



**ATCO Electric Ltd., ENMAX Power Corporation,
and FortisAlberta Inc.
Decision on Preliminary Question
Application for Review of Decision 26061-D01-2021
Commission-Directed Examination of
Distribution Facility Owner Payments under the
Independent System Operator Tariff Customer
Contribution Policy**

October 1, 2021

Alberta Utilities Commission

Decision 26608-D01-2021

ATCO Electric Ltd., ENMAX Power Corporation and FortisAlberta Inc.

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Commission-Directed Examination of Distribution Facility Owner Payments
under the Independent System Operator Tariff Customer Contribution Policy
Proceeding 26608

Applications 26608-A001, 26608-A002, 26608-A003

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Commission-Directed Examination of Distribution Facility

Owner Payments under the Independent System Operator

Tariff Customer Contribution Policy

Decision 26608-D01-2021

Proceeding 26608

1 Decision summary

1. In this decision, the Alberta Utilities Commission denies applications by ATCO Electric Ltd., ENMAX Power Corporation, and FortisAlberta Inc. (the review applicants) to review and vary Decision 26061-D01-2021.¹

2 Background

2.1 Proceeding history

2. Decision 26061-D01-2021 (the original decision) was a Commission-directed examination of distribution facility owner (DFO) customer contribution payments under the Independent System Operator (ISO) tariff.

3. The issues raised in Proceeding 26061² (the original proceeding) stem from Decision 22942-D02-2019,³ in which the Commission addressed an application from the Alberta Electric System Operator (AESO) for approval of its 2018 ISO Tariff (2018 AESO tariff decision).

4. In Section 8.1 of the 2018 AESO tariff decision the Commission considered a proposal advanced by AltaLink Management Ltd. to change how the AESO's customer contribution policy is accounted for as between a DFO and a transmission facility owner (TFO). The mechanics of this proposal included AltaLink, as a TFO, refunding all unamortized contributions paid to it by Fortis, a DFO, in respect of Fortis connection projects as at December 31, 2017. The Commission approved the AltaLink proposal in the 2018 AESO tariff decision.

5. That approval led to two requirements. First, the balance of unamortized AESO customer contributions in Fortis's rate base effective December 31, 2017 was to be transferred to AltaLink, for which AltaLink was to compensate Fortis at net book value. Second, as of January 1, 2018, all AESO customer contributions would be capitalized by AltaLink, not Fortis. The Commission directed the AESO and AltaLink, to file a joint proposal with respect to the implementation of this aspect of its decision.

¹ Decision 26061-D01-2021: Commission-Directed Examination of Distribution Facility Owner Payments under the Independent System Operator Tariff Customer Contribution Policy, Proceeding 26061, April 23, 2021.

² Proceeding 26061, Commission-Directed Examination of Distribution Facility Owner Payments under the Independent System Operator Tariff Customer Contribution Policy.

³ Decision 22942-D02-2019: Alberta Electric System Operator, 2018 Independent System Operator Tariff Application, Proceeding 22942, September 22, 2019.

6. In Decision 24932-D01-2020,⁴ the Commission rescinded Section 8.1 of the 2018 AESO tariff decision. This had the effect of removing the requirement for Fortis to transfer to AltaLink the unamortized balance of its AESO customer contributions as at December 31, 2017. The Commission also set aside the commencement of the AltaLink customer contribution proposal and scheduled a separate proceeding in which it expected all DFOs, TFOs and the AESO to participate. The new proceeding would examine: (i) the legal basis of the existing AESO customer contribution policy as it pertains to all TFOs and DFOs; (ii) whether there is a need for a new policy, including consideration of AltaLink's customer contribution proposal; and (iii) if approved, set the prospective date on which any new policy would commence.⁵

7. The proceeding scheduled in Decision 24932-D01-2020, was commenced by the Commission as Proceeding 26061 by way of notice dated November 10, 2020. The review applicants now seek to review and vary the decision issued in that proceeding.

8. The Commission made a number of findings, which were summarized in paragraph 2 of the original decision.

9. The Commission found that the current treatment of AESO customer contributions, including the way that DFOs recover the invested contribution amounts, is supported by the legislative framework.⁶ On this point, the Commission also found that the Commission has the discretion, as part of its authority to set just and reasonable rates under the *Electric Utilities Act*⁷ (EUA), to determine how AESO customer contributions paid by a DFO are recovered in the DFO's tariff.⁸

10. The Commission found AESO customer contributions made by DFOs prior to the date of the original decision would continue to be treated according to the current DFO tariff recovery mechanism (i.e., AESO customer contributions are capitalized and included in the DFO's rate base until the contribution amounts have been fully depreciated). It decided, however, that the current DFO tariff recovery mechanism applicable to AESO customer contributions does not provide effective price signals to incent the end-use customers to choose the most economical connection solution.

11. The Commission found that, to better achieve the objectives of the AESO customer contribution policy: (i) DFOs will no longer be permitted to earn a return (i.e., return-on-equity component) on AESO customer contributions; and (ii) to the extent possible, AESO customer contributions are to be flowed through to the DFO customer that is requesting the new connection.

12. The Commission also rejected AltaLink's customer contribution proposal, that would allow a TFO to earn a return on an AESO customer contribution, on the basis that it also failed to

⁴ Decision 24932-D01-2020: Commission-Initiated Review and Variance of Decision 22942-D02-2019, Proceeding 24932, November 4, 2020.

⁵ Decision 24932-D01-2020, paragraphs 30 and 183.

⁶ Decision 26061-D01-2021, paragraph 110.

⁷ *Electric Utilities Act*, SA 2003, Chapter E-5.1.

⁸ Decision 26061-D01-2021, paragraphs 97 and 98(d).

provide an effective price signal. The Commission therefore found that it is not in the public interest for either a DFO or a TFO to earn a return on AESO customer contributions.

13. DFOs were directed to file, by May 31, 2021, a proposal or proposals for a revised regulatory accounting treatment for future AESO customer contributions. The direction specified that the revised treatment must exclude any return-on-equity component or the use of weighted average cost of capital as part of the recovery of financing costs associated with AESO customer contributions. Those proposals were filed and are currently being considered by the Commission in Proceeding 26521.⁹

14. The DFOs were also directed to track all AESO customer contributions made subsequent to the original decision. The specific accounting treatment for AESO customer contributions and carrying costs were made subject to placeholder treatment pending the outcome of Proceeding 26521.¹⁰

2.2 Procedure for review applications

15. Each of the review applicants filed separate applications to review and vary the original decision pursuant to Section 10 of the *Alberta Utilities Commission Act* and Rule 016: *Review of Commission Decisions*. The Commission consolidated the review applications as Proceeding 26608.

16. The Commission issued a filing announcement for the review applications and, by letter dated July 6, 2021,¹¹ established a process schedule for the proceeding.

17. The AESO, AltaLink, the Consumers' Coalition of Alberta (CCA) and EPCOR Distribution & Transmission Inc. (EPCOR) filed submissions or comments on the review applications. The AESO took no position on the applications but noted its submission in Proceeding 26061 that it is within the Commission's ratemaking powers to determine who can earn a rate of return on AESO customer contributions that are paid towards the cost of transmission connection facilities, and whether a TFO must earn a rate of return on all of its assets.¹² AltaLink and EPCOR supported the review applications. The CCA contested the applications.

18. Each of the review applicants filed reply submissions in response to the CCA's submissions and, pursuant to a ruling of the review panel on a CCA motion, the CCA filed reply submissions in response to EPCOR's comments on the review applications.

19. The Commission considers the record for this proceeding to have closed on August 3, 2021.

⁹ Proceeding 26521, Revised regulatory accounting treatment for AESO customer contributions was established on May 7, 2021. To date no decision in that proceeding has been issued.

¹⁰ Decision 26061-D01-2021, paragraphs 144-145.

