



## Alberta Electric System Operator

Competitive Process Pursuant to  
Section 24.2(2) of the Transmission Regulation  
Part B: Final Determination

February 14, 2013

**The Alberta Utilities Commission**

Decision 2013-044: Alberta Electric System Operator

Competitive Process Pursuant to Section 24.2(2) of the Transmission Regulation

Part B: Final Determination

Application No. 1607670

Proceeding ID No. 1449

February 14, 2013

Published by

The Alberta Utilities Commission

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## **1 Introduction and background**

1. On September 15, 2011, the Alberta Utilities Commission (AUC or the Commission) received an application from the Alberta Electric System Operator (AESO) requesting approval of a competitive process to determine who is eligible to apply to the Commission for the construction and operation of certain transmission facilities pursuant to Section 24.2 of the *Transmission Regulation*, and for such further and other relief as the Commission deemed appropriate.<sup>1</sup>

2. The Commission issued notice of the application on September 23, 2011, and subsequently established a process schedule. In accordance with the process schedule, interested parties and the Commission prepared information requests respecting the AESO's competitive process application. The AESO submitted its information request responses on November 14, 2011.

3. On November 29, 2011, AltaLink Management Ltd. (AltaLink) submitted its evidence and requested the Commission direct the AESO to refile its application on the basis that insufficient details were provided in the application, and that parties and the Commission could not assess what was being proposed on the basis of the materials that had been filed by the AESO in the proceeding. On December 2, 2011, the Commission suspended the proceeding process and invited parties to provide their comments on whether there was sufficient material on the record to continue.

4. On February 27, 2012, the Commission issued Decision [2012-059](#).<sup>2</sup> In the decision, the Commission determined that the application could not be approved as filed and directed the AESO to advise the Commission if it would file additional evidence to address the details identified in the decision as being missing and, if so, when the additional information would be expected to be filed.

5. On March 9, 2012, the AESO advised the Commission that it intended to submit supplemental evidence by March 30, 2012, and on March 15, 2012, the Commission established a further process schedule for the proceeding.

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<sup>1</sup> See Section 24.2(2) of the *Transmission Regulation* as amended on September 7, 2012.

<sup>2</sup> Decision 2012-059: Alberta Electric System Operator – Competitive Process Pursuant to Section 24.2(2) of the *Transmission Regulation* Part A: Statutory Interpretation, Application No. 1607670, Proceeding ID No. 1449, February 27, 2012.

6. In accordance with this further process schedule established by the Commission, the following parties issued information requests to the AESO: Elecnor Internacional S.A. (ELEC NOR), ATCO Electric Ltd. (ATCO Electric), LS Power LLC (LS Power), AltaLink, EPCOR Utilities Inc. (EPCOR), TransCanada Energy Ltd. (TCE), the AUC and the Office of the Utilities Consumer Advocate (UCA).

7. On May 4, 2012, the AESO responded to the information requests.

8. On May 9, 2012, TCE requested an extension from the Commission to the deadline for filing intervenor evidence and proposed a new process schedule for the Commission's consideration. On May 17, 2012, the Commission established a revised schedule for the submission of intervenor evidence, information requests, information responses and rebuttal evidence.

9. In a subsequent letter, the Commission determined that an oral hearing would be held on July 16 to 19, 2012, and further extended the deadline for the submission of rebuttal evidence to allow for sufficient time between the two process steps.

10. On June 4, 2012, the Commission received a request from the AESO in which the AESO proposed new oral hearing dates as well as to indicate that a pre-hearing conference would be of benefit to identify the issues for the oral hearing.

11. The Commission asked for parties views on the AESO's letter and upon reviewing those comments, on June 15, 2012, denied the request to hold a pre-hearing conference, and rescheduled the oral hearing to September 10 to 14, 2012.

12. On September 7, 2012, the Commission adjourned the oral hearing in response to the release of amendments to the competitive procurement provisions in the *Transmission Regulation*. The Commission was of the view that both the AESO and registered parties should have an opportunity to review those amendments and asked for interested parties' comments on the following two proposed ways of proceeding with the process:

[...] (1) a supplementary round of information requests (IRs) can be brought forward to test any amendments to the evidence as a consequence of this change or any other outstanding issues that have not already been tested, with the balance of the proceeding to be completed through a written process; or (2) the oral proceeding can be rescheduled without the provision for a supplementary round of IRs.<sup>3</sup>

13. The majority of parties expressed support for a supplementary round of information requests and a written process. The Commission, in its September 11, 2012 letter, established a written process to replace the proposed oral proceeding as set out below:<sup>4</sup>

Process schedule	Due date
AESO files supplemental evidence respecting <i>Transmission Regulation</i> amendments	September 17, 2012 at 4 p.m.
Information requests to the AESO	September 24, 2012 at 4 p.m.

<sup>3</sup> Exhibit 134.01, AUC Letter – Notice of proceeding hearing change, September 7, 2012.

<sup>4</sup> Exhibit 145.01, AUC Letter – Notice of proceeding process and schedule, September 11, 2012.

<b>Process schedule</b>	<b>Due date</b>
Information responses from the AESO	October 1, 2012 at 4 p.m.
Supplemental intervenor evidence	October 9, 2012 at 4 p.m.
Information requests on supplemental intervenor evidence, if any	October 16, 2012 at 4 p.m.
Information responses on supplemental intervenor evidence	October 23, 2012 at 4 p.m.
Rebuttal evidence, if any	October 30, 2012 at 4 p.m.
Argument	November 13, 2012 at 4 p.m.
Reply argument	November 20, 2012 at 4 p.m.

14. The Commission considers November 20, 2012, to be the close of record for this proceeding, corresponding with the submission of parties' reply argument.

15. In reaching the determinations contained within this decision, the Commission has considered all relevant materials comprising the record of this proceeding, including the evidence and argument provided by each party. 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 record with respect to that matter.

## **2 The AESO's proposed competitive procurement process**

16. In Decision 2012-059, the Commission provided parties with its determinations regarding the scope and intent of the competitive procurement legislative, and the manner in which those provisions were incorporated within the overall legislative scheme for the development, construction, operation and payment for transmission infrastructure in Alberta. The Commission's determinations in this regard remain unchanged. In addition, the Commission addressed various aspects of the application and identified those areas where it saw deficiencies and where further evidence might be of assistance in its consideration of the application.

17. This decision considers both the initial evidence and argument filed in this proceeding as well as the supplemental evidence and argument filed by parties and should be considered as an extension of Decision 2012-059.

### **2.1 Issues arising from specific legislative provisions in the Electric Utilities Act and the Transmission Regulation**

#### **2.1.1 Generic versus project-specific procurement process**

18. The AESO has applied for approval of a generic competitive process with the specific commercial terms and conditions to be developed for each individual transmission project to which the competitive procurement process will be applied.<sup>5</sup>

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<sup>5</sup> Exhibit 170.02, AESO Rebuttal Evidence, October 30, 2012, page 3, paragraph 6.

19. AltaLink has asserted that with the repeal of Section 41.1 of the *Electric Utilities Act*, the Fort McMurray project would be the only project to which the competitive process proposed by the AESO would apply and that there is no reason for the AESO to seek approval of a generic process.<sup>6</sup> ATCO Electric provided similar assertions.<sup>7</sup>

20. Notwithstanding this legislative change, the AESO has continued to request, pursuant to Section 24.2(8) of the *Transmission Regulation*, approval for a generic process characterizing the Fort McMurray project as two separate projects, Fort McMurray East and Fort McMurray West and further, arguing that the government of Alberta's Action Plan, as set out in its February 23, 2012 response to the Critical Transmission Review Committee Report suggests the future use of this process for all major infrastructure projects.<sup>8</sup> TCE also argued that this document demonstrated a predilection for expanding the competitive procurement process to other transmission projects that are not critical transmission infrastructure (CTI) projects.

### Commission findings

21. The Commission, in Decision 2012-059, considered the competitive process provisions in the context of the overall legislative scheme in Alberta. At paragraphs 24, 32, 33 and 34, the Commission concluded:

24. The competitive process provisions are part of the critical transmission infrastructure provisions which serve as an exception to some steps and approvals in the standard approval process...

32. Recently, amendments were introduced into the *Electric Utilities Act*, *Hydro and Electric Energy Act* and *Transmission Regulation* to provide for the construction and operation of critical transmission infrastructure (CTI).

33. With the creation of CTI, the legislation has now established two streams of regulatory treatment for the development of transmission projects (1) need-initiated that continue to follow the standard regulatory process and (2) Alberta government-designated (or CTI projects).

34. For CTI projects, the standard approval process, need, facilities and cost recovery through rates, has been altered. There are also two separate regulatory paths for selection of the proponent found within the provisions governing CTI projects, one in which the proponent is determined by the Minister and one in which the proponent is determined by the competitive process. The determination as to who is entitled to construct and operate the transmission facilities and the manner in which costs are recovered differs between CTI projects which the Alberta government designates and CTI projects which fall under the competitive process provided for under the *Transmission Regulation*. (emphasis added)

22. In the fall of 2012, the Alberta government passed Bill 8, the *Electric Utilities Amendment Act, 2012*. With the passage of Bill 8, the Alberta government repealed Section 41.1 and amended sections 1(1)(f.1) and 41.3 of the *Electric Utilities Act*. As a consequence of these legislative amendments, the Alberta government removed its ability under the act to designate

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<sup>6</sup> Exhibit 174.01, AltaLink Argument, November 13, 2012, page 1, paragraph 5.

<sup>7</sup> Exhibit 186.02, ATCO Electric Reply Argument, November 20, 2012, page 6, paragraphs 21 and 22.

