Milner Power Inc.

Decision on Preliminary Question
Application for Review of Decision 26084-D01-2021
Request for Guidance on the Interest Calculation to be Applied to the Proceeding 790 Module C Settlement Process

June 22, 2021

Alberta Utilities Commission
Decision 26424-D01-2021
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1 Decision

1. Milner Power Inc. has requested that the Commission review and vary its findings in Decision 26084-D01-2021.[1] In those findings, the Commission determined that a simple interest calculation should be applied to loss factor charges recalculated for the period between January 1, 2006, and December 31, 2016 (the historical period). Milner Power argues that the Commission erred by not directing the application of compound interest to the historical period loss factor charges.

2. The Commission has a discretionary authority to grant a review of its own decisions. Milner Power has the onus of demonstrating the errors it has raised. The Commission finds that Milner Power has not satisfied that onus. The review application is denied.

2 Background

3. In November 2020, the Alberta Electric System Operator (AESO) requested direction from the Commission as to whether the interest applied to loss factor charges, recalculated for the historical period, should be determined using a monthly (or some other frequency) compound interest calculation (compound interest) or a simple interest calculation (simple interest). The Commission released Decision 26084-D01-2021 (the Decision) finding that the loss factor charges should be calculated using simple interest.

4. On March 26, 2021, the Commission received a review application from Milner Power requesting a review and variance of the Decision. The review application was filed pursuant to Section 10 of the *Alberta Utilities Commission Act* and Rule 016: *Review of Commission Decisions*.

5. A filing announcement of the review application was released on March 29, 2021, and on March 31, 2021, the Commission issued a letter which advised parties that pursuant to Rule 016, consideration of the review application would follow the two-step process provided for in the rule. That letter also established a process schedule for submissions or comments on the review application from other parties.

[1] Decision 26084-D01-2021: Alberta Electric System Operator Request for Guidance on the Interest Calculation to be Applied to the Proceeding 790 Module C Settlement Process, January 26, 2021.

6. The Balancing Pool[2], Capital Power Corporation[3], ENMAX Energy Corporation[4] and TransAlta Corporation[5] each filed submissions opposing Milner's request for a review.

7. On April 15, 2021, as part of its reply submission, Milner Power objected to the Commission receiving submissions from parties opposed to its application.[6] On April 30, 2021, the Commission advised that it would consider the submissions from all parties that were filed at that time. The record for this proceeding closed on that date.

8. The subject of this review concerns determinations in Proceeding 790, Proceeding 26084, and the record of this proceeding, Proceeding 26424. Accordingly, for clarity, each Commission panel is referred to as follows:

(a) The members of the Commission panel who authored the decisions in Proceeding 790 are referred to as the "790 panel."

(b) The members of the Commission panel who authored Decision 26084 will be referred to as the "hearing panel."

(c) The members of the Commission panel considering the review application will be referred to as the "review panel."

9. In reaching its determinations, the review panel has reviewed the pertinent portions of the Decision and relevant materials comprising the record of this proceeding and of proceedings 790 and 26084. Accordingly, references in this decision to specific parts of the record 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 several records with respect to the matter.

3 The Commission's review process

10. 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.

11. 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).

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

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2 Exhibit 26424-X0009, Balancing Pool Submission, April 8, 2021.
3 Exhibit 26424-X0013, Submissions of Capital Power Corporation, April 8, 2021.
4 Exhibit 26424-X0014, ENMAX Energy Corporation - Response, April 8, 2021.
5 Exhibit 26424-X0010, TransAlta Submission, April 8, 2021.
6 Exhibit 26424-X0017, Milner Power Inc. Cover Ltr to Reply Submissions, April 15, 2021.

13. Section 4(d) of Rule 016 requires an applicant to set out in its application the grounds on which it is relying. In its review application, Milner Power relied on section 4(d)(i), errors of fact, law or jurisdiction.

14. Milner Power has requested the Commission exercise it 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

15. Milner Power argued that the Commission made errors of fact, law and jurisdiction on the following six grounds:

(a) By acting on false assumptions, thus erring in fact and in law.

(b) By unlawfully forcing some Alberta electricity market participants to provide financing advantages to other market participants, thus unlawfully injuring some market participants and unlawfully benefiting other market participants, thereby undermining the fairness, efficiency and competitiveness of the Alberta electricity market.