¹¹ Exhibit 26608-X0012, AUC Process announcement.

¹² Exhibit 26608-X0014, AESO letter re SIP, paragraph 3, referencing Exhibit 26061-X0099, AESO Summary of Argument, PDF page 1.

20. In this decision, the members of the Commission panel who authored the original decision will be referred to as the “hearing panel” and the members of the Commission panel considering the review applications will be referred to as the “review panel.”

21. In reaching its determinations, the review panel has reviewed the pertinent portions of the original decision and relevant materials comprising the record of this proceeding and of Proceeding 22942,¹³ Proceeding 24932,¹⁴ and Proceeding 26061.¹⁵ Accordingly, references in this decision to specific parts of the records are intended to assist the reader in understanding the review panel’s reasoning relating to a particular matter and should not be taken as an indication that the review panel did not consider all relevant portions of the several records with respect to the matter.

3 The Commission’s review process

22. 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. The Commission has considered the applications under the version of Rule 016 that was applicable when the review applicants filed their applications on June 14, 2021. All references to the rule in this decision refer to the language in the version in effect at the time the applications were filed.¹⁶

23. 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).

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

25. Subsection 4(d) of Rule 016 requires an applicant to set out in its application the grounds it is relying on. In their review applications, the review applicants are relying on Section 4(d)(i) of Rule 016, which is that the Commission made errors of fact, law or jurisdiction.

26. Subsection 6(3)(a) of Rule 016 describes the test that must be met by the review applicants for the Commission to grant a review of an error of fact, law or jurisdiction:

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.

¹³ Proceeding 22942, Alberta Electric System Operator, 2018 Independent System Operator Tariff Application.

¹⁴ Proceeding 24932, Commission-Initiated Review and Variance of Decision 22942-D02-2019.

¹⁵ Proceeding 26061, Commission-Directed Examination of Distribution Facility Owner Payments under the Independent System Operator Tariff Customer Contribution Policy.

¹⁶ The current version of Rule 016 applies to review and variance applications filed on or after June 15, 2021.

4 Grounds for review

27. The review applications focus largely on the hearing panel's findings in sections 3.2 and 3.3 and in particular on the findings summarized at paragraphs 2(d) and (h) of the original decision. While there was significant overlap in the grounds for review, the review panel has briefly summarized each of the review applications.

28. ATCO Electric submitted that the hearing panel rendered decisions that are:

- (a) inconsistent with the legislative requirements of s. 122 of the EUA;
- (b) inconsistent with the judicially recognized regulatory compact that details the rights and obligations of both regulated utilities and their customers; and
- (c) inconsistent with ATCO Electric's rights, as an applicant, to procedural fairness and due process, in knowing the case it has to meet.¹⁷

29. ENMAX submitted that by prohibiting electric utilities from earning a fair return on AESO customer contributions or the related transmission facilities, the hearing panel erred in:

- (a) exceeding the limits of the Commission's jurisdiction (namely, its implied power and authority over regulatory accounting matters and the supervision of the operations and finances of electric utilities), thereby failing in its statutory obligation to provide the utilities with a reasonable opportunity to earn a fair return;
- (b) failing to adequately identify or consider the consequences of changing the regulatory accounting treatment of DFO customer contributions, an error in law;
- (c) breaching its duty of procedural fairness by deciding that neither DFOs nor TFOs will be permitted to earn a return on transmission facilities (or the related customer contributions) that require a customer contribution under the AESO tariff without identifying that as an issue in its notice of application and without giving parties a reasonable opportunity to be heard on that issue.¹⁸

30. Fortis submitted that the hearing panel's determination to remove the return-on-equity component earned on any AESO customer contribution payments paid by DFOs resulted from the hearing panel making errors in fact and law, which were material to the original decision.¹⁹ Specifically, Fortis submitted that the hearing panel erred by making factual findings without sufficient evidence and in making factual determinations that are contrary to Section 122 of the EUA.

31. The grounds raised in the review applications will be addressed below under the three broad categories: treatment of AESO customer contributions, sufficiency of evidence, and procedural fairness.

¹⁷ Exhibit 26608-X0011, ATCO Electric application, paragraph 11.

¹⁸ Exhibit 26608-X0006, ENMAX application, paragraph 12.

¹⁹ Exhibit 26808-X0002, Fortis application, paragraph 2.

5 Review panel findings

5.1 Treatment of AESO customer contributions

5.1.1 Section 122 of the EUA and the opportunity to earn a fair return

32. The review applicants argued that the hearing panel's directions prohibited DFOs from an opportunity to earn fair return on AESO customer contributions, contrary to Section 122 of the EUA. They submitted that this constitutes an error in fact, law or jurisdiction.

33. ATCO Electric submitted that Section 122 of the EUA mandates that the Commission allow a DFO an opportunity to earn a return on AESO customer contributions. ATCO Electric stated that the hearing panel's finding that it is not in the public interest for either a DFO or a TFO to earn a return on AESO customer contributions is in direct contradiction to Section 122.²⁰ ATCO Electric submitted that in paragraphs 93-97 of the original decision, the hearing panel referenced that Sections 122(1)(b), (c) or (h) give it the authority to include the costs related to AESO customer contributions in a DFO's tariff. However, the hearing panel then failed to allow the DFO to earn a return on its required electric utility investment, in accordance with Section 122(1)(a)(iv).²¹

34. ENMAX stated that as both a TFO and DFO, the original decision denies it the opportunity to earn a fair return on either AESO customer contributions or on the portion of the underlying transmission facility that is financed by the contribution. It said that this violates Section 122 of the EUA that requires that it be given a reasonable opportunity to recover its prudently incurred costs, including a fair return.²² ENMAX indicated that the owner's investment in the electric utility asset used or required to be used to provide utility service is a combination of debt and equity capital that conforms to the deemed capital structure approved by the Commission. ENMAX added that by altering the longstanding treatment of accounting for AESO customer contributions, which allows the DFO to capitalize the contribution and to recover the associated costs, and prohibiting electric utilities from earning a fair return on an entire class of utility assets, the hearing panel committed serious reviewable errors of law or jurisdiction.²³

35. Fortis stated that the hearing panel's finding that the current DFO tariff recovery mechanism applicable to AESO customer contributions fails to effectively incent end-use customers to choose the most economical connection solution²⁴ directly conflicts with Section 122 of the EUA.²⁵ It submitted that the direction prohibiting DFOs from an opportunity to earn a fair return on prudent investments in AESO customer contributions is contrary to the requirements for Commission-approved tariffs contained in Section 122 of the EUA.²⁶

²⁰ Exhibit 26608-X0011, ATCO Electric application, paragraphs 13-14.

²¹ Exhibit 26608-X0011, ATCO Electric application, paragraph 17.

²² Exhibit 26608-X0006, ENMAX application, paragraph 10.

²³ Exhibit 26608-X0006, ENMAX application, paragraphs 13-14.

²⁴ Decision 26061-D01-2021, paragraph 125.

²⁵ Exhibit 26608-X0002, Fortis application, paragraph 20.

²⁶ Exhibit 26608-X0002, Fortis application, paragraph 23.

36. The CCA submitted that although the EUA affords the utility a reasonable opportunity to recover a fair return on the equity portion of its investment, the key requirement is that there must be an equity investment for a fair return to be recoverable. The CCA indicated that the Commission has the discretion in the context of setting just and reasonable rates to determine when an equity investment is required. The CCA stated that the EUA does not clearly set out that an equity investment is required for all utility investments and that the hearing panel permissibly exercised its discretion having regard for the setting of effective price signals.²⁷ The CCA added that the requirements of Section 122 of the EUA are clear in that a utility is not guaranteed a legal right to make a specific level of equity investment. The level of equity investment that is permitted is at the discretion of the Commission, which accords with *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)* (the ATCO pensions case).²⁸

37. In both the current proceeding and in the original proceeding the AESO referenced the Commission's broad ratemaking discretion. It stated that "...it is within the Commission's ratemaking authority to determine whether a DFO or TFO should earn a rate of return on customer contributions that are paid towards the cost of transmissions connection facilities."²⁹ It also offered that "It is for the AUC to determine how best to incentivize the behavior of DFOs and TFOs in this area."³⁰

38. The Commission is a creature of statute and its authority to set utility rates or tariffs is found in its governing legislation.

