the parties.

47. The review panel finds that the hearing panel's assessment of the disallowance was a determination that, on its face or on a balance of probabilities, was not unreasonable. TransAlta has not shown, either on a balance of probabilities or apparent on the face of the Decision, that an error in fact or law exists on this ground that could lead the Commission to materially vary or rescind the Decision. Accordingly, TransAlta's request for a review on this ground is denied.

5 Decision

48. In answering the preliminary question, the review panel finds that TransAlta has not met the requirements for a review of Decision 25369-D01-2020 and the application for review is dismissed.

Dated on April 22, 2021.

Alberta Utilities Commission

(original signed by)

Vera Slawinski
Panel Chair

(original signed by)

Cairns Price
Commission Member