(c) By unlawfully undermining the reasonableness and justness of the ISO's rates by causing customers of the same ISO rate class to receive vastly different rates through an unjust, unjustifiable and unreasonable cross-subsidy forced upon some ISO customers and benefitting other ISO customers of the same rate class, thus violating the Commission's duty to ensure that the ISO's rates are at all times just, reasonable and not unduly preferential, arbitrarily or unjustly discriminatory or inconsistent with or in contravention of the *Electric Utilities Act*, R.S.A. 2003, c. E-5.1 ("EUA"), and the *Alberta Utilities Commission Act*, SA 2007, cA-37.2 ("AUCA"), and other laws and enactments.

(d) By erroneously assuming that compliance with its duties under its governing statutes is a matter of discretion.

(e) By assuming, without accepting, that the Commission's compliance with its duties under its governing statutes is a matter of discretion, by failing to exercise its discretion in a fair, reasonable and judicious manner, in, *inter alia*, (i) basing the exercise of its discretion on irrelevant considerations, and (ii) failing to take into account relevant considerations.

(f) By assuming, contrary to law, that the default position when awarding interest is a simple interest award.

16. In order to be successful, Milner Power must demonstrate that these errors are either apparent on the face of the Decision or are demonstrated on a balance of probabilities (more likely than not) and that the error, if demonstrated, is material. That is, would the existence of the error lead the Commission to vary the findings in the decision?

17. Several of the grounds raised are interrelated and have been addressed as such.

4.1 The Commission acted on false assumptions

18. Milner Power stated that the hearing panel "erred in finding that no party in Proceeding 790 raised the nature of interest to be awarded by the Commission."[7] Milner asserted that this finding of fact was wrong and referenced two occasions in which it stated that compound interest had been raised: (1) a motion for interim relief that included a calculation for payment that contemplated interest compounded monthly; and (2) in an IR response. It further considered that the Decision was based on the hearing panel's assumption that the AESO had not contemplated the calculation of compound interest. Milner submitted that this assumption was incorrect because the AESO had made a calculation of this nature prior to submitting its application in Proceeding 26084. Because the hearing panel made the finding it did in paragraph 21 of the Decision, Milner argued that the finding must be material and consequently, it is a material error to be corrected.

19. The hearing panel's findings with respect to submissions made in Proceeding 790 concerning interest and the determinations in Decision 790-D04-2016[8] regarding the interest rate to be applied to the historical period[9] are found in paragraphs 20 to 23 of the Decision:

> 20. On January 28, 2016, the Commission first invited parties to provide their views on the issues to be addressed in Module C, including the determination of financial compensation. In response, parties filed submissions regarding the inclusion of interest in the compensation resulting from recalculated loss factor charges.
>
> 21. On April 21, 2016, the Commission specifically requested that parties comment on "[w]hether interest costs should be included in charges payable or compensation receivable by market participants from 2006 to the effective date of new loss factors based on a compliant loss factor rule." Parties responded directly to that issue in both argument and reply argument. No submission filed by parties with respect to financial compensation and the consideration of interest included reference to compound interest or a frequency at which interest should be compounded.
>
> 22. Because there is more than one way to determine compound interest, the Commission is of the view that it is reasonable to conclude that if parties had intended the Commission

[7] Exhibit 26424-X0004, Milner Power Inc. Application, March 26, 2021, paragraph 16.
[8] Decision 790-D04-2016: Milner Power Inc. Complaints regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology ATCO Power Ltd. Complaint regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology Phase 2 Module C – Preliminary Issues, September 28, 2016.
[9] The period between January 1, 2006, and December 31, 2016.

> to consider the use of compound interest, they would have stated so and included a frequency for compounding.
>
> 23. Similarly, as set out above, there is nothing included within the Commission's findings in Decision 790-D04-2016, that specifically referenced the use of compound interest, and more significantly, the frequency for doing so.

20. In Decision 790-D04-2016, the 790 panel found that it would be reasonable to apply an interest rate equal to the Bank of Canada's Bank Rate plus one and one half per cent to loss factor charges that are recalculated for the historical period. That decision was issued on September 28, 2016, and upheld on appeal. In paragraphs 22 and 23 of the Decision, the hearing panel stated that if parties had intended the use of compound interest, then they would have stated so and included a frequency, and that nothing in the findings of Decision 790-D04-2016 referred to the use of compound interest. Milner Power did not identify any instance in the findings in Decision 790-D04-2016 that are contrary to this finding of the hearing panel in the Decision. Moreover, the two instances it identified were not provided in response to the 790 panel's request of parties to comment on interest charges.