39. In the original decision, the hearing panel referenced and provided its analysis of the relevant provisions of the EUA, including Section 122, and the regulations that apply to AESO customer contributions. In particular, in Section 3.1.3.2 of the original decision, "Legislative provisions establishing the recovery of costs through a DFO tariff," the hearing panel considered each of the provisions that were applicable.

40. The hearing panel recognized the obligation imposed on the DFO to secure system access service on behalf of its customers, that the amount payable by a DFO to do so is recoverable in the DFO's tariff, and determined that the Commission's assessment of these costs, as part of its authority to determine what is just and reasonable in the tariff, is wholly consistent with the statutory scheme. The hearing panel noted that the EUA does not prescribe how AESO customer contributions are to be recovered within the DFO's tariff.³¹

41. The hearing panel then went on to determine that:

Based on its findings, the Commission considers that any of sections 122(1)(b), (c) or (h) empower the Commission to consider costs related to AESO customer contributions in a DFO's tariff. The legislation gives the Commission the discretion to determine whether and how such costs are recoverable, subject to the requirements that the owner be

²⁷ Exhibit 26608-X0020, CCA submission on applications, paragraph 5-6.

²⁸ Exhibit 26608-X0020, CCA submission on applications, paragraph 18, referring to *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)*, [2015] 3 SCR 219, 2015 SCC 45.

²⁹ Exhibit 26608-X0014, AESO letter re SIP, paragraph 3. Also Exhibit 26061-X0099, AESO Summary of Argument, PDF page 1.

³⁰ Transcripts, Volume 1, page 134, lines 4-6.

³¹ Decision 20621-D01-2021, paragraph 94.

provided with a reasonable opportunity to recover these costs in its tariff once the costs and expenses are determined to be reasonable or prudent, and subject to the direction in Section 121 of the act that the Commission approve a tariff that is just and reasonable, not unduly preferential, arbitrary, unjustly discriminatory or inconsistent with the law.³²

42. In its analysis, the hearing panel referred to subsections 122(1)(b), (c) and (h) of the EUA, which require that a tariff approved by the Commission provide the owner of an electric utility with the opportunity to recover:

(b) other prudent costs and expenses associated with...transmission, exchange or distribution of electricity or associated with the Independent System Operator...

(c) amounts that the owner is required to pay under this Act or the regulations,

...

(h) any other prudent costs and expenses that the Commission considers appropriate...

43. Importantly, Subsection 122(1)(a), which relates to costs and expenses associated with capital related to a utility owner's investment, and in particular, Subsection 122(1)(a)(iv), which requires the Commission to provide the owner of an electric utility with a reasonable opportunity to recover a fair return on the equity of shareholders of the utility as it relates to that capital investment, were specifically excluded from the hearing panel's analysis. On the face of the decision, as shown in the hearing panel's assessment reproduced at paragraph 41 of this decision, the hearing panel determined that AESO customer contributions would appropriately fall into subsections 122(1)(b), (c) or (h) of the EUA, as other (non-capital) costs, expenses or amounts, that would not, therefore, attract a fair return.

44. Whether AESO customer contributions are a cost and expense associated with a capital investment as described in Subsection 122(1)(a), the equity portion of which, in accordance with Subsection 122(1)(a)(iv), would attract a fair return, or whether AESO customer contributions are a cost, an expense or an amount that a utility owner is required to pay under other subsections of Section 122, is a decision to be made by the Commission applying the law to determine how those contributions should be categorized. The hearing panel expressly did so, provided its reasoning therefor, and concluded that AESO customer contributions are properly an other (non-capital) cost or expense under subsections 122(1)(b) or (h) or an "amount that the owner is required to pay" under Subsection 122(1)(c). Because they are not capital investments the hearing panel determined that it was "necessary to (i) remove the profit element (i.e., return-on equity-component) earned on any AESO customer contribution payments DFOs make..."³³ As the hearing panel noted, the legislation gives the Commission the discretion to determine whether and how such costs are recoverable and does not require the Commission to adopt any particular approach in determining how AESO customer contributions are to be recovered in a DFO's tariff.

³² Decision 26061-D01-2021, paragraph 97.

³³ Decision 26061-D01-2021, paragraph 132.

45. The hearing panel determined that the costs incurred for AESO customer contributions must not earn a return on AESO customer contributions in order to avoid the distorted or muted price signals that arise when DFOs are permitted to earn a fair return, which the hearing panel concluded, converted what was intended to be a price signal into a revenue signal to the DFO. The hearing panel reached a similar conclusion with respect to the impact on price signals if a TFO were to earn a return on AESO customer contributions as proposed by AltaLink. These conclusions are consistent with the hearing panel's reliance on subsections 122(1)(b), (c) and (h) and with its determination that the AESO customer contributions are properly recoverable in a tariff, but do not provide the owner of the electric utility an opportunity to recover a return on (in addition to the recovery of) these amounts.

46. The review applicants have not demonstrated that the hearing panel exercised its authority in a manner inconsistent with its statutory authority in determining whether the AESO customer contributions should earn a return. On these grounds, the review panel finds that the review applicants have not shown the existence of an error in fact, law, or jurisdiction that 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 original decision. Accordingly, the requests to review the hearing panel's direction prohibiting a utility owner from an opportunity to earn fair return on AESO customer contributions are denied.

5.1.2 The regulatory compact

47. ATCO Electric submitted that the regulatory compact requires that regulated utilities be provided the opportunity to earn a fair return on capital invested in the provision of utility service. It alleged that the hearing panel's finding that neither a DFO, nor a TFO, is entitled to earn a return on AESO customer contributions fails to respect the regulatory compact, which constitutes an error of law. ATCO Electric cited the Supreme Court of Canada's findings on the role of the regulatory compact in the Commission's rate setting process.³⁴

48. Fortis also argued that the approach adopted by the hearing panel to purportedly correct the price signals, which the hearing panel found did not effectively incent end-use customers to choose the most economical connection solution,³⁵ directly conflicts with the regulatory compact.³⁶ Fortis, asserted that, like other DFOs, it is required to pay returns to both its equity and debt holders. Fortis stated that DFOs are required to provide a return-on-equity to the investors that provide this form of capital to finance utility operations.³⁷

49. The review panel notes that the regulatory compact is not a fixed construct. In *FortisAlberta Inc v Alberta (Utilities Commission)*,³⁸ Justice Paperny summarized the regulatory compact and found that it is a shifting standard. In that decision, the court stated that the regulator's role is one of market proxy: to strike a balance in rate setting between utility profit

³⁴ Exhibit 26608-X0011, ATCO Electric application, paragraphs 15-21; quoting the court in *ATCO Gas and Pipelines v Alberta* [2006] 1 SCR, paragraph 64. The decision references the Alberta Energy and Utilities Board, the predecessor to the Alberta Utilities Commission.

³⁵ Decision 26061-D01-2021, paragraph 125.

³⁶ Exhibit 26608-X0002, Fortis application, paragraph 20.

³⁷ Exhibit 26608-X0002, Fortis application, paragraphs 21-22.