<sup>8</sup> Exhibit 181.01, AESO Reply Argument, November 20, 2012, page 2, paragraph 8.



any future critical transmission infrastructure projects beyond those already identified in the schedule to the *Electric Utilities Act*.

23. Section 24.2(2) of the *Transmission Regulation* states:

(2) The ISO must develop a competitive process to determine the person who is eligible to apply for the construction and operation of the transmission facilities referred to in section 24(3)(a), (c) and (d).

24. Section 24(3)(a), (c) and (d) of the *Transmission Regulation* states:

(3) Subsection (1) does not apply in respect of

(a) a transmission facility to which section 27 applies,

...

(c) section 4 of the Schedule to the Act, or

(d) other critical transmission infrastructure that is designated under section 41.1 of the Act after June 1, 2010.

25. The repeal of Section 41.1 of the *Electric Utilities Act* renders Section 24(3)(d) of the *Transmission Regulation* inoperative. Thus, the operational provisions of Section 24.2(2) of the *Transmission Regulation* are restricted to inter-tie projects (Section 27 of the *Transmission Regulation*) and Section 4 of the schedule to the *Electric Utilities Act*, which states:

**4** Two single circuit 500 kV alternating current transmission facilities from the Edmonton region to the Fort McMurray region, generally described as follows:

(a) a facility from a new substation to be built in the Thickwood Hills area, approximately 25 km west of the Fort McMurray Urban Service Area, to a substation at or in the vicinity of the existing Brintnell 876S substation;

(b) a facility at or in the vicinity of the existing Brintnell 876S substation, to a substation in the vicinity of the existing Keephills - Genesee generating units;

(c) a facility, located east of the facilities described in clauses (a) and (b) and geographically separated from those facilities for the purposes of ensuring reliability of the transmission system, from a new substation to be built in the Gibbons - Redwater region to a new substation to be built in the Thickwood Hills area, approximately 25 km west of the Fort McMurray Urban Service Area.

26. Section 24.2(8) of the *Transmission Regulation* permits the AESO to use a competitive process that has been approved by the Commission for more than one transmission facility project. To the extent that the AESO is legislatively directed to use a Commission-approved competitive process pursuant to Section 24.2 of the *Transmission Regulation*, it is not necessary for the AESO to obtain approval for each competitive process on a project-by-project basis.

27. However, the Commission finds that the scope of the application of the competitive process provided for under Section 24.2 of the *Transmission Regulation* cannot be expanded to all major infrastructure projects that are not critical transmission infrastructure projects. Such an expansion would be contrary to the legislative provisions found in the *Electric Utilities Act*, and

the *Transmission Regulation* and is not supported by the overall legislative scheme in Alberta in which transmission services are identified, developed, constructed, operated, owned and ultimately paid for by electricity ratepayers.

### **2.1.2 Establishment of a separate affiliate for a regulated transmission facility owner**

28. In its evidence, TCE has indicated that it has concerns that the AESO, in developing its competitive procurement process, did not sufficiently take into consideration the extent to which incumbent transmission facility owners would have a competitive advantage and therefore has not created a level playing field for all potential bidders.<sup>9</sup>

29. As a solution to this concern, TCE recommended that during the bid submission of the request for proposals (RFP) stage the regulated transmission facility owners be required to create a separate affiliate (competitive transmission facility owner or TFO), and that during the implementation and operational phase, that the inter-affiliate codes of conduct operate as between the regulated transmission facility owner and the affiliated competitive transmission facility owner.

30. In its evidence, TCE pointed to a number of scenarios in which it asserted that an unfair competitive advantage could arise in the development of a bid including the use of planning information known to the regulated transmission facility owners in that area, free office space and access to information management systems for the bid development team, the use of the regulated transmission facility owner's staffing expertise at little or no cost because such costs are already being paid for by ratepayers, and ongoing business relationships with low cost suppliers.

31. TCE proposed that there be complete separation between the regulated transmission facility owner's operation and competitive TFO operations including; (1) separation of staff, equipment, facilities and other services; (2) accounting records that can be separately tracked, monitored, and reported; (3) the application of a code of conduct to govern the interactions between the regulated transmission facility owner and the competitive TFO; and (4) clear identification of direct charges or cost allocations for shared staff, shared equipment and facilities and other common costs.<sup>10</sup>

32. Iccenlux, Corp (Iccenlux) and ELECNOR took similar positions in each of their one-page submissions.<sup>11</sup>

33. The AESO rejected TCE's suggestion that a separate affiliate entity was required to ensure a level playing field as part of its proposed competitive procurement process. In its responses to AUC.AESO-003(f) and TCE.AESO-024(f), the AESO stated:

AUC.AESO-003(f):<sup>12</sup>

...whether the successful proponent is a new transmission facility owner or an incumbent transmission facility owner, it will file with the Commission a tariff setting out the rates established in the arrangements from the competitive process, and the Commission must

<sup>9</sup> Exhibit 85.01, TCE Evidence, June 1, 2012, pages 4-7.

<sup>10</sup> Exhibit 85.01, TCE Evidence, June 1, 2012, pages 10-14.

<sup>11</sup> Exhibit 173.01, Iccenlux Argument Submission, November 13, 2012; Exhibit 171.01, ELECNOR Argument, November 13, 2012.

<sup>12</sup> Exhibit 27.01, AESO Information Request Response to AUC, November 14, 2011, AUC.AESO-003(f), page 3.

approve the tariff as filed. Therefore, the “traditional regulatory review” with respect to rates would not apply in respect of the facilities resulting from the competitive process. It is the AESO’s interpretation that this does not necessarily mean the incumbent transmission facility owner must form an “independent entity” as a result of the competitive process; it simply means that the costs of a project awarded through the competitive process are excluded from the incumbent transmission facility owner’s regulated ratebase and tariff.

TCE.AESO-024(f-1):<sup>13</sup>

The AESO does not intend to establish a Competitive Process that purposely confers an advantage upon any competitor, be it an existing TFO or a new entrant. The AESO recognizes that each existing TFO or new entrant may have some inherent and different competitive advantages or disadvantages - but the AESO cannot eliminate those advantages or disadvantages and make all competitors the same, nor does it believe that it should endeavour to do so. The AESO also cannot detect and eliminate inappropriate cross-subsidization between a regulated TFO and its affiliates - this will need to be addressed by codes of conduct and by the Commission in tariff cases. If TCE has other specific recommendations to address the issue of cross-subsidization, it should include them in its evidence, as the Commission has invited it to do.

34. Both of the regulated transmission facility owners, AltaLink and ATCO Electric, opposed TCE’s proposal referencing both their agreement with the AESO’s position as set forth in the information responses referenced above and Section 24.3(5)(a) of the *Transmission Regulation*, which specifically authorizes the participation of regulated transmission facility owners in the competitive procurement process. Further, both AltaLink and ATCO Electric argued that TCE had improperly characterized competitive advantages of incumbent transmission facility owners as a competitive fairness issue that must be remedied in the competitive process.

35. In addition, ATCO Electric also indicated in its evidence submission that the issue of cross-subsidization raised by TCE is not limited to only existing regulated transmission facility owners in Alberta. ATCO Electric stated: “[i]t seems equally reasonable to ensure that customers paying regulated rates charged by other utility companies, whether in Alberta or in other jurisdictions, are not subsidizing the efforts of transmission facility owners competing in the competitively procured transmission business in Alberta.”<sup>14</sup>

### **Commission findings**

36. The Commission initially addressed the issue of cross-subsidies and level playing field competitive issues in Decision 2012-059. At paragraphs 162, 163 and 164, the Commission stated:

162. While the level playing field issue appears to have been raised primarily from the standpoint of potential competitors to incumbent TFOs, the Commission is also concerned about the need to protect TFO rate payers.

163. If an incumbent TFO were to be selected to construct, operate, or own a new transmission facility through the competitive process, the inclusion of forecast costs

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<sup>13</sup> Exhibit 70.01, AESO Information Request Response Round 2 to TCE, May 4, 2012, TCE.AESO-024(f-1), page 3.

<sup>14</sup> Exhibit 83.02, ATCO Electric Evidence, June 1, 2012, page 10, paragraph 22.

under the traditional cost of service tariffs of incumbent TFOs could enable incumbent TFO's to cross-subsidize their participation in future competitive processes.

164. The Commission considers that these matters can be addressed in the context of a general tariff application for a TFO that has both direct assigned and competitively procured transmission facilities and the Commission invites parties to provide any additional evidence as to why this matter cannot be dealt with in this manner.

37. The Commission has reviewed the additional submissions of parties in response to its invitation in paragraph 164 regarding this issue and remains of the view that issues of cross-subsidies can be addressed in general tariff application proceedings should an Alberta regulated transmission facility owner be selected as the successful bid applicant.

38. In particular, the Commission has specifically addressed TCE's request that the Commission impose a requirement on regulated transmission facility owners to create a separate affiliate.