21. As is well-understood to all of the parties who were participants in Proceeding 790, the 790 panel heard the issues in that proceeding through separate modules. Whether interest should be awarded on the charges during the historical period was specifically addressed within the scope of the matters considered in the module leading to Decision 790-D04-2016. The references to compound interest by Milner Power were received on November 9, 2016,[10] and March 17, 2017,[11] respectively, several months after the 790 panel had issued Decision 790-D04-2016. Further, and as argued by both ENMAX[12] and Capital Power,[13] the review panel notes the distinction between submissions that were received during the argument and consideration of the interest rate to be applied for the historical period as part of the module, as referenced by the hearing panel in paragraphs 21 and 22 of the Decision and those that were later received to support Milner's estimation of its financial losses in a subsequent module and decision.

22. The review panel finds that Milner Power has not demonstrated either on the face of the Decision or on a balance of probabilities that the review panel made an error of fact in its findings in paragraphs 20 to 23 of the Decision regarding the submissions received concerning compound interest. Further, Milner Power has not persuaded the review panel that such an error, if it was made, could lead the Commission to materially vary the decision. That is, even had the hearing panel referenced the two instances identified by Milner Power, Milner Power has not demonstrated why these two references would necessitate a variance to the hearing panel's findings on the matter.

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10 Exhibit 790-X3099, Evidence of John MacCormack Ph.D. P.Eng. and Dragan Brankovich M.Sc. P.Eng. on behalf of Milner Power Inc., November 9, 2016.

11 Exhibit 790-X3257, Milner Power Inc. Reponses to CPC IRs 07-Apr-17, April 7, 2017.

12 Exhibit 26424-X0014, Enmax Energy Corporation – Response to Milner R&V, April 8, 2021, page 4.

13 Exhibit 26424-X0013, Submissions of Capital Power Corporation on Milner Review Application, April 8, 2021, paragraphs 13 to 17.

23. In response to Milner's assumption that the hearing panel somehow misunderstood the work the AESO had done prior to filing its application in Proceeding 26084, it is clear from the Decision that the hearing panel understood that the AESO was seeking guidance from the hearing panel on the simple versus compound interest calculation. Moreover, whether the AESO had made calculations on the loss factors using either or both of these methods prior to filing its application is not material to the hearing panel's determination of the issue. The review panel finds that Milner Power has not met its onus on this argument.

24. For the above these reasons, Milner Power's request for a review on this ground is denied.

4.1.1 Financial harm

25. Grounds (b) to (e) raised by Milner Power concern Milner Power's position that the hearing panel failed in the Decision to consider that some generators of the same ISO rate class suffered financial harm and that others benefited by being overpaid, and that the Commission has no choice but to use compound interest to address this financial harm.[14] Milner Power has also argued that the rate of interest determined in Decision 790-D04-2016 should also be reviewed. The review panel has addressed this latter request in Section 4.1.2 below.

26. Briefly summarized, Milner Power has argued the following in support of grounds (b) to (e):

(a) that unjust enrichment was determined in Decision 790-D02-2015[15] and consequently, relying on *Jin v Ren*, [2015] A.J. No. 176, it was an error not to award compound interest as full restitution

(b) that anything less than compound interest damages the fair, efficient and openly competitive operation of the electricity market and fails to ensure that the AESO's rates are just and reasonable as required under the *Electric Utilities Act*

27. In its submissions, Milner Power relied on the 790 panel's findings in paragraph 226 of Decision 790-D02-2015. This paragraph was further referred to twice in Decision 790-D04-2016. First, in paragraph 53 as part of the 790 panel's findings that charges for line losses be recalculated going back to January 1, 2006, [16] and second, at paragraph 78 in support of its finding that interest should be charged. [17] The 790 panel then specified that interest be charged at a "rate of interest equal to the Bank of Canada's Bank Rate plus one and one half per cent."[18]

28. In the Decision, the hearing panel considered the 790 panel's findings in paragraphs 78, 80 and 81 of Decision 790-D04-2016 in its consideration as to whether the interest rate directed

[14] Exhibit 26424-X0004, Milner Power Inc. Application, March 26, 2021, paragraph 17.
[15] Decision 790-D02-2015: Milner Power Inc. Complaints regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology ATCO Power Ltd. Complaint regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology Phase 2 Module A, January 20, 2015.
[16] Decision 790-D04-2016, paragraph 53.
[17] Decision 790-D04-2016, paragraph 78.
[18] Decision 790-D02-2015, paragraph 80.