³⁸ *FortisAlberta Inc v Alberta (Utilities Commission)*, 2015 ABCA 295 (CanLII).

and reasonable cost of service.³⁹ She then summarized the regulatory compact and the role of the regulator:

The foundational principal of public utility regulation is often called the “regulatory compact”. Although there are disagreements as to what is included in terms of rights and obligations under that rubric, the general understanding can be stated as follows: The utility is granted the right to provide a service in a particular area with the opportunity to earn a reasonable return on its investment and to recover its prudently incurred expenses. The utility must provide that service to all, in a consistent, non-discriminating manner at a fair and reasonable cost.

The manner in which these objectives are achieved is usually left with the experts, the regulators, subject to the terms of their legislative authority. Regulators have been obliged historically to adapt to rapidly changing economic forces, including technological advances, demographics, and geopolitical realities. In addition to this mix of forces, regulators must also respond to legislative changes and developing jurisprudence. Thus, the regulatory compact, as it is called, is not a monolith but rather an evolution of policy choices designed to achieve the appropriate balance between profitable and efficient utilities and satisfied ratepayers paying a reasonable amount for the service they receive.⁴⁰

50. In the original decision, the hearing panel discussed how the regulatory compact differed from property rights, “...the EUA explicitly creates fractures in the bundle of traditional property law entitlements, through the establishment of the regulatory compact by which the owners of the assets, in exchange for their service area monopoly, have a duty to use their assets to provide service to customers.”⁴¹

51. The findings in the original decision demonstrate that the hearing panel was aware of the Commission’s requirement to ensure that a utility is provided with a reasonable opportunity to recover a fair return on the equity portion of capital investments. In fact, the hearing panel used clear and deliberate language to confirm that it was removing the return-on-equity component previously earned by DFOs on AESO customer contributions. It did this to eliminate the incentive that it found could exist for a pure-play DFO, such as Fortis, to prefer a transmission solution over a distribution solution⁴² and the general incentive for DFOs to increase the amount of AESO customer contributions to grow rate base.⁴³ The hearing panel stated that it did so to protect the public interest.

52. Ultimately, the hearing panel exercised its legislative discretion to remove incentives that it determined were not in the public interest and to determine whether and how the AESO customer contributions are recoverable. This is consistent with the obligations articulated by the Court of Appeal of Alberta’s decision in *FortisAlberta Inc.* to “achieve the appropriate balance between profitable and efficient utilities and satisfied ratepayers paying a reasonable amount for

³⁹ *FortisAlberta Inc.*, paragraph 9.

⁴⁰ *FortisAlberta Inc.*, paragraphs 10-11.

⁴¹ Decision 26061-D01-2021, paragraph 63.

⁴² Decision 26061-D01-2021, paragraph 127.

⁴³ Decision 26061-D01-2021, paragraph 121.

the service they receive.”⁴⁴ The change in the treatment of AESO customer contributions was expressly considered in light of whether these contributions should be treated as capital investments and therefore attract return or should be expensed.⁴⁵ Consistent with the regulatory compact, the hearing panel was attuned to shareholder interests, the requirement to ensure that utilities are given a reasonable opportunity to earn a fair return on the equity of shareholders, and the interests of ratepayers in making its finding that AESO customer contributions were to be treated as an expense. While the reviewing parties clearly disagree with how the hearing panel chose to exercise its discretion to achieve that balance, this does not constitute a reviewable error of law.

53. On these grounds, the review panel finds that the review applicants have not shown the existence of an error of law 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 original decision. Accordingly, the review applicants’ requests to review the original decision on the basis that the hearing panel erred in law in making a decision inconsistent with the regulatory compact are denied.

5.1.3 Jurisdiction

54. In the original decision, the hearing panel concluded that the current DFO tariff recovery mechanism applicable to AESO customer contributions fails to provide effective price signals to incent the end-use customers to choose the most economical connection solution.⁴⁶ Specifically, the DFO is not generally flowing the costs of the AESO customer contribution amounts to the end-use customers who trigger the need for new connection assets, resulting in AESO customer contributions for connections being socialized across all DFO customers. Further, the hearing panel concluded that the intended price signal is at best distorted or muted and is likely absent because the DFO is able to earn a return on AESO customer contribution payments. As a result, what was intended to be a price signal is converted to a revenue signal to a DFO.⁴⁷

55. The hearing panel also concluded that:

Considering the lumpy nature of the AESO customer contribution amounts paid by DFOs in any given year, and the potential for rate shock and rate volatility that could arise from changing the regulatory accounting treatment of AESO customer contribution amounts paid by DFOs to an expense item, the Commission directs DFOs to propose an accounting method that will recognize these DFO costs in a manner that allows the DFO to make the investment (earning no profit and suffering no loss) and allows for the recovery of the AESO customer contribution amounts from the DFOs customers on a go-forward basis.⁴⁸

56. In requesting that the Commission review and vary the above findings and direction, ATCO Electric and ENMAX stated that the hearing panel exceeded its statutory authority and that, therefore, the original decision results in errors of jurisdiction. ATCO Electric requested

⁴⁴ *FortisAlberta Inc.*, paragraph 11.

⁴⁵ Decision 26061-D01-2021, paragraph 134.

⁴⁶ Decision 26061-D01-2021, paragraph 2(d).

⁴⁷ Decision 26061-D01-2021, paragraphs 125-127.

⁴⁸ Decision 26061-D01-2021, paragraph 137.

that the review panel vary the direction in the original decision for DFOs to propose an accounting method that will recognize the costs incurred by the DFO for AESO customer contributions and in a manner that allows the DFO to recover the costs incurred without earning a return on a go-forward basis.⁴⁹

57. ENMAX took issue with the jurisdiction of the hearing panel to change the regulatory accounting treatment for AESO customer contributions as a means of addressing concerns regarding ineffective price signals. ENMAX submitted that the hearing panel's findings on price signals are in error because it is not reasonably possible for the AESO customer contribution policy to send such price signals where the need for the underlying transmission facility is not driven by a single end-use customer or a readily identifiable group of end-use customers.⁵⁰

58. ENMAX argued that altering the longstanding and conventional regulatory accounting treatment of DFO customer contributions was not practically necessary to address these issues, which means that the hearing panel exceeded its jurisdiction. ENMAX submitted that administrative tribunals obtain their jurisdiction from various statutes (explicit powers) and by application of the doctrine of jurisdiction by necessary implication (implicit powers).⁵¹ It argued that the Supreme Court of Canada's decision in *Stores Block* found that the principal function of the Alberta Energy and Utilities Board, the Commission's predecessor, was the determination of rates and that the power to supervise the finances of public utilities and their operations was merely incidental to that function.⁵² It argued that the Commission does not have the explicit power to prescribe a particular regulatory accounting treatment for distribution-driven transmission projects (DDTPs) or associated customer contributions.⁵³

59. ENMAX asserted that the hearing panel erroneously concluded that greater oversight of the need identification document (NID) and facility process would not address the revenue signal issues where the DFO is incented to increase the contribution and maximize its return.⁵⁴ ENMAX alleged that the hearing panel committed a serious error of law or jurisdiction by concluding that it was necessary to eliminate this incentive of DFOs to prefer capital spending and maximize the customer contributions, and to eliminate the right to earn a fair return.⁵⁵

60. Fortis indicated that implementing the original decision requires DFOs to fund regulated investments in a manner inconsistent with their regulated capital structures. It submitted that the change in accounting treatment of AESO customer contributions results in higher debt balances, which could negatively impact the DFO's credit ratings, and increase interest rates (costs that DFOs pass on to customers) while eroding Alberta's utility investment climate.⁵⁶

⁴⁹ Exhibit 26608-X0011, ATCO Electric application, paragraphs 3-4.

⁵⁰ Exhibit 26061-X0023, ENMAX evidence, paragraphs 41-43 and 48.

⁵¹ Exhibit 26608-X0006, ENMAX application, paragraph 17.

⁵² *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4 (*Stores Block*) [Authorities, Tab 1], para 38.

⁵³ Exhibit 26608-X0006, ENMAX application, paragraphs 19-22, and quoting *Stores Block* at paragraph 77.