39. The Commission issued an information request to TCE asking TCE to indicate the legislative authority it was relying on to support this recommendation. In its response, TCE stated:

TCE acknowledges that section 24.2 (5) provides, in part, that the competitive process not exclude a TFO. However, the section goes on to state "unless the TFO ...does not have the necessary qualifications to participate in the competitive process." If the AESO is to create a fair and open process, it is necessary that one of the qualifications for a participant is that it not have an unfair competitive advantage, cross-subsidies or information sharing advantages. One interpretation of that qualification is the requirement for a separate affiliate.<sup>15</sup>

40. This response suggests that there is an implied and necessary authority granted to the Commission to impose this restriction as part of its mandate to approve the AESO's competitive procurement process under the *Transmission Regulation*. Indeed, in its reply argument, TCE argues that the Commission's jurisdiction to grant this relief lies in its mandate to approve a fair and open process and in its authority pursuant to Section 8 of the *Alberta Utilities Commission Act*.<sup>16</sup>

41. Section 8 of the *Alberta Utilities Commission Act* sets out in general terms the power of the Commission. Section 8(2) enables the Commission to do all things that are necessary for or incidental to the exercise of its powers and the performance of its duties and functions. Section 8(5)(d) enables the Commission to make an order granting relief applied for, however, this section must be read in the context of Section 8 as a whole. That is, Section 8(5) contemplates the Commission's options when considering an application (i.e., approve, make interim orders, grant partial or other relief).

42. The Commission examined whether, read together, the *Alberta Utilities Commission Act* and the *Transmission Regulation* confers authority upon the Commission to impose the relief proposed by TCE to require that a separate affiliate must be created for incumbent transmission facility owners. As an administrative tribunal possesses not only the powers expressly conferred

<sup>15</sup> Exhibit 107.01, TCE Information Request Responses to AUC, June 28, 2012, AUC.TCE-8, pages 1-2.

<sup>16</sup> Exhibit 184.02, TCE Reply Argument, November 20, 2012, page 6, paragraphs 23-26.

upon it, but also by implication all powers that are reasonably necessary, or practically necessary to accomplish its mandate, the function of an administrative tribunal is important to assess when determining whether it possesses an implied power.

43. The leading case that discusses the jurisdiction of the Commission remains the decision of the Supreme Court of Canada in ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board) (the Stores Block case).<sup>17</sup> Bastarache J. writing for the majority, stated:

[...] The Board's seemingly broad powers to make any order and to impose any additional conditions that are necessary in the public interest has to be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The limits of the powers of the Board are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the system.<sup>18</sup>

44. As noted by the Supreme Court of Canada, the discretion of an administrative tribunal must be exercised within the scope of its legislative regime and the regulatory principles that the legislature would have had in mind when drafting that legislation. Very broad powers are more likely to be more restrictively interpreted to include only powers necessary to accomplish the purposes of the tribunal's regulatory framework. The converse with respect to very narrow powers is also true. This concept is explained by professor Ruth Sullivan in her book, Sullivan and Driedger on the Construction of Statutes, 4<sup>th</sup> ed. Markham, Ont.: Butterworths, 2002 and quoted by the Supreme Court of Canada:

In practice, however, purposive analysis makes the powers conferred on administrative bodies almost infinitely elastic. Narrowly drawn powers can be understood to include "by necessary implication" all that is needed to enable the official or agency to achieve the purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose.<sup>19</sup>

45. The Supreme Court of Canada enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:<sup>20</sup>

- [when] the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;
- [when] the enabling act fails to explicitly grant the power to accomplish the legislative objective;
- [when] the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
- [when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
- [when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.

<sup>17</sup> ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board) [2006] 1S.C.R. 140. (Stores Block).

<sup>18</sup> Stores Block at paragraph 7.

<sup>19</sup> Stores Block at paragraph 74.

<sup>20</sup> Stores Block at paragraph 73.

46. Implying authority on the Commission to require an incumbent transmission facility owner to establish a separate affiliate entity for the purposes of participating in the AESO's competitive procurement process fails almost every criterion set out by Supreme Court of Canada that determines when the doctrine of jurisdiction by necessary implication may be applied:

- The objectives of Section 24.2 are to use a competitive process to determine eligibility to apply under the *Hydro and Electric Energy Act* for the construction and operation of the transmission's project and the Commission's mandate as it relates to the competitive procurement process is as set out in paragraph 51 of Decision 2012-059 "to be satisfied that the form and content of the competitive process will yield a result determined by competitive market forces". It is not necessary for competitive market forces to operate that a separate affiliate entity for incumbent transmission facility owners must be created.
- There is an absence of necessity and the Legislature clearly addressed its attention to the issue of determining eligibility to participate. First, Section 24.2(1) of the *Transmission Regulation* confers on the AESO the responsibility to determine who is a qualified person to submit a proposal. The AESO has indicated that incumbent transmission facility owners fall within this category. Second, and more significantly, Section 24.2(5) specifically provides that TFOs, regardless of their working relationship with the AESO on a proposed transmission facility, are not to be excluded unless they do not have the necessary qualifications to participate (which qualifications are solely within the AESO to determine as set out in Section 24.2(1).)

47. As noted in Sullivan on the Construction of Statutes, *Fifth Edition*, at page 359, "when words are read in their immediate context, the reader forms an initial impression of their meaning. ...But any impression based on immediate context must be supplemented by considering the rest of the Act, including the other provisions of the Act and its various components." Further, at page 364, the author notes "[w]hen analyzing the scheme of the Act, the court tries to discover how the provision or parts of the Act work together to give effect to a plausible and coherent plan. It then considers how the provision to be interpreted can be understood in terms of that plan. ...The fundamental presumption in scheme analysis is being able to grasp and explain the basic structure on which the Act is built and how the various parts and provisions were meant to function within this structure to achieve the desired goal, or more often, the desired mix of goals."

48. TCE has argued that the sections 24.2(1) and 24.2(2) of the *Transmission Regulation* require a level playing field for all incumbents and that the requirement for regulated transmission facility owners to create a separate affiliate would not disadvantage the incumbent transmission facility owners and further that this requirement would not be contrary to Section 24.2(5) of the *Transmission Regulation* because the transmission facility owners would still be able to participate.

49. The Commission considers that the imposition of a requirement for the creation of a separate affiliate entity for incumbent transmission facility owners would render meaningless the specific authorization that transmission facility owners, or any party with a relationship with the AESO, is not to be excluded.

50. Section 24.2(5) states:

- (5) The competitive process developed under subsection (2) must not exclude
- (a) a TFO, whether or not the TFO has undertaken any work or provided any services to the ISO in respect of a proposed transmission facility, or
  - (b) any other person that has undertaken any work or provided any services to the ISO in respect of a proposed transmission facility

unless the TFO or other person does not have the necessary qualifications to participate in the competitive process.

51. A plain reading of this provision suggests that the Alberta government has contemplated whether having prior knowledge or a prior relationship with the AESO should disqualify a transmission facility owner from competing and concluded that it would not exclude transmission facility owners or indeed, any other potential bidder who had a relationship with the AESO, from participating in the competitive process. The only restriction that has been legislatively imposed on potential bidders is having the necessary qualifications to participate and in this regard, the determination of this requirement has been conferred on the AESO pursuant to Section 24.2(1) of the *Transmission Regulation*.

52. If the Commission were to impose a condition on the eligibility requirements that a separate affiliate entity must be created in order for a transmission facility owner to participate in the competitive process through its general authority under the *Alberta Utilities Commission Act*, the Commission would effectively be imposing a condition that is contrary to the intent of Section 24.2(5) of the *Transmission Regulation* to not exclude participants based on past relationships with the AESO.

53. The Commission therefore rejects TCE's request.

### 2.1.3 Alternative models

54. In paragraph 97 of Decision 2012-059, the Commission advised that it would welcome any additional evidence from the AESO or any other party that would assist the Commission in determining whether alternative models, such as the creation of two separate competitive processes, one for each function, should be considered.

55. In response, the AESO reiterated its view that a single competitive process for the construction and operation functions is preferable to separate competitive processes for each function. The AESO submitted that a single competitive process:

- Permits costs to be optimized over the life cycle of the facility.
- Allows the risk of upfront development work to be offset over the life cycle of the facility.
- Permits maximum innovation over the project's life cycle.
- Allows one owner to manage landowner and other stakeholder relationships from project inception to end of contract term.
- Does not require hand-offs and transfers.

- Is more attractive to new entrants that are interested in the long-term return on investment that comes through facility ownership.<sup>21</sup>

56. ATCO Electric questioned the claims made by the AESO as to what the single-owner model delivers, and expressed concern that the AESO's proposed model necessitates after-the-fact bilateral negotiations that may undermine the competitive process.<sup>22</sup>

57. No other parties provided submissions on this issue.

### Commission findings

58. At the time that the Commission released Decision 2012-059, Section 24.2 of the *Transmission Regulation* allowed for the AESO to consider proposing separate competitive processes for the construction phase and for the operational phase of the transmission infrastructure project. The section read:

(2) The ISO must develop a competitive process to determine the person who is eligible to apply for the construction, or operation or both of the transmission facilities referred to in section 24(3)(a), (c) and (d). (emphasis added)

59. However, in the fall of 2012, the Alberta government passed the *Transmission Amendment Regulation* (AR 156/2012) and amended Section 24.2(2) of the *Transmission Regulation* to read as follow:

(2) The ISO must develop a competitive process to determine the person who is eligible to apply for the construction and operation of the transmission facilities referred to in section 24(3)(a), (c) and (d). (emphasis added)

60. With this amendment to the *Transmission Regulation*, the language that would have permitted the use of separate competitive processes for the construction and operation phases of a project has been removed. The only model that can be approved is a competitive process that provides for both the construction and operation of the transmission facility.

## 2.2 Objectives of the competitive process

61. In paragraph 85 of Decision 2012-059, the Commission advised that it would like to hear from the AESO and parties as to which objectives identified by the AESO in its application the AESO considered to be mandatory or most important, and where certain objectives may be in conflict with others, to identify its proposed approaches to minimize the impact of these conflicts.