in Decision 790-D04-2016 should be applied as simple or compound interest.[19] It is clear on the face of Decision 790-D04-2016 that the 790 panel, in determining whether to award interest at all, had turned its mind to the issue of whether awarding interest was necessary to consider the time value of money and further, it is clear that the 790 panel was alive to the legislative requirements under the *Electric Utilities Act*. Paragraph 78 concludes "… to help remedy the gains that unjustly accrued to some parties and the costs that were unjustly imposed on other parties, the Commission finds that it is just and reasonable to consider the time value of money dating back to January 1, 2006, and that awarding (and charging) interest is a practical and just and reasonable method of doing so." [emphasis added] Moreover, fault was also addressed and dismissed as a factor for awarding interest in Decision 790-D04-2016. As stated in paragraph 81, "The question is not who was at fault" … " further "[a]warding interest helps to rectify the issue of the time value of the money unjustly at the disposal of, or unjustly denied to, each party, respectively." [emphasis added]

29. The 790 panel made no finding that the award of interest, regardless of whether it is compounded, was intended to provide full restitution. To the contrary, the 790 panel acknowledged that the award of interest would not do this. As set out above, the 790 panel in its findings determined that awarding interest would "help" to rectify. The 790 panel did not find that interest was intended to rectify the issue.

30. In the Decision, the hearing panel made a factual determination at paragraph 18 that both simple and compound interest account for the time value of money and no error of fact has been demonstrated by Milner Power concerning this finding. As both methods of interest calculation can take into account the time value of money, and as there is no finding by the 790 panel that interest is intended to provide full restitution, Milner Power has failed to demonstrate that the hearing panel erred in law by finding that simple interest should be awarded. Further, the hearing panel's finding at paragraph 35 of the Decision that "the Commission made no findings concerning the conduct of the parties that would warrant sanctioning" is consistent with the findings of the 790 panel.

31. Regarding the *Jin* decision, as noted by Capital Power, Milner Power could have raised this 2015 Alberta Court of Queen's Bench decision in proceeding 26084 and Milner Power has not demonstrated to the review panel why it could not have done so. Regardless, even had the *Jin* case been submitted in proceeding 26084, the Alberta court made its decision on the basis of the Supreme Court of Canada *Bank of America* decision[20], a decision that the hearing panel also considered. It is clear from the Decision that the review panel fully considered the principles set out in the *Bank of America* decision and concluded on the basis of the findings of the 790 panel that the case was distinguishable. As noted by several of the interveners, a review process is not intended to provide a second opportunity to reargue or seek to bolster arguments previously made and rejected.[21]

[19] Decision 26084-D01-2021, paragraphs 16-18.
[20] Bank of America Canada v. Mutual Trust Co. 2002 SCC 43.
[21] Exhibit 26424-X0010, TransAlta Submission on Milner Review Application, April 8, 2021, paragraph 8. Exhibit 26424-X0009 Balancing Pool Submissions responding to Application for Review, April 8, 2021, page 3.

32. Regarding Milner Power's assertion that the hearing panel did not have discretion to award anything other than compound interest because it had a duty to award full restitution, as set out above, the hearing panel's finding in paragraph 34 of the Decision that "neither expectation nor restitution damages were at issue in Proceeding 790" is supported by the 790 panel's findings in Decision 790-D04-2016. Moreover, this finding is also supported by the Alberta Court of Appeal in *Milner Power Inc v Alberta Utilities Commission*[22], who found:

> 49] Awarding interest at a rate which provided a level of compensation for the time cost of money, but which did not penalize those having paid the hitherto lawful charges, was a decision which was within the range of options the parties could have reasonably anticipated the Commission to make. An award of interest on compensation at a prescribed rate is not a decision which can only be made after hearing evidence from industry participants as to their cost of capital. As the Commission alluded to in its decision, the Rule 023 interest rate eliminated "mismatches that would occur due to different costs of capital for different market participants." Far from fettering its discretion, the Commission made a deliberate decision not to hold a hearing on what an appropriate interest rate might be and decided on a rate which was not unlike rates awarded by courts and tribunals charged with compensating those deprived of funds to which they were entitled for a finite period of time. The Commission concluded the applicants' cost of capital and the expert evidence proposed to be adduced was irrelevant. A decision on evidentiary relevancy, made by the Commission after hearing from the applicants with respect to same, does not give rise to a question of procedural fairness.

33. The review panel finds that Milner Power has not demonstrated either on the face of the Decision or on a balance of probabilities that the review panel made the errors of law raised in grounds (b) to (e).

4.1.2 Effect of Commission ruling in proceeding 790 to prohibit reviews

34. As noted in paragraph 25 above, Milner Power has not only sought a review of the type of interest awarded in the Decision but has also proposed that the Commission, on its own initiative, conduct a review on the rate of interest previously awarded in Decision 790-D04-2016. In support of this request, Milner Power asserted that the Commission should award an appropriate rate and type of interest to provide full restitution. Further, Milner Power argued that because the 790 panel issued a ruling precluding reviews from parties[23], that a Commission review is the only remedy available to it.