⁵⁴ Exhibit 26608-X0006, ENMAX application, paragraph 35.

⁵⁵ Exhibit 26608-X0006, ENMAX application, paragraph 38.

⁵⁶ Exhibit 26608-X0002, Fortis application, paragraph 25.

61. The CCA submitted that the “explicit powers” of the Commission as outlined in *Stores Block* were based on different facts from those in the original proceeding. It noted that *Stores Block* concerned a determination on an asset sale and that the circumstances before the hearing panel were whether it is just and reasonable for a DFO to invest equity in AESO customer contributions along with considering more effective price signals to parties that drive these contributions.⁵⁷

62. Noting ENMAX’s arguments on incentives, the CCA stated that it was surprised by ENMAX’s characterisation of the hearing panel’s alleged error as “serious,” and submitted that such an allegation warrants significant irrefutable support. It said that ENMAX has not provided that support. Instead, the CCA commented that ENMAX’s contention appears to be that the Commission should fix the AESO NID application process and not approve a project to proceed in the first place.⁵⁸ The CCA disagreed and submitted that, while the Commission can and likely should consider other means to address AESO contribution investment levels, such considerations do not invalidate the hearing panel’s findings, nor does the presence of other options to address the problem constitute “a serious reviewable error” in the hearing panel’s findings.⁵⁹

63. In *Stores Block*, Justice Rothstein, on behalf of the Supreme Court of Canada, wrote that, “the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature.”⁶⁰ Further, Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate.⁶¹ The Supreme Court of Canada confirmed that the mandate of the Commission as the regulatory rate setting tribunal in Alberta included “...a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities”⁶² and that “fixing the going-forward rate of return was a matter squarely within the Board’s [now, the Commission’s] statutory mandate.”⁶³

64. The review panel is not persuaded by ENMAX that the original decision is inconsistent with the doctrine of implied authority. In addition, the review panel agrees with the CCA that the application of the doctrine of necessary implication to the facts in the original decision regarding regulatory accounting treatment of AESO customer contributions and the hearing panel’s findings on price signals is distinguishable from the application of the doctrine in *Stores Block* to a sale of assets. In the original decision, the hearing panel sought to safeguard the public interest, by ensuring that: 1) the price signals that AESO customer contributions are intended to achieve are not muted, and 2) that the incentives intended to bring discipline to the cost of new facilities and result in prudent investment are “right sized.” In doing so, the original decision was

⁵⁷ Exhibit 26608-X0020, CCA submission on applications, paragraph 18.

⁵⁸ Exhibit 26608-X0020, CCA submission on applications, paragraph 20.

⁵⁹ Exhibit 26608-X0020, CCA submission on applications, paragraph 22.

⁶⁰ *Stores Block*, paragraph 51.

⁶¹ *Stores Block*, paragraph 51.

⁶² *Stores Block*, paragraph 92.

⁶³ *Stores Block*, paragraph 93.

consistent with the Commission's rate setting mandate, which is of "the widest proportions to safeguard the public interest in the nature and quality of the service."⁶⁴

65. As noted above, in response to the arguments raised on the accounting treatment conclusions in the original proceeding, the hearing panel acknowledged the lumpy nature of the AESO customer contribution amounts paid by DFOs, and the potential for rate shock and rate volatility that could arise from changing the regulatory accounting treatment of AESO customer contribution amounts.⁶⁵ The hearing panel also noted that the scope and the corresponding record of the original proceeding did not extend to establishing a new DFO tariff recovery mechanism applicable to AESO customer contributions.⁶⁶

66. The future accounting treatment of AESO customer contributions is currently being adjudicated in Proceeding 26521 based on the proposals of the DFOs. Accordingly, the accounting treatment for AESO customer contributions for the DFOs and the ultimate impact of the original decision is not yet known. In its direction to DFOs to file one or more proposals for a revised regulatory accounting treatment for AESO customer contributions, the hearing panel indicated that DFOs should, among others, address:

- An evaluation of whether it is appropriate to recover AESO customer contributions as an expense item in the year they are made, similar to other operating expenses.
- The impact of the revised accounting treatment proposal(s) on each DFO.
- Any risks associated with the proposal(s), the likelihood of the risks arising and the consequences of the risks should they occur.⁶⁷

67. As such, the review applicants, in their capacities as DFOs, had an opportunity to propose accounting mechanisms that are consistent with the findings in the original decision and to make submissions on any consequences associated with those proposals. In particular, the hearing panel's provision for DFO proposals, appears on its face to be targeted to specifically address the kinds of concerns raised by Fortis with respect to the prejudice and damage that it alleges has or will result from the original decision.⁶⁸

68. The grounds raised by ATCO Electric, ENMAX, and Fortis, more broadly on the accounting treatment of AESO customer contributions are fundamentally directed at the hearing panel's finding that the contributions should be treated as an expense (and therefore not earn a return), and the accounting adjustment is the result of that change in treatment. That is not a reviewable error. The merits of the grounds related to the treatment of the AESO customer contributions were addressed in Section 5.1.1 of this decision.

69. ENMAX also alleged that in removing the return associated with AESO customer contributions, the hearing panel used the wrong tool to eliminate the incentive to maximize such

⁶⁴ *Stores Block*, paragraph 92.

⁶⁵ Decision 26061-D01-2021, paragraph 137.

⁶⁶ Decision 26061-D01-2021, paragraph 135.

⁶⁷ Decision 26061-D01-2021, paragraph 139.

⁶⁸ Exhibit 26808-X0002, Fortis application, Section IV, paragraphs 24-28.

contributions. However, ENMAX itself pointed out that the hearing panel considered the use of the Commission’s approval authority in relation to transmission facilities to address the incentives.⁶⁹ The CCA had recommended that the Commission better oversee the costs for proposed transmission projects by directing AltaLink to participate in all NID applications filed by the AESO arising out of a DFO system access service request. The hearing panel addressed this recommendation and determined that “...the CCA’s proposal only partially addresses the problem. That is, it does not address the revenue signal to the DFO to increase the contribution described in Section 3.2 above.”⁷⁰

70. In its application, ENMAX explicitly acknowledged the incentive for utilities to prefer capital spending in a regulatory framework, such as in Alberta, in which utilities only earn a return on the equity portion of capital investments. It argued that the incentive is a “natural consequence of the statutory framework”⁷¹ and that it cannot be eliminated without violating the legislation. ENMAX appears to be suggesting in its submissions that the Commission should accept that utilities will attempt to maximize capital investments that attract returns, which will ultimately be borne by customers, without attempting to fulfill its public interest mandate “by achieving the appropriate balance between profitable and efficient utilities and satisfied ratepayers paying a reasonable amount for the service they receive.”⁷²

71. The hearing panel chose to exercise its discretion to address what it determined were incentives that were not in the public interest. The hearing panel stated that it continued to support the principles it had previously identified as the foundation for a customer contribution policy, the most important of which is the establishment of an effective price signal for the siting of connection facilities. It cited Decision 2012-362,⁷³ in which the Commission found that the AESO’s customer contribution policy should “exert an economic discipline on siting decisions by sending price signals, reflective of the AESO’s economics, to connecting customers.”⁷⁴ The hearing panel did not err in making its findings on how to properly give effect to these principles. It exercised its legislative discretion to determine whether and how AESO customer contributions are recoverable.

72. ENMAX disagrees with what it characterizes as the hearing panel’s “unduly narrow focus on the issue of price signals” and its choice of remedy to address the identified incentives. The review panel considers that the original decision concerned AESO customer contributions and that a focus on the ability of such contributions to achieve their primary stated purpose, “the establishment of an effective price signal for the siting of connection facilities”, cannot and does not, on the face of the original decision, amount to a reviewable error.