62. The objectives identified by the AESO were as follows:<sup>23</sup>

- (a) must result in the minimization of life-cycle costs through the use of competitive pricing
- (b) must create opportunity for maximum innovation throughout the life cycle of the facilities

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<sup>21</sup> Exhibit 55.02, AESO's Additional Evidence and Revised Competitive Process Application – Reply to Decision, March 30, 2012, page 5, paragraph 12.

<sup>22</sup> Exhibit 83.02, ATCO Electric Evidence, June 1, 2012, pages 11-12.

<sup>23</sup> Exhibit 02.00, AESO Competitive Process Application, September 15, 2011, page 2, paragraph 9.



- (c) must create opportunity for new market entry
- (d) must allocate risk to most efficiently and effectively reduce costs and mitigate risk
- (e) must foster efficient investment, operation and maintenance of assets across the life cycle of the facilities
- (f) must foster regulatory predictability
- (g) must be straightforward and efficient
- (h) must clearly state the accountabilities of each party involved
- (i) must achieve a reasonable level of transparency and consistency over time
- (j) must ensure the facilities are designed to meet standards for performance and reliability and do not jeopardize the Alberta Interconnected Electric System
- (k) must be fair, open and consultative
- (l) must consider obligations typically assumed by the incumbent transmission facility owner
- (m) must provide transparent selection criteria to address the principles outlined above.

63. The AESO stated that certain objectives of the competitive process identified by the AESO are mandatory, as they are requirements of legislation. These included:

- Objective (c) must create opportunity for new market entry.
- Objective (j) must ensure the facilities are designed to meet standards for performance and reliability and do not jeopardize the Alberta Interconnected Electric System.
- Objective (k) must be fair, open and consultative.
- Objective (l) must consider obligations typically assumed by the incumbent transmission facility owner.<sup>24</sup>

64. The AESO considered the remaining objectives to be important in guiding the development of the proposed competitive procurement process but did not endeavour to rank them by importance. Instead, the AESO classified the objectives as attributes of competition (objectives a, b, d and e) or attributes of a fair and open process (objectives f, g, h, i and m). The AESO submitted that it did not find any conflicts among the objectives.<sup>25</sup>

65. ATCO Electric supported all of the objectives identified by the AESO, with the exception of objective (c) and agreed that certain of the objectives are mandatory. However, ATCO Electric submitted that the objectives should not have equal weighting when evaluating to determine whether or not they have been met by the AESO's proposal.<sup>26</sup>

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<sup>24</sup> Exhibit 55.02, AESO's Additional Evidence and Revised Competitive Process Application – Reply to Decision, March 30, 2012, page 4, paragraph 10.

<sup>25</sup> Exhibit 55.02, AESO's Additional Evidence and Revised Competitive Process Application – Reply to Decision, March 30, 2012, page 4, paragraph 11.

<sup>26</sup> Exhibit 83.02, ATCO Electric Evidence, June 1, 2012, pages 3 and 10, paragraphs 13 and 25.

66. ATCO Electric grouped the objectives into three broad categories in order of importance:

- system integrity and safety, which includes objectives h, j and l
- customer costs, which includes objectives a, b, c, d and e
- design of process, which includes objectives f, g, i, k and m

67. ATCO Electric submitted that any competitive process will allow for all objectives to be achieved, and that the current AESO-proposed process may cause objectives to be in conflict with one another.<sup>27</sup> Further, ATCO Electric submitted that whatever competitive process is selected, it must be the best process to meet the objectives, in addition to ensuring that all three of the broad objectives are met. It is not enough to say that the best competitive process was selected, but rather that customers' interests need to be considered so that the best process is implemented.<sup>28</sup>

68. In its argument submission, the UCA briefly addressed objective (a). The UCA stated that the competitive process should produce lower life-cycle costs relative to the current regulatory assessment of prudence, not just the lowest competitive bid. It submitted that the AESO should be directed to provide an analysis of the financial comparison of the competitive process lifetime cost estimates to escalated current transmission facility owner costs, even though such an approach is not a specific requirement of the *Transmission Regulation*.<sup>29</sup>

69. No other parties provided specific views or comments on the AESO identified objectives.

### **Commission findings**

70. In Decision 2012-059, the Commission recognized that certain of the objectives established by the AESO are mandatory, that not all objectives would have equal weighting and that not all objectives may be achieved. The Commission also suggested that it is possible that in some instances the objectives may be in conflict.

71. The Commission has reviewed the objectives identified by the AESO and takes no issue with them other than as stated below. The Commission considers that the development of these objectives serves as a valuable metric against which the competitive process can be measured through each of its phases from development through to completion and award.

72. Notwithstanding, the Commission provides its observations regarding the specific objectives identified by some of the stakeholders, namely objective (c) and objective (a).

73. With regard to the inclusion of objective (c), the objective of creating an opportunity for new market entries, whose inclusion was objected to by ATCO Electric, the development of a competitive process should be created in such a way that the process removes barriers to entry for all qualified parties regardless of whether they are already in the Alberta market. As such, the Commission considers that objective (c) should be revised to read "must not create barriers for entry to the market."

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<sup>27</sup> Exhibit 83.02, ATCO Electric Evidence, June 1, 2012, pages 3-11, paragraphs 13-25.

<sup>28</sup> Exhibit 83.02, ATCO Electric Evidence, June 1, 2012, pages 10-11, paragraph 25.

<sup>29</sup> Exhibit 172.02, UCA Argument, November 13, 2012, page 1, paragraph 6.

74. With regard to the inclusion of objective (a), the objective of minimizing life-cycle costs, that was commented on by the UCA, the Commission agrees that it is in the interests of consumers that the costs of transmission infrastructure be minimized as much as possible. However, for the transmission projects to which the AESO competitive process will apply it is the operation of competitive market forces that are intended to protect the consumer. The costs of the construction and operational life of the infrastructure will be the costs that arise from the market. There is no regulatory assessment of prudence. Accordingly, a comparison of costs between competitive procurement versus regulated service is outside of the scope for the Commission to consider.

75. Subject to the observations above, the Commission is satisfied that the objectives identified by the AESO will assist the AESO in conducting a fair, open and transparent competitive process.

### **2.3 Competitive process compliance monitoring**

76. In paragraph 151 of Decision 2012-059, the Commission invited the AESO and other parties to file or supplement their evidence on the issue of competitive process compliance monitoring within the current proceeding.

77. The AESO submitted that it intends to retain an independent fairness advisor<sup>30</sup> to act as an independent observer to ensure the fairness of the implementation and execution of the competitive process for selecting a preferred proponent. The fairness advisor would assess the request for qualifications (RFQ) and RFP stages and evaluate whether the appropriate process had been followed. The AESO stated that it would require the fairness advisor to deliver a review plan, review all applicable documents related to the RFQ and RFP processes, and to prepare a final report to the AESO, which the AESO in turn would post on its website.<sup>31</sup>

78. TCE submitted that the AESO needs to clearly demonstrate how the process has been conducted in a fair and transparent manner as the proposed independent fairness advisor will have a critical role in ensuring and demonstrating that the AESO has complied with the competitive process approved by the Commission. As such, the AESO should refine the manner it will demonstrate compliance at different stages of the project.<sup>32</sup> TCE also recommended that the role of the fairness advisor proposed by the AESO be expanded similar to an independent assessor under Section 95 of the *Electric Utilities Act*. TCE submitted that the fairness advisor should also evaluate the details of bids to ensure that no bidder had an unfair competitive advantage or has benefitted from inappropriate cross-subsidies.<sup>33</sup>

79. Through an information request, AltaLink asked the AESO if parties would be given the opportunity to clarify matters, or test the findings in the final report of the fairness advisor. In response to AltaLink's information request, the AESO stated that they would be prepared to

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<sup>30</sup> In its application (Exhibit 02.00) the AESO indicated that it would appoint an independent third party to fulfill the role of fairness advisor, and that this advisor would be competitively procured using standard industry practices including request for proposals, evaluation and selection of those proposals based on pre-defined and transparent criteria.

<sup>31</sup> Exhibit 55.02, AESO Additional Evidence and Revised Competitive Process Application – Reply to Decision, March 30, 2012, page 7, paragraphs 18-21.

<sup>32</sup> Exhibit 41.01, TCE Comments, December 19, 2011, page 3, paragraph 11.

<sup>33</sup> Exhibit 178.01, TCE Final Argument, November 13, 2012, pages 7-8, paragraphs 47-48.

discuss the findings of the fairness advisor with parties that participated in the competitive process.<sup>34</sup>

80. AltaLink stated that the AESO should provide a comprehensive description of the manner in which the AESO will demonstrate that it has complied with any competitive process approved by the Commission at the conclusion of each project, and the consequences in the event that such compliance cannot be demonstrated.<sup>35</sup> AltaLink also submitted that TCE's proposed expanded role of the fairness advisor should be rejected as being unnecessary.<sup>36</sup>

81. ATCO Electric submitted that the competitive process must include the tools, practices and processes that facilitate and verify actions that will take place during an event, to remedy it and do the right things that result in compliance to the rules. There is no assurance as to how the AESO will ensure that transmission facility owner's terms and conditions and all pertinent independent system operator (ISO) rules will be met by a successful proponent.<sup>37</sup> ATCO Electric also submitted that TCE's proposed expanded role of the fairness advisor is unnecessary and should not be included in any approved process.<sup>38</sup>

### Commission findings

82. The Commission supports the AESO's efforts to establish an effective mechanism to monitor and report on the implementation and execution of the competitive process for selecting a preferred proponent. The Commission is satisfied with the AESO's description of the role of the fairness advisor, and is also satisfied that with the access to information and documents the AESO has proposed to provide to the fairness advisor, that the fairness advisor should be able to observe and report on whether the AESO has complied with the competitive process approved by the Commission. The Commission does not consider it to be necessary to expand the role of the fairness advisor as requested by TCE.