35. As part of its application, Milner filed a hypothetical example using an assumed rate of return of 8.5 per cent, which it presented as equivalent to the after-tax cost of capital for generators entering the Alberta market as set out in evidence presented in the capacity market proceeding (Proceeding 23757).

36. In its submission opposing Milner Power's review application, the Balancing Pool referenced the 790 panel's letter of January 26, 2018, in which the Commission determined that it would not exercise its discretion to review its decisions for any 790 proceedings, including

[22] Milner Power Inc v Alberta Utilities Commission, 2019 ABCA 127.
[23] Exhibit 790-X3266, AUC Ruling on CP motion on PTA adjournment, April 21, 2017.

Decision 790-D04-2016.[24] The Balancing Pool argued that because the findings in the Decision arose from the 790 proceedings and decisions that followed, Milner Power's request for a review is contrary to this ruling.[25] ENMAX[26] and Capital Power[27] similarly filed submissions rejecting Milner Power's request for a review on this basis.

37. Milner Power rejected this argument on the basis that the Decision did not arise under Proceeding 790 and that the prohibition only arose for those decisions issued prior to January 26, 2018. Alternatively, it suggested that the Commission should exercise its own review authority to review not only the Decision but Decision 790-D04-2016.

38. The review panel denies Milner Power's request for a review on the level of interest for the following reasons. First, as set out in Section 4.1.1 above, Milner Power has not persuaded the review panel that the hearing panel made an error of law when the hearing panel determined that the 790 panel had not considered that interest was intended to provide full restitution. Second, the level of interest was a matter that was already addressed in Decision 790-D04-2016 and upheld on appeal. The Commission's ruling of January 26, 2018, precluding reviews on Commission decisions in Proceeding 790, did not foreclose parties from seeking relief from the court. Milner Power was one of these parties. Third, the January 26, 2018, ruling stated that the Commission had taken this position because it was important to promote certainty and finality. The scope of the Decision was restricted to the type of interest, simple or compound. Requesting that the Commission initiate a review on the kind of interest through a review request in this proceeding would undermine the certainty and finality on this issue following the decision of the Alberta Court of Appeal.

4.1.3 Default position

39. Milner Power argued that the hearing panel erred in law by adopting, as a default position, that interest should be simple. It argued that the hearing panel erred in following *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*[28] a decision that it states considered restitution on constitutional grounds.

40. The review panel notes that in the Decision, the hearing panel carefully considered both the *Bank of America* decision and the *Kingstreet* decision in its consideration of the common law position on the award of interest. It is apparent on the face of the Decision that the hearing panel found on the facts, that the *Bank of America* decision was distinguishable because although the 790 panel determined that the payment of interest was warranted, it did not do so on the basis of any fault or conduct of the parties. This was a finding that the Alberta Court of Appeal noted was not challenged on appeal.[29] In the Decision, the hearing panel determined that the Supreme Court of Canada's reasoning in *Kingstreet*, declining to award compound interest on the basis that

[24] Exhibit 26424-X0009, Balancing Pool Submissions responding to Application for Review, April 8, 2021, page 2.
[25] Exhibit 26424-X0009, Balancing Pool Submissions responding to Application for Review, April 8, 2021, pages 2 and 3.
[26] Exhibit 26424-X0014, Enmax Energy Corporation – Response to Milner R&V, April 8, 2021, page 4.
[27] Exhibit 26424-X0013, Submissions of Capital Power Corporation on Milner Review Application, April 8, 2021, paragraph 42.
[28] Kingstreet Investments Ltd. v. New Brunswick (Department of Finance), 2007 SCC 1.
[29] Milner Power Inc v Alberta Utilities Commission, 2019 ABCA 127, at paragraph 34.

sanctions were not warranted, was similar to this finding. The hearing panel did not state that it was compelled to follow this decision. Further, the Supreme Court of Canada's decision in *Kingstreet* cited *Bank of America.* As noted by the hearing panel, *Bank of America* discussed the award of compound interest where there was a contractual agreement specifying the award of compound interest. There is no question that none of those particulars were present in the 790 proceeding. If that had been the case, there would have been no need for Proceeding 26084.

41. The review panel finds that Milner Power has not demonstrated either on the face of the Decision or on a balance of probabilities that the review panel made the error of law raised in ground (f).

5 Decision

42. In answering the preliminary question, the review panel finds that Milner Power Inc. has not met the requirements for a review of Decision 26084-D01-2021 and the application for review is dismissed.

Dated on June 22, 2021.

Alberta Utilities Commission

(original signed by)

Douglas A. Larder, QC
Panel Chair

(original signed by)

Kristi Sebalj
Commission Member