73. The review applicants have not shown the existence of an error of jurisdiction that is either apparent on the face of the decision or otherwise exists on a balance of probabilities that

⁶⁹ Exhibit 26608-X0006, ENMAX application, paragraph 25 referencing paragraph 130 of Decision 26021-D01-2021.

⁷⁰ Decision 26061-D01-2021, paragraph 130.

⁷¹ Exhibit 26608-X0006, ENMAX application, paragraph 35.

⁷² *FortisAlberta Inc.*, paragraph 11.

⁷³ Decision 2012-362: Alberta Electric System Operator, 2012 Construction Contribution Policy, Proceeding 1162, Application 1067193-1, December 28, 2012.

⁷⁴ Decision 26061-D01-2021, paragraph 112.

could lead the Commission to materially vary or rescind the decision. Accordingly, the review applicants' requests for review on the basis that the hearing panel exceeded its statutory authority in the original decision are denied.

5.2 Sufficiency of evidence

74. ENMAX and Fortis each took issue with the hearing panel's conclusion at paragraph 125 of the original decision that "the current DFO tariff recovery mechanism applicable to AESO customer contribution amounts fails to provide effective price signals intended to incent the end-use customers to choose the most economical connection solution."

75. ENMAX alleged that there was no evidentiary basis for what it characterized as an assumption by the hearing panel that DDTPs generally arise as a result of connection requests from end-use customers from whom AESO customer contributions can be recovered. ENMAX pointed to its evidence that price signals cannot be sent to end-use customers because DDTPs are not driven by a single end-use customer or an identifiable group of customers. ENMAX submitted that the hearing panel's focus on the issue of price signals led the hearing panel to erroneously conclude that it was necessary to eliminate the utilities' return on AESO customer contributions.⁷⁵

76. Fortis submitted that the hearing panel wrongly concluded that the current AESO customer contribution policy fails to provide effective price signals to incent end-use customers to choose the most economical connection solution, which it said is contrary to findings from the 2018 AESO tariff decision. In the 2018 AESO tariff decision, the Commission determined that there was insufficient evidence to conclude that Fortis caused the construction of excessive transmission facilities.⁷⁶ Fortis's application states that absent this evidence, the hearing panel's finding on ineffective price signals is unsupported.

77. The CCA submitted that the hearing panel's findings in the original decision were based on the evidence before it and are aligned with addressing the ineffective price signals that exist under the current AESO contribution framework. The CCA said that the findings are not contrary to Decision 22942-D02-2019 regarding the size of Fortis's investment in AESO contributions.⁷⁷ The CCA maintained that there was nothing irreconcilable in the hearing panel's finding and there was no error in fact.

78. In the original decision, the hearing panel made the following overarching statement with respect to the importance of price signals to the establishment of an effective AESO customer contribution policy:

The Commission continues to support the principles it had previously identified as the foundation for a customer contribution policy, the most important of which is the establishment of an effective price signal for the siting of connection facilities. As noted above, in Decision 2012-362, the Commission found that the AESO's customer contribution policy should "exert an economic discipline on siting decisions by sending

⁷⁵ Exhibit 26608-X0006, ENMAX application, paragraphs 40-49.

⁷⁶ Exhibit 26608-X0002, Fortis application, paragraph 13, noting 2018 Decision 22942-D02-2019, paragraph 1030.

⁷⁷ Exhibit 26608-X0020, CCA submission on applications, paragraphs 14-15.

price signals, reflective of the AESO’s economics, to connecting customers.” Further, customer contributions are intended to balance the economic effects of connecting a new customer between existing customers and the new customer.

... Connecting customers that have to bear the project costs above the AESO maximum investment levels by way of a CIAC [contribution in aid of construction] are incented to (i) request the most economical connection facilities and service requirements that meet their needs; and (ii) take into account proximity to the existing or planned transmission system when considering alternative locations for their load to be served. In turn, these contribution amounts offset the investments made by the TFO (with a TFO only investing up to the maximum investment level and therefore only receiving a return of, and on, that investment). As a result, existing customers do not unduly subsidize the construction of new facilities.⁷⁸ [footnotes removed]

79. The hearing panel then went on to weigh the evidence on the record with respect to the incentives under performance-based regulation for DFOs related to AESO customer contributions. In so doing, the hearing panel expressly addressed the Commission’s findings in Decision 22942-D02-2019 that Fortis’s significantly higher AESO customer contribution balances relative to other DFOs could not be attributed entirely to differences in the size or nature of Fortis’s operations, but that there was “insufficient evidence to support AltaLink’s contention that Fortis caused the construction of excessive transmission voltage connected facilities.” The hearing panel indicated that it had not varied the findings in Decision 22942-D02-2019. It then went on to say:

Notwithstanding, the Commission considers that there is a general incentive for DFOs to increase the amount of AESO customer contributions to grow rate base, and that this incentive is exacerbated by the fact that a DFO has a degree of influence on transmission project requirements, associated costs, and therefore AESO customer contribution amounts.

80. The review panel considers that the words “general incentive for DFOs” in the above quote demonstrate that the hearing panel’s consideration is general in nature, relating to the AESO customer contribution scheme as it broadly pertains to all DFOs, rather than specifically to Fortis, and are grounded in general evidence, rather than being specific to Fortis, as was the case in the 2018 AESO tariff proceeding. The review panel is satisfied that the hearing panel was aware of the previous decision and expressly made its finding “notwithstanding” and without varying, the finding in the 2018 AESO tariff decision.

81. The hearing panel then went on to explain why the current DFO tariff recovery mechanism applicable to AESO customer contributions fails to provide effective price signals, stating, in part:

First, the DFO is not generally flowing the costs of the AESO customer contribution amounts to the end-use customers that trigger the need for new connection assets. As a result, the costs of the AESO customer contributions associated with the connections are socialized across all DFO customers. This mutes the price signal on siting decisions since the customer or customers that caused the need for a new connection do not directly pay

⁷⁸ Decision 26061-D01-2021, at paragraphs 112-113.

their share of the AESO customer contribution associated with the assets ultimately built...

Second, the DFO is able to earn a return on its invested AESO customer contribution amounts. As a result, the intended price signal is at best distorted or muted and is likely absent. In fact, what was intended to be a price signal is converted to a revenue signal to a DFO...⁷⁹

82. The review panel finds that the decision took into consideration the Commission's determinations in the 2018 AESO tariff decision related to Fortis's higher AESO customer contribution balances relative to other DFOs. The hearing panel went on to provide clear reasons for its finding related to price signals. Fortis has not demonstrated that the hearing panel's determinations in this section are "logically irreconcilable with previous findings of the Commission" as alleged in its review application.

83. The review panel also notes that there was ample evidence adduced and arguments made on price signals and other incentives resulting from the current AESO customer contribution policy.

84. For example, Fortis's evidence in the original proceeding included the following in the overview section that directly references that price signals were a factor for the Commission's consideration:

Section 5.0 provides an overview of the guiding principles that should be considered in the development of an optimal policy governing customer contributions and maximum investment levels (MIL) at both the distribution and transmission levels. This section also considers the importance of harmonization between transmission and distribution investment policies that together provide the right price signals to end-users to incent efficient transmission development.⁸⁰

85. In its evidence, EPCOR stated the following:

Under the AltaLink proposal, the requirement for a contribution continues to serve as an appropriate and effective price signal to the DFO, consistent with the Commission's previous determination that sending proper price signals should be a primary objective reflected in the AESO's contribution policy. Contribution costs will flow through to those causing the need for the transmission project (i.e., the DFO and its customers) while allowing the TFO to properly earn a rate of return on transmission assets which it owns, maintains and operates, and in respect of which it bears the risks of ownership.⁸¹ (original footnotes removed)

86. ENMAX's evidence provided a review of previous decisions that discussed price signals.⁸² It then commented on AltaLink's AESO contribution policy proposal, stating:

⁷⁹ Decision 26061-D01-2021, paragraphs 126-127.