83. The Commission considers that any issue that may arise regarding whether or not there has been compliance with a Commission direction can be addressed as an enforcement matter through the legislated complaint process provided for under Section 26 of the *Electric Utilities Act*.

## 2.4 Selection criteria

84. In paragraph 118 of Decision 2012-059, the Commission advised that based on its initial review of the record in this proceeding, it considered that the AESO had been reasonably clear in setting out the assessment criteria it currently expects to apply to RFQ and RFP submissions.

85. The Commission further commented in Decision 2012-059, that while parties may file evidence and argument on selection criteria during the balance of the current proceeding, the Commission considers that there is no basis to specifically direct or recommend that the AESO supplement its evidence on selection criteria at this time.<sup>39</sup>

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<sup>34</sup> Exhibit 61.01, AESO Information Request Responses Round 2 to AltaLink, May 4, 2012, page 7, AML.AESO-029.

<sup>35</sup> Exhibit 33.01, AltaLink Intervener Evidence, November 29, 2011, page 4, paragraph 12.

<sup>36</sup> Exhibit 183.01, AltaLink Reply Argument, November 20, 2012, page 13.

<sup>37</sup> Exhibit 179.05, ATCO Electric Final Argument, November 13, 2012, page 19, paragraph 50.

<sup>38</sup> Exhibit 179.05, ATCO Electric Final Argument, November 13, 2012, page 27, paragraph 80.

<sup>39</sup> Decision 2012-059, page 23, paragraph 119.

86. In its additional evidence and revised competitive process application, the AESO did not propose any changes with respect to the selection criteria associated with the RFQ and RFP submissions.

87. AltaLink noted that the evaluation criteria weighting, which are to be included in the RFQ, and the minimum requirements for the pass/fail criteria had yet to be finalized by the AESO.<sup>40</sup> ATCO Electric provided similar comments.<sup>41</sup>

88. TCE submitted that the scoring for the RFQ stage will not allow the AESO to adequately distinguish among proponents such that a proponent that could offer the greatest value in the RFP stage may be excluded from participating. TCE noted that the evaluation criteria for the RFQ and RFP processes differ and are sufficiently different that success in one does not imply success in the other. TCE suggested that this be addressed by:

- Adjusting the quantitative evaluation of the bid submission to include the cost of financing.
- Requiring financial security only after the competitive process project agreements are finalized.
- Broadening the scope of the responsibilities of the fairness advisor.
- Expanding the number of proponents that will be shortlisted to participate in the RFP from three to up to five.<sup>42</sup>

89. In its rebuttal evidence, the AESO responded to the TCE's recommendation and proposed to change the financial weighting evaluation criteria and the number of proponents as follows:

The AESO recognizes that the financing solution and financing costs are important RFP evaluation considerations. The AESO's objective with regards to the financing solution and financing costs at the RFP evaluation stage is to identify the Proponent that best demonstrates its ability to structure a deliverable, low risk and low cost financing solution based on the then current financial markets. Accordingly, the AESO will incorporate into the proposed RFP methodology a pass/fail test to assess the reasonableness, deliverability and potential risks of the financing solution based on current market conditions. Proponents will be required to provide sufficient evidence to allow the AESO to make this determination. The AESO will also include Proponents' financing costs, based on the then current financial market conditions, in its quantitative evaluation of the NPV of the annual service payments. The quantitative evaluation will be scored at 100%.<sup>43</sup>

While it remains the AESO's assessment that three is an appropriate number of Proponents, the AESO would be prepared to allow up to four Proponents to participate in the competitive process for the first competition. This recognizes that it is the first time the process will be used, and that the judgment of the AESO and others will be informed by the experience that is gained for subsequent competitions.<sup>44</sup>

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<sup>40</sup> Exhibit 82.01, AltaLink Evidence, June 1, 2012, page 9, paragraph 36.

<sup>41</sup> Exhibit 83.02, ATCO Electric Evidence, June 1, 2012, page 10, paragraph 24.

<sup>42</sup> Exhibit 85.01, TCE Written Evidence, June 1, 2012, page 3, and Appendix B - Written Evidence of Robert Mudge, June 1, 2012, pages 3-17.

<sup>43</sup> Exhibit 116.02, AESO Rebuttal Evidence, July 5, 2012, page 5, paragraph 13.

<sup>44</sup> Exhibit 116.02, AESO Rebuttal Evidence, July 5, 2012, page 6, paragraph 20.

90. With respect to the changes made by the AESO in its rebuttal evidence, ATCO Electric submitted that the scoring of net present value of all costs, including financing, will likely drive proponents to use a more leveraged capital structure. A more leveraged entity is financially more risky and is therefore more likely to default. ATCO Electric also noted that the project-specific RFQ and RFP criteria are subject to approval by AESO management prior to the commencement of the competitive process for a given project.<sup>45</sup>

91. No other parties provided submissions on the changes proposed by the AESO to the weighting of its selection criteria for its RFQ and RFP processes.

### Commission findings

92. The Commission considers that the AESO has been reasonably clear in setting out the assessment criteria it currently expects to apply to RFQ and RFP submissions. The Commission addressed comments with respect to the fairness advisor in the section above, and will address the financial weighting evaluation criteria, financial security and the number of proponents in the sections that follow.

## 3 Competitive procurement document

93. The AESO proposes a competitive process with three stages: i) the request for expressions of interest (REOI) stage; ii) the RFQ stage; and iii) the RFP stage. Each of the three stages, including an overview of the information requirements and the related evaluation process, is described in the sections that follow.

94. In Appendix 1 of the application, the AESO provided an outline of the stages of the competitive process and the related agreements indicating in paragraph 3:

The Schedules are provided as outlines of the respective documents only. The ISO may, as it deems appropriate with respect to a Project being implemented pursuant to the Competitive Process, vary or refrain from using any of the Schedules.

95. Parties were generally divided into one of two groups: those who were supportive of the AESO proposed process and considered it to be fair, open, transparent and providing an acceptable level of detail,<sup>46</sup> and those finding that the AESO's proposed process lacked detail and completeness.

96. ATCO Electric expressed concern that, as presented, the AESO may vary the structure of the competitive process to include or exclude specific components of the process at its discretion. In ATCO Electric's view this latitude provided the AESO with "unfettered discretion" and that "the AESO is asking the Commission to give it *carte blanche* to later design a competitive process, as it sees fit, for any particular project that may be competitively procured."<sup>47</sup>

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<sup>45</sup> Exhibit 167.01, Supplemental Evidence of ATCO Electric, October 9, 2012, page 6, paragraph 20.

<sup>46</sup> Exhibit 171.01, ELECNO Argument, November 13, 2012; Exhibit 181.02, EPCOR Argument, November 13, 2012; Exhibit 173.01, Iccenlux Argument, November 13, 2012; Exhibit 175.01, LS Power Argument, November 13, 2012; Exhibit 178.01, TCE Argument, November 13, 2012.

<sup>47</sup> Exhibit 179.05, ATCO Electric Argument, November 13, 2012, page 11, paragraph 33.

97. The AESO submitted that it has applied for a generic competitive process and has provided a comprehensive description of that process.

### **Commission findings**

98. In paragraph 117 of Decision 2012-059, the Commission stated that it considered the AESO's general approach to the mechanics of its competitive process to be relatively straightforward. The Commission does, however, find that a level of certainty is required in approving the competitive process and it is a requirement that the AESO implement the process as approved. Accordingly, the Commission directs the AESO to limit the exercise of its discretion to vary or refrain from using any of the schedules included in the description of the competitive process.

### **3.1 Request for expressions of interest (REOI) stage**

99. The first stage of the AESO competitive process is the REOI stage. The principal objective of the REOI stage is to attract interest in a project and assist the AESO in gauging the level of participatory interest in the competitive process.<sup>48</sup>

100. In Schedule 1 of Appendix 1 of the application, the AESO provided an REOI outline describing the information that will be provided to and requested from interested parties. This information includes:

- An introduction stating the purpose of the request for expressions of interest, details of the information meeting, the objective of the competitive process and project, and a description of the process administration.
- Background to the project describing the legislative mandate, additional sources of information for a project, proposed scope of a project, and an overview of the commercial structure.
- Information requested from interested parties and the request of expressions of interest procedures and schedule.

101. The REOI stage is not a mandatory stage, there are no restrictions to providing responses and the responses are not evaluated.

102. Parties submissions related specifically to the REOI stage were limited. LS Power expressed support for the inclusion of the REOI stage as a component of the overall process stating:<sup>49</sup>

This is similar to the experience LS Power companies have had in other jurisdictions for other competitive solicitations, and consistent with the other processes identified in the Recommendation Paper.

103. NextEra Energy Canada (NextEra) recommended that the REOI stage be shortened as it relates to the Fort McMurray project. NextEra considered that this proceeding had generated an

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<sup>48</sup> Exhibit 02.00, AESO Competitive Process Application, September 15, 2011, page 5, paragraph 17.

<sup>49</sup> Exhibit 175.01, LS Power Argument, November 13, 2012, page 2, paragraph 7.

adequate level of interest and had identified a suitable level of awareness of the AESO competitive process.<sup>50</sup>

### **Commission findings**

104. In a competitive market, an entity will use an REOI to determine whether there is a market interest in proceeding with a competitive tender process. If there is insufficient interest, the entity will reassess its decision to competitively tender the project as compared to other options it may have, such as completing the work itself or sole-sourcing the project.