⁸⁰ Exhibit 26061-X0021, Fortis evidence, paragraph 6.

⁸¹ Exhibit 26061-X0023, EPCOR evidence, paragraph 22.

⁸² Exhibit 26061-X0023, ENMAX evidence, paragraphs 27, 29, 30 and 34.

For the reasons set out above, the current customer contribution policy does not achieve the objective of providing effective locational price signals and therefore, fails to meet a key principle set by the Commission for assessing the contribution policy. AltaLink's proposal also does not remedy the issue. As indicated above, a holistic review of the contribution policy is required to consider the objectives of the contribution policy.⁸³

87. ENMAX also stated that “the need for customer contributions from DFOs for DDTP facilities required to serve multiple end-use customers should be comprehensively re-examined. Neither the current policy nor AltaLink's proposal achieve the objective of sending effective locational price signals.”⁸⁴

88. Each of the above examples demonstrate that the importance of price signals, associated with the ability to capitalize and therefore earn a return on AESO customer contributions, were in evidence and at issue. While the reviewing parties may not agree with the result of the hearing panel's weighing of this evidence, this does not detract from the fact that there was evidence before the hearing panel to support its decision.

89. The review panel concludes that the submissions of Fortis and ENMAX that there was insufficient evidence amount to complaints by these applicants that the hearing panel failed to give the weight desired by the review applicants to their evidence. As stated by Justice Fruman in *EPCOR v Alberta (Energy and Utilities Board)*:

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.⁸⁵

90. The review panel's task is not to retry the application based upon its own interpretation of the evidence, nor is it to second guess the weight assigned by the hearing panel to various pieces of evidence.⁸⁶ The review process is also not intended to provide a second opportunity for parties to reargue the issues in a proceeding.⁸⁷

91. ENMAX and Fortis have not demonstrated an error of fact, law or jurisdiction either apparent on the face of the decision or otherwise on a balance of probabilities that could lead the Commission to materially vary or rescind the original decision. Accordingly, the review applicants' requests for review on the ground that there was insufficient evidence to support the findings in the original decision are denied.

⁸³ Exhibit 26061-X0023, ENMAX evidence, paragraph 35.

⁸⁴ Exhibit 26061-X0023, ENMAX evidence, paragraph 45.

⁸⁵ *EPCOR v Alberta (Energy and Utilities Board)*, 2003 ABCA 374, paragraph 23.

⁸⁶ 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, May 14, 2012, paragraph 31.

⁸⁷ Decision 22166-D01-2017: ATCO Pipelines, Request for Review and Variance of Decision 21515-D01-2016, ATCO Pipelines' 2015-2016 Revenue Requirements Compliance Filing to Decision 3577-D01-2016, Proceeding 22166, April 5, 2017.

5.3 Procedural fairness

92. Both ATCO Electric and ENMAX alleged that the parties were denied due process and procedural fairness.

93. ATCO Electric submitted that no party advanced a position that resembles what the hearing panel ultimately decided and that no party was provided an opportunity to comment on the legality of the hearing panel's conclusions or the implications or practicality of implementing the hearing panel's decision on the return component for assets to provide service. ATCO Electric indicated that, as a result, the parties did not know the case to meet and were denied the opportunity to be heard because they did not have input into the findings.⁸⁸

94. ENMAX argued that there was nothing in the notice to alert parties to the fact that eliminating the right of any electric utility to earn a return on AESO customer contributions was being contemplated.⁸⁹ ENMAX conceded that there was some discussion of whether it was appropriate for a TFO to earn a return rather than the DFO, but that because eliminating the right of any electric utility to earn a return was not advanced by any party or discussed as a possible outcome, the parties were not given the opportunity to be heard. ENMAX alleged that this is a serious reviewable error of law.⁹⁰

95. The CCA disputed the procedural fairness allegations and stated that the scope of the original proceeding was clearly and broadly established by the hearing panel.⁹¹ The CCA maintained that as an expert tribunal, the Commission retains the authority to exercise its discretion in determining an issue and has consistently exercised this discretion irrespective of whether it is consistent with proposals or expectation of proceeding participants.⁹²

96. The Commission's processes must be fair and meet the duty of procedural fairness. 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."⁹³ Procedural fairness must be reviewed within the context in which the issue arises.

97. The review panel has considered the alleged breaches of procedural fairness to ATCO Electric and ENMAX. The question is whether, through the process established in the proceeding giving rise to the original decision, the review applicants were provided with reasonable notice of the issues to be addressed by the hearing panel and raised by the interveners, and had the opportunity to address the same.

⁸⁸ Exhibit 26608-X0011, ATCO Electric application, paragraphs 22-24.

⁸⁹ Exhibit 26608-X0006, ENMAX application, paragraph 62.

⁹⁰ Exhibit 26608-X0006, ENMAX application, paragraphs 59-63.

⁹¹ Exhibit 26608-X0020, CCA submission on applications, paragraph 27.

⁹² Exhibit 26608-X0020, CCA submission on applications, paragraph 16.

⁹³ *Baker*, paragraph 22.

98. The notice of the original proceeding reiterated the scope and stated that the Commission would consider:

- (i) the legal basis of the current ISO customer contribution policy as it pertains to all transmission facility owners (TFOs) and DFOs;
- (ii) whether there is a need for a new policy, including consideration of AltaLink Management Ltd.'s contribution proposal; and
- (iii) if approved, set the date on which any new policy would commence.⁹⁴

99. The notice was accompanied by an appendix that contained a more detailed scoping of the proceeding. In this appendix, the Commission stated that the proceeding was intended to consider the AESO's contribution policy, and, in particular, whether the current practice that allows a DFO to earn a fair return on AESO customer contributions is aligned with the legal framework.⁹⁵

100. After this notice was issued, interested parties (including ATCO Electric and ENMAX) had the opportunity to file statements of intent to participate in the proceeding, followed by evidence, information requests and responses, and then make oral argument.

101. The review panel agrees with the CCA that the scope set out in the notice specifically addressed the question of the existing AESO customer contribution practice, which allows a DFO to earn a regulated return on AESO customer contributions. It is also evident that the then-current practice did not allow a TFO to earn a fair return on AESO customer contributions.

102. The review panel finds that, based on the comprehensive notice issued for the original proceeding, registered parties, including ATCO Electric and ENMAX, knew, or reasonably should have known, that the scope of the original proceeding included the possibility that: (i) the Commission would set a new AESO customer contribution policy, and (ii) that implementation of that new policy could impact the structure and recovery of AESO customer contribution amounts.

103. In *Milner Power Inc. v Alberta Utilities Commission*, the applicants for permission to appeal argued that the Commission breached procedural fairness by denying them a full opportunity to be heard regarding the Commission's decision on the rate of interest to be paid or charged. In denying permission to appeal, Justice O'Ferrall held that while the Commission may require additional information and material from the parties under its rules of practice, it is not compelled to do so:

The point being made is that when the Commission seeks input, all parties know that the Commission is contemplating a decision. More importantly, all parties know that the decision of the Commission may or may not be reflective of their input. It was up to the parties to contemplate possible outcomes and provide input with respect to them.⁹⁶

⁹⁴ Exhibit 26061-X0004, Notice of application, PDF page 1.

⁹⁵ Exhibit 26061-X0004, Notice of application, PDF page 4.

⁹⁶ *Milner Power Inc v Alberta Utilities Commission*, 2019 ABCA 127 (CanLII), at paragraph 55.

...

Furthermore, it is also open to the Commission to render decisions on not only the identified issues, but also other issues which arise from the submissions received.⁹⁷

104. Having reviewed the records of the proceedings leading up to the original proceeding and the record of the original proceeding, the review panel considers that the existing AESO customer contribution policy, as it pertains to all TFOs and DFOs, was directly raised as an issue in the original proceeding. The question of whether there was a need for a new policy was also clearly an issue, which led to the filing evidence and argument on whether AESO customer contributions should be capitalized into a DFO or a TFO's rate base and therefore attract a return.