105. However, the provisions of the *Transmission Regulation* and the *Electric Utilities Act* direct the use of a competitive process for certain of the transmission projects and, unlike the entity above, the AESO has no alternative but to continue to use a competitive tender process, regardless of the level of interest in the project.

106. Given the intended purpose of the REOI stage it to identify the level of interest in a project, the Commission has examined whether there are other advantages to including this stage of the competitive process under the legislative parameters in which the AESO must operate.

107. The Commission considers that this stage can provide the AESO with valuable information in assessing the effectiveness of the competitive process early on in the process such that if changes have to be made to the tender documents, the AESO can respond quickly. For this reason, the Commission finds that this stage shall be mandatory.

#### **3.1.1 Consortium**

108. In paragraph 124 of Decision 2012-059, the Commission stated that it was interested in further exploring the concept raised by EPCOR that consortiums could be formed for the purpose of participating in specific future competitive processes. The Commission advised that it was interested in receiving additional evidence related to the potential use of consortiums in future competitive processes and to what extent the AESO may wish to entertain the use of consortiums in this competitive process. Further, the Commission sought further information from the AESO as to under what conditions consortium participation would not be acceptable.

109. The AESO was the only party to provide additional evidence on this topic. The AESO stated that it does not propose any restriction on consortium participation, apart from the application of conflict of interest provisions. The AESO indicated that consortiums could be made of new entrants, existing transmission facility owners or combinations of the two.<sup>51</sup>

### **Commission findings**

110. The Commission considers that the AESO's acceptance of consortiums could promote the participation of a greater number of proponents in the competitive process and approves the AESO's proposal regarding the inclusion of consortiums as noted above.

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<sup>50</sup> Exhibit 177.01, NextEra Argument, November 13, 2012, page 2, paragraph 9.

<sup>51</sup> Exhibit 55.02, AESO's Additional Evidence and Revised Competitive Process Application – Reply to Decision, March 30, 2012, page 5, paragraph 13.



### 3.2 Request for qualifications (RFQ) stage

111. The second stage in the AESO competitive process is the RFQ stage. The AESO submitted that the intent of the RFQ stage is to:

...identify a short-list of up to four proponents that are most qualified to construct and operate a particular project.<sup>52</sup>

112. In Schedule 2 of Appendix 1 of the application, the AESO provided an RFQ outline describing the information that will be provided to and requested from respondents. This information includes:

- An introduction describing the purpose and objective of the RFQ.
- A description of the project including a scope of work, a description of any work to the interconnected electric system, the start and end points of a project route, key individuals undertaking the administration of the competitive process, the project schedule, and draft project agreements.
- A description of the RFQ requirements that includes the form and content of the RFQ submission.
- The proponent agreement obligating the respondent to continue in good faith if selected as a proponent, commit to non-reliance on exclusivity arrangements or ownership or other interests in respect of land that may form part of any project routing and assign such rights to the preferred proponent at market rates, deliver the proponent security, and submit a compliant RFP submission.
- The receipt confirmation and confidentiality agreement.

#### 3.2.1 RFQ evaluation process

113. In the application, the AESO described the RFQ evaluation process as including a combination of pass/fail and scored criteria. Respondents who meet all of the pass/fail criteria and attain the highest scores in the scored criteria will be shortlisted as proponents. Selection criteria may include:

- ownership and organization structure
- financial viability and capability
- technical record and capability
- consultation and relationship management and development
- innovation and cost optimization

114. The AESO submitted that a respondent will not be shortlisted unless it meets all pass/fail criteria. Selection criteria will be provided in the RFQ and be in the form of a scoring matrix. The individual criteria and whether an item is pass/fail or scored will depend on the nature of a project.

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<sup>52</sup> Exhibit 176.02, AESO Argument, November 13, 2012, page 2, paragraph 10.

115. Several issues with the proposed RFQ stage were identified by parties including: a lack of clarity when describing the evaluation criteria and scoring; the requirement to provide security in advance of the RFP stage; and the number of respondents who are shortlisted and eligible to make an RFP submission.

116. LS Power supported the provision that only the most qualified proponents identified in the RFQ stage are eligible to participate in the RFP stage and was supportive of the AESO's proposal to limit participation to a discreet number of proponents. LS Power indicated that it would not be "willing to commit the necessary level of resources without knowing that it will be competing only against a select field of the most qualified proponents."<sup>53</sup> LS Power considered that the evaluation criteria in the RFQ stage will be objective and clearly defined, evaluated and scored by independent experts, and that the process will enjoy an additional level of protection with the involvement of a fairness advisor. LS Power stated that all these together are the characteristics of a fair process.

117. EPCOR indicated that in its view, the RFQ stage ensures that only the best proponents will have the opportunity to present a bid and that the competitive process included all of the key elements in sufficient detail to allow EPCOR to support the application.<sup>54</sup>

118. TCE presented the written evidence of John Dalton,<sup>55</sup> who identified the number of shortlisted proponents resulting from the RFQ process to be a concern. The TCE evidence put forward the position that the AESO should not limit the number of proponents to three,<sup>56</sup> but rather four or five. In response to a question concerning the number of qualified proponents Mr. Dalton stated:

In my experience, a more appropriate approach is to bring forward as many as five qualified proponents based on the results of the RFQ evaluation, but no more than five recognizing the significant cost of developing a proposal. The AESO should look for a clear break point in the respective qualifications of proponents such that if it is difficult to distinguish between the relevant qualifications of the third, fourth and fifth highest scoring proponents based on the RFQ evaluation criteria scores, then very likely it is appropriate to have all five of these top scoring proponents in the RFQ participate in the RFP stage. Under these conditions, excluding the fourth and fifth highest RFQ scoring proponents may eliminate a party who is positioned to offer the most attractive proposal in the RFP process. As discussed further below, I believe that having only three qualified proponents participating in the RFP stage is risky and threatens to undermine the process's competitive tension.

119. ATCO Electric expressed concern with the level of detail included in the definition of the RFQ stage. Specifically, ATCO Electric referenced the RFQ evaluation criteria and weightings, as well as the lack of transparency in establishing the process for scoring a proposal. ATCO Electric maintained that the AESO retains significant discretion to vary and modify the competitive process.<sup>57</sup>

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<sup>53</sup> Exhibit 175.01, LS Power Argument, November 13, 2012, page 2, paragraph 7.

<sup>54</sup> Exhibit 180.02, EPCOR Argument, November 13, 2012, page 5, paragraph 8.

<sup>55</sup> Exhibit 85.01, TCE Written Evidence, Appendix A - Written Evidence of John Dalton, June 1, 2012, page 12.

<sup>56</sup> AESO originally proposed three proponents and modified this to four after considering parties' submissions.

<sup>57</sup> Exhibit 179.05, ATCO Electric Argument, page 8, paragraph 26.

## Commission findings

120. In paragraph 118 of Decision 2012-059, the Commission stated :

... the Commission considers that the AESO has been reasonably clear in setting out the assessment criteria it currently expects to apply to RFQ and RFP submissions. In particular, the Commission observes that in Appendix E to the AESO's June 1, 2011 recommendation paper, the AESO provides a matrix describing the primary criteria by which it currently intends to evaluate RFQ responses, including a description of the high-level rationale for each criterion identified and the currently proposed weighting.

121. Having reviewed the additional submissions related to the RFQ selection process, the Commission is satisfied that the AESO proposed process is clear in setting out the RFQ evaluation process. The Commission does, however, agree with the position put forward by TCE that the AESO should identify a "clear break point in the respective qualifications of proponents" when determining the number of proponents included in its short list. This will ensure that the greatest number of qualified proponents are able to participate in the RFP process and that the competitive tension necessary within the competitive process is not diminished by arbitrarily limiting participation to a predetermined number of participants. For these reasons, the Commission directs the AESO to allow five proponents to move forward to the RFP stage unless there is a clear distinction in the qualifications of the fourth and fifth-highest ranking proponents, in which case, the AESO will allow four proponents to move forward.

### 3.2.2 Financial security

122. In paragraphs 128 and 129 of Decision 2012-059, the Commission stated that it would be interested in receiving any additional evidence from the AESO or any other party that would assist the Commission in determining the balance between the need, level and conditions under which financial security is required against the potential for security requirements to impact participation and competitive pressures.

123. The AESO submitted that it intends to request financial security at certain milestones in order to ensure that selected participants will complete the procurement process and execute the project agreement. The first financial security milestone will be required at the RFP stage of the process. Respondents who are shortlisted as proponents to participate in the RFP process will be required to post financial security under the terms of the proponent agreement. This security will be provided at the submission requirement one (SR1) stage of the RFP process, at which time the terms and conditions of the project agreement will have been finalized and proponents will be in a position to fully understand the risks they are expected to bear. The AESO explained that this security requirement is intended to act as an incentive for respondents to submit a compliant RFP submission.<sup>58</sup>

124. The AESO submitted that the second financial security will be required of the preferred proponent to encourage that party to remain in the process until the execution of the project agreement. The AESO also advised that the second financial security would continue to be required until work of a similar value to the financial security has been completed on the project, if a security package has not been provided to project finance lenders to support their debt. If a

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<sup>58</sup> Exhibit 55.02, AESO's Additional Evidence and Revised Competitive Process Application – Reply to Decision, March 30, 2012, page 6, paragraph 15; and Exhibit 116.02, AESO Rebuttal Evidence, July 5, 2012, page 5, paragraph 15.

security package is provided, the AESO would not require additional security under the project agreement.<sup>59</sup>

125. AltaLink expressed concern that shortlisted proponents will be required to post security at the RFQ stage, in the absence of knowing the risks they are being required to undertake, which will not be determined until the terms of the agreements have been finalized.<sup>60</sup> To the extent that contract terms are not finalized and associated risks have not been allocated, it is not reasonable for the AESO to require security from a proponent in order to ensure a compliant proposal.<sup>61</sup>

126. ATCO Electric submitted that the need for financial security must not only focus on the AESO's desire to ensure that proponents included in the RFP stage submit compliant bids, but also that there is some financial recourse to interconnected transmission facility owners as the end of term approaches. ATCO Electric further noted that while the project agreement is provided before the RFP stage, it is still subject to change. As well, after entering the RFP stage, ATCO Electric indicated that the proponent may then find out that it is not allowed to conduct the due diligence it wants, as the AESO or a third party may provide that service.<sup>62</sup>

127. TCE provided evidence that best practices in the electricity sector require proponents to provide security at the proposal submission deadline and if they are awarded a contract, they are required to provide completion or performance security shortly after contract award.<sup>63</sup> TCE proposed that financial security should only be required after the terms of the project development agreement and project agreements are finalized so that proponents fully understand the risks that they are expected to bear under these agreements before they are required to make major financial commitments.<sup>64</sup>

### **Commission findings**

128. The AESO, in its additional submissions, clarified the purpose and timing of the financial security requirements included in the competitive process. The financial security requirements are intended to ensure that selected participants complete the procurement process and submit a compliant RFP submission. The Commission is satisfied that the changes to the timing of the financial security to correspond with the technical submission and indicative financial submission in the RFP process adequately addresses concerns expressed by the parties.

129. Having reviewed the additional submissions related to the financial security requirements outlined by the AESO, the Commission remains satisfied that the AESO decisions regarding the need, level and conditions under which financial security is required must be balanced with consideration about the potential for security requirements to impact participation and thus competitive pressures. The Commission considers that the AESO is well positioned and qualified to make this determination while ensuring that there are no unreasonable barriers to entry.

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<sup>59</sup> Exhibit 55.02, AESO's Additional Evidence and Revised Competitive Process Application – Reply to Decision, March 30, 2012, page 6, paragraph 15.

<sup>60</sup> Exhibit 82.01, AltaLink Evidence, June 1, 2012, pages 2-3, paragraph 7.

<sup>61</sup> Exhibit 82.01, AltaLink Evidence, June 1, 2012, page 11, paragraph 40.

<sup>62</sup> Exhibit 83.02, ATCO Electric evidence, June 1, 2012, page 12, paragraph 26.

<sup>63</sup> Exhibit 85.01, TCE Written Evidence, Appendix B – Written Evidence of Robert Mudge, June 1, 2012, page 15.

<sup>64</sup> Exhibit 85.01, TCE Written Evidence, June 1, 2012, page 3 and Appendix A - Written Evidence of John Dalton, June 1, 2012, page 5.

### 3.3 Request for proposals (RFP) stage

130. The third of the three stages in the AESO competitive process is the RFP stage. The AESO submitted that the intent of the RFP stage is:

... the selection of a Preferred Proponent able to deliver the technical requirements for a Project at the lowest cost.<sup>65</sup>

131. In Schedule 3 of Appendix 1 of the application, the AESO provided an RFP outline describing the information that will be provided to and requested from proponents. This information includes:

- An introduction describing the purpose and objective of the RFP.
- An outline of the preferred proponents obligations with respect to communication and consultation, safety and security management, environmental management, and quality management.
- A description of the project scope of work including preliminary project design and development responsibilities, engineering, procurement and construction specifications, project financing responsibility, operation and maintenance requirements, end of life requirements, and any other activities deemed necessary by the AESO.
- A description of the business arrangements including the proposed form of the project agreements, the basis and timing of payments, holdbacks and other performance security, tax, and insurance requirements.
- A description of information requested from proponents.
- A description of the RFP submission requirements providing detailed components of the first and second RFP submissions.

#### 3.3.1 RFP evaluation process

132. When describing the RFP evaluation process, the AESO will establish three selection panels each consisting of three members. Each panel member will individually evaluate and score RFP submissions in respect of their domain. The three domains are presented as financial, technical, and environmental and consultation. Each panel will identify a senior member to facilitate discussion and identification of the preferred proponent. After completing the evaluation and scoring, panel members for each domain will convene and review the evaluations and scoring and identify the conditionally selected preferred proponent. After all panels have completed their evaluations and scoring, the panels will meet for the purpose of recommending the conditional selection of the preferred proponent.

133. In Schedule 3 of Appendix 1 of the application the AESO listed the process as:<sup>66</sup>

- Technical submissions will be evaluated against the technical requirements provided in the RFP. Assessment may be on a pass/fail basis.

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<sup>65</sup> Exhibit 55.04, AESO Revised Competitive Process Application – Reply to Decision, March 30, 2012, page 6, paragraph 28.

<sup>66</sup> Exhibit 55.04, AESO Revised Competitive Process Application – Reply to Decision, Appendix 1, Schedule 3, March 30, 2012, page 37.

- Indicative financial submissions will be evaluated against the financial requirements provided in the RFP on a pass/fail basis.
- Only those proponents submitting technical submissions and indicative financial submissions deemed to be satisfactory by the AESO will be invited to submit a final submission.
- A proponent's final submission will typically be evaluated on scored criteria including the net present value of all project costs, excluding financing costs,<sup>67</sup> and any other factors which the AESO considers relevant and of which proponents have been advised and requested to address in their RFP submissions.

### Commission findings

134. Having reviewed the submissions related to the RFP selection process, the Commission is satisfied that the AESO proposed process as modified during the course of the proceeding is clear in setting out the RFP evaluation process. The Commission does however, have concerns with the possibility of a circumstance where only one proponent proceeds to the final submission stage of the RFP process. Given the requirement that competitive process cannot include or rely on after-the-fact bilateral negotiations, the Commission directs the AESO to cancel a competitive process where there is only one proponent remaining after the evaluation of proponent's technical submissions and indicative financial bids.

#### 3.3.2 Honoraria

135. In paragraph 135 of Decision 2012-059, the Commission invited parties to assist the Commission's understanding of the costs associated with participating in the competitive process by filing evidence that would help the Commission to understand the expected cost of preparing RFQ and RFP submissions, and how an honorarium would be expected to impact the decision to participate in a future competitive process.

136. In its initial application the AESO indicated that its competitive process may entitle a shortlisted respondent to receive an honorarium if it submits a compliant RFP submission, but is not selected as the preferred proponent.<sup>68</sup> However, the AESO indicated that the decision to introduce an honorarium and the amount to be distributed is at the discretion of AESO's management.<sup>69</sup>

137. No parties submitted evidence indicating their expected costs of preparing RFQ and RFP bids.

138. TCE noted in its evidence that during the RFP stage, proponents may incur significant costs and that an honorarium may be made available to cover a portion of a proponent's bid development costs. TCE submitted that if the AESO is concerned with the cost of honoraria, one strategy would be for the AESO to set a total budget for the honoraria and to split this among all qualified proponents not selected.<sup>70</sup>

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<sup>67</sup> Financing costs were subsequently revised in the AESO's rebuttal evidence, see Exhibit 116.02.

<sup>68</sup> Exhibit 02.00, AESO Competitive Process Application, September 15, 2011, page 10, paragraph 51.

<sup>69</sup> Exhibit 161.01, AESO Information Request Response to AUC Round 3, October 1, 2012, AUC.AESO-40, Attachment A, page 14, Item 23.

<sup>70</sup> Exhibit 85.01, TCE Written Evidence, June 1, 2012, pages 6 and 13.

139. In argument, TCE noted that typically, a proponent is at risk for developing a proposal in a conventional RFP process. Since the AESO's proposed honorarium is unlikely to come close to covering the full costs of participation, TCE suggested that the honorarium is unlikely to be a significant factor when potential proponents are assessing whether to participate in the competitive process. TCE further stated that it believes that motivated proponents, a level playing field and efficient risk allocation are more likely to effectively deliver value for ratepayers by ensuring competitively priced bids than an approach based on honoraria and security.<sup>71</sup>

### **Commission findings**

140. In paragraph 135 of Decision 2012-059, the Commission invited parties to make submissions concerning the need for honoraria in light of the costs participants expect to incur in preparing competitive process submissions. No parties provided information regarding the magnitude of costs.

141. The Commission agrees with the submission made by TCE that the AESO competitive process as outlined is not preferable to a process that is implemented without honorariums. A competitive process "that results in a fair allocation of risks and treats proponents fairly and equitably"<sup>72</sup> does not require honoraria. For these reasons the Commission directs the AESO to remove the payment of honoraria to unsuccessful proponents of the competitive process.

### **3.3.3 Affordability requirement**

142. In paragraph 145 of Decision 2012-059, the Commission stated that it would be interested in further information from the AESO regarding the use and calculation of the affordability requirement in the context of its proposed competitive process.

143. In paragraphs 148 and 149, the Commission also stated that it considered that any expected incremental costs as a result of specific bid arrangements should be accounted for in any affordability assessments conducted by the AESO when it is evaluating or assessing bid programs from proponents, and that the Commission would be interested in receiving any additional evidence from the AESO or any other party to address this matter.