105. In the original proceeding AltaLink argued that only a TFO may own and earn a return on transmission facilities⁹⁸ and submitted that the Commission's general rate-setting powers under the EUA cannot allow a DFO to earn a return on transmission assets.⁹⁹ Fortis submitted that DFOs are required to invest in AESO customer contributions as part of arranging for, and financially settling with the AESO for system access service on behalf of their customers.¹⁰⁰ As a DFO, Fortis submitted that it is entitled to a return of and on its prudent investments in AESO customer contributions.¹⁰¹

106. In the original proceeding, Fortis provided the following evidence:

What AltaLink characterizes as unfairness at the transmission level also occurs at the distribution level; it is a predictable and necessary part of any utility tariff. That is, each utility tariff typically has a customer contribution and utility investment policy that ensures that balanced price signals are sent to connecting customers to provide economic discipline in the extension of the system. The result is that DFOs, like TFOs, own and operate assets for which a customer contribution was collected for amounts above the MILs, and the DFO does not earn a rate of return on the customer contributed portion of those customer-related costs. This demonstrably rational feature of any utility tariff ensures the communication of economically efficient price signals to customers as they are connecting.¹⁰²

107. In addressing the investment in transmission facilities and return, EDTI proffered the following:

By transferring the investment in the required transmission facilities, including the return thereon, from the DFO to the TFO, the proposal will remove potentially harmful incentives present in the current contribution policy under which a pureplay DFO can financially benefit from the construction of transmission facilities (i.e., earning a return

⁹⁷ *Milner*, paragraph 47.

⁹⁸ Exhibit 26061-X0026, AltaLink evidence, paragraph 86.

⁹⁹ Exhibit 26061-X0026, AltaLink evidence, paragraphs 98-109.

¹⁰⁰ Sections 101 and 105 of the EUA.

¹⁰¹ Exhibit 26061-X0021, Fortis evidence, paragraphs 23-30.

¹⁰² Exhibit 26061-X0021, Fortis evidence, paragraph 76.

on transmission facilities which it does not operate and with respect to which it does not bear the risks associated with asset ownership).¹⁰³

108. In oral argument, ATCO Electric submitted:

- The difficulty with the currently approved structure is that the TFO does not actually invest the dollars in the key asset in an amount equal to the TFO's contribution; hence, there is no investment of dollars upon which to earn a return.¹⁰⁴
- This also leads directly to another concern raised by a number of parties, being that the TFO is required to assume the numerous risks and responsibilities of ownership of the subject key assets, but does not get any of the associated benefits, including the opportunity to earn a return. Just as the AUC has the authority to authorize the current structure of customer contributions, ATCO Electric considers that the Commission has the jurisdiction to alter the current structure and impose a different regime. This could involve adopting a form similar to that proposed by AltaLink in the sense that it would involve annual expense payments by the DFO instead of the upfront lump sum payment that is treated as a capital expenditure by the DFO and thereby allowing the DFO to earn a return.¹⁰⁵

109. In the passage quoted above, ATCO Electric not only expressly addresses the question of who should earn the return on AESO customer contributions, but also acknowledges the Commission's jurisdiction to alter the current AESO customer contribution structure and to impose a different regime.

110. The review panel observes that the option of not allowing a return on AESO customer contributions at all was expressly contemplated in the original proceeding during an exchange between the hearing panel and counsel for Fortis, during which the concept of expensing (rather than capitalizing) AESO customer contributions was discussed:

MS. SEBALJ: I think you've gotten to the point that I wanted to get to, which is where is it in the legislation where -- I think you've suggested that customer contributions are permitted and that they should be permitted for DFOs as well as every other type of customer, but my question goes to where is it that it says that customer contributions should earn a rate of return.

MR. IGNASIAK: Well, what I would say is that the legislation is silent. I mean, the legislation clearly contemplates that a DFO will earn a return for all of its costs and expenses, including investments it needs to make. I don't think there's any issue about that. So that's what we're entitled to do. And we're doing that because currently the regime is that when we require transmission solutions we must pay an upfront cost for those, and that's been determined to be necessary to make sure certain price signals flow through. And whether those price signals are appropriate, whether they should be maintained, that's entirely within the discretion of this Commission. So to the extent that we are required to pay an upfront expense before a transmission operator will construct those facilities, and to the extent we are going to amortize that expense over a number of years, and because of the recent R&V decision we're doing so more or less in line with

¹⁰³ Exhibit 26061-X0024, EDTI evidence, paragraph 11.

¹⁰⁴ Transcripts, Volume 1, page 47.

¹⁰⁵ Transcripts, Volume 1, pages 47-48.

the life of those assets, because it's commonly done, that's clearly something that a DFO is entitled to earn a return on.

MR. LARDER: Just to follow up on that, Mr. Ignasiak. Fortis is not entitled to earn a return on every cheque it cuts; is that correct?

MR. IGNASIAK: I'm a little reluctant to answer that. I'll take your word for it, sir. I'm sure there are -- well, I think, sir, what -- if I understand your question, what you're getting into is what is an expense and what is something that you earn a return on, and I think those are accounting principles and those apply to whether something is considered an expense amortized over time and subject to depreciation and everything else or whether something is a current period expense. So if you buy a computer, you expense it. If you buy an iPad, typically you -- or, sorry. If you buy a computer, you amortize it. If you buy an iPad, typically your account will tell you to expense it. So different principles apply to that decision, but I don't think the legislation speaks to it in any way.

MR. LARDER: What would be the rationale be, for example, to treat the customer contributions that Fortis makes as capital as opposed to an expense?

MR. IGNASIAK: Because it derives a benefit from that expense. It derives a benefit over a course of, you know, 25 to 30 years, depending on the life of the asset. So you amortize it. You could imagine the rate shocks if we were to start expensing, you know, major investments and infrastructure.¹⁰⁶

111. The hearing panel was explicitly considering the legal basis of the AESO customer contribution policy as it pertains to all TFOs and DFOs and whether a new AESO customer contribution policy was needed. This involved consideration of AltaLink's contribution proposal, which included transferring the investment in the required transmission facilities and the fair return thereon from the DFO to the TFO. It also involved the filing of evidence, information requests and responses, and the advancement of positions by the parties. Ultimately, the hearing panel determined that neither the TFO, nor the DFO, would be permitted to earn a return on AESO customer contributions made in respect of new transmission facilities. ATCO Electric and ENMAX both allege that it was a breach of procedural fairness for the hearing panel to have so determined without having expressly put this possibility to the parties. The review panel is not persuaded that the process was unfair. The hearing panel was permitted to render a decision on not only the identified issues, but also other issues which arose from the submissions received,¹⁰⁷ was free to accept or reject evidence presented by the parties, and was entitled to use its expertise to arrive at different conclusions than the parties.¹⁰⁸

112. In summary, the review applicants have not demonstrated an error on the grounds of procedural fairness that 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 original decision. The review applicants' requests for review on the grounds of a lack of procedural fairness are denied.

¹⁰⁶ Transcripts, Volume 1, pages 119-121.

¹⁰⁷ *Milner*, paragraph 47.

¹⁰⁸ *EPCOR v Alberta (Energy and Utilities Board)*, at paragraph 23.

6 Decision

113. In answering the preliminary question, the review panel finds that ATCO Electric Ltd., ENMAX Power Corporation and FortisAlberta Inc. have not met the requirements for a review of Decision 26061-D01-2021 and the applications for review are denied.

Dated on October 1, 2021.

Alberta Utilities Commission

(original signed by)

Cairns Price
Panel Chair

(original signed by)

Kristi Sebalj
Commission Member