144. The AESO, in its additional evidence, determined that it would not include an affordability requirement in the RFP. Instead, the AESO intends to provide an order of magnitude estimate of the capital costs of construction for the project, which the AESO expects would enable qualified and capable potential proponents to determine whether or not to participate in the competitive process. The AESO stated that it would also consider the preliminary submission of each proponent in the RFP stage of the competitive process to assess whether or not any scope changes for the project are being suggested. The AESO indicated that, following receipt of the final RFP submissions, it would make an internal assessment to test the reasonableness of the submissions from both the technical and financial perspectives. It will include, as part of the provisions of the competitive process, the ability for the AESO to cancel the competitive process for a project and to undertake a subsequent competitive process for the

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<sup>71</sup> Exhibit 178.01, TCE Final Argument, November 13, 2012, page 10, paragraphs 61-62.

<sup>72</sup> Exhibit TCE Written Evidence, Appendix – Written Evidence of John Dalton, June 1, 2012, page 14, lines 15 and 16.

project if, among other reasons, none of the financial submissions received are acceptable to the AESO.<sup>73</sup>

145. The UCA, in its argument<sup>74</sup> was concerned that the affordability requirement had been more narrowly defined as an order of magnitude assessment of capital requirements and would not provide a measure of the effectiveness of the overall process. The UCA stated that an analysis and assessment of the overall costs and affordability of the project should be part of the AESO's mandate to provide economic operation of the interconnected electric system. The UCA submitted that this assessment is required and suggested that the assessment be integrated with the evaluation the AESO intends to conduct once the Fort McMurray project is completed.

### **Commission findings**

146. Having reviewed the submissions related to the proposed affordability requirement and the AESO's subsequent revision to the competitive process to exclude the affordability requirement in favor of an order of magnitude estimate, the Commission accepts the AESO's proposed change. The Commission also acknowledges that the AESO may cancel the competitive process for a project based on its assessment of the RFP submissions.

#### **3.3.4 Land access issues**

147. In paragraphs 156 and 157 of Decision 2012-059, the Commission raised concerns that the examination of potential routes when there is only one proponent can be disruptive for landowners, and all efforts should be made to minimize the impact of multiple consultation activities on landowners. It was not clear what role the AESO would play in the coordination of activities or the extent to which this role would mitigate impacts and disruptions to landowners. The Commission stated that further clarification and information from the AESO on these matters would assist interested parties and the Commission.

148. The AESO submitted that during the RFP stage, it intends to make information available to proponents relating to land matters. The AESO may provide information from previous projects in a similar geographic region concerning landowner issues, AUC decisions, mitigating reasons, compensation considerations, and developer consultation approaches. The AESO further submitted that it may also retain a third party to collect raw data about relevant geotechnical, environmental, infrastructure and social considerations. The AESO further submitted that each proponent will be required to submit to the AESO a plan describing details of its proposed due diligence activities that require access to land or consultation with landowners. The AESO stated that it will review the plans and work with the proponents to coordinate their common activities with an objective to minimize disruption to landowners.<sup>75</sup>

149. AltaLink indicated that there will be significant stakeholder and landowner disruption and confusion caused by multiple proponents conducting concurrent pre-bid consultation to determine an indicative route to bid on. AltaLink submitted that the AESO maintained that it will minimize landowner disruption but provided few details as to how it will do so. AltaLink asserted that effective consultation requires landowner input to mitigate impacts, and any

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<sup>73</sup> Exhibit 55.02, AESO's Additional Evidence and Revised Competitive Process Application – Reply to Decision, March 30, 2012, pages 6-7, paragraph 17.

<sup>74</sup> Exhibit 0172.01, UCA Argument, page 3, paragraphs 10-12.

<sup>75</sup> Exhibit 55.02, AESO's Additional Evidence and Revised Competitive Process Application – Reply to Decision March 30, 2012, page 8, paragraphs 22-23.



indicative routing determined pre-bid will change following comprehensive AUC Rule 007: *Applications for Power Plants, Substations, Transmission Lines, and Industrial System Designations* (AUC Rule 007) compliant consultation.<sup>76</sup>

150. TCE submitted that the AESO's proposal to coordinate due-diligence activities that require land access or consultation with stakeholders with land interests provides a workable solution.<sup>77</sup>

151. EPCOR submitted that the AESO should provide information on the manner in which the AESO will lead proponent activities related to consultation or due diligence activities related to land access issues. EPCOR further indicated that the AESO should provide a list of the activities the proponents will be relying upon the AESO to lead.<sup>78</sup>

### Commission findings

152. The Commission continues to hold the view that all applicants must comply with AUC Rule 007, with respect to landowner consultation. The Commission shares the concern of parties that the potential exists for landowner confusion and disruption and supports the AESO undertaking activities to minimize these impacts in a cost effective manner. The Commission does observe that, while not optimal, the impacts are unavoidable.

#### 3.3.5 End-of-term provisions

153. In paragraph 184 of Decision 2012-059, the Commission stated that the legislative scheme does not allow for the direct assignment of critical transmission infrastructure if the facilities are subject to a competitive process. For these critical transmission infrastructure facilities, eligibility to apply for an operating licence under the *Hydro and Electric Energy Act* must be determined through a competitive process. Once the right to operate the facilities under the current competitive process has expired, through the terms of the agreement, the AESO must use a competitive process to determine who is eligible to bring forward an application for operating the facility going forward. The AESO does not have the ability to use its direct assign authority under Section 24 of the *Transmission Regulation* for these critical transmission infrastructure assets, nor can it simply negotiate a further term as it would not be the result of a transparent competitive process.

154. The AESO submitted that at the end of the term, the AESO would direct that the ownership of the projects assets be transferred, for a nominal amount, to a designate determined by the AESO pursuant to a competitive process.<sup>79</sup> The AESO further stated that prior to the end of the 40-year term, it intends to run a new competitive process to determine the transmission facility owner who would operate and maintain the project assets for a fixed price over a defined concession term. At the end of the original term of the project agreement, the project assets would be transferred to the newly selected transmission facility owner for a nominal payment [\$1].<sup>80</sup>

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<sup>76</sup> Exhibit 174.01, AltaLink Argument, November 13, 2012, page 3, paragraph 9.

<sup>77</sup> Exhibit 178.01, TCE Final Argument, November 13, 2012, page 13, paragraph 13.

<sup>78</sup> Exhibit 39.01, EPCOR Comments on Suspension, December 19, 2011, page 4.

<sup>79</sup> Exhibit 55.04, AESO Revised Competitive Process Application – Reply to Decision, March 30, 2012, page 57.

<sup>80</sup> Exhibit 71.01, AESO Information Request Responses Round 2 EPCOR Final, May 4, 2012, EUI.AESO-011.

155. The UCA submitted that the competitive process and project agreement specify that the ownership of the asset can be transferred at the end of term giving the AESO the ability to continue the service life of the facility by contracting the asset out for a second term.<sup>81</sup>

### **Commission findings**

156. When the Commission released Decision 2012-059, the language in Section 24.2(2) of the *Transmission Regulation* permitted a competitive process to be used to determine the person who is eligible to apply to operate the transmission facilities, construct the transmission facilities or both construct and operate the transmission facilities.

157. However, as noted in paragraph 58 of this decision, Section 24.2(2) of the *Transmission Regulation* has since been amended such that there is no longer a legislative ability to use a competitive process to only determine the person eligible to operate the transmission facilities. Further, the AESO cannot use its direct assign authority under Section 24 of the *Transmission Regulation* for these critical transmission infrastructure assets, nor can it simply negotiate a further term as doing so would be contrary to the legislative policy that the person entitled to hold the permit and licence for the operation of these assets be determined through a transparent competitive process.

158. Moreover, notwithstanding the fact that the transmission infrastructure would be fully depreciated, as critical transmission infrastructure, the Commission considers that it would nonetheless have more than a nominal value at the end of the term of the agreement.

159. Given this legislative change, the Commission finds that the AESO's proposal to use an undefined competitive process to determine the new owner at the end of the term would be contrary to the specific provisions in the legislation.

160. In light of this legislative vacuum, the Commission considers that changes to the operational ownership of the assets at the end of the term of the agreement would be the type of material change to the agreement that was contemplated to come before the Commission for determination pursuant to Section 24.3 of the *Transmission Regulation*.

### **3.3.6 Adjustment methodologies and future changes to resulting arrangement**

161. In Decision 2012-059, the Commission found that the AESO's competitive process application would circumvent the requirements of the *Transmission Regulation* in that the AESO's interpretation and preferred approach would allow for financial bids to be made and then, after acceptance of the bid, subsequently renegotiated with the successful bidder before finalization of the terms and also during the life of the contract.

162. The Commission stated that the *Transmission Regulation* did not allow bilateral negotiation to determine new prices or other arrangements. Rather, the *Transmission Regulation* contemplated that some sort of competitive process would have to be used to establish, in a transparent manner, the price or prices to be charged by the successful proponent over the life of the contract along with the terms and conditions of service. Those prices could be adjusted from time to time through a formula or other similar mechanism, because that formula or mechanism would have been included in the bid proposal submitted by the successful proponent. However, prices could not be determined through bilateral negotiations because those negotiations would

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<sup>81</sup> Exhibit 172.02, UCA Argument, November 30, 2012, page 5, paragraph 17.

not bring competitive pressures to bear on the successful proponent nor would the process be open and transparent.<sup>82</sup>

163. The AESO responded to the Commission’s findings by submitting additional evidence on March 30, 2012.<sup>83</sup> The AESO stated that it did not propose to use the competitive process to simply determine eligibility and thereafter negotiate all of the remaining terms and conditions bilaterally with the successful proponent after the fact.<sup>84</sup> Rather, for each project, the AESO intends to discuss the proposed form of the project agreements with the proponents during the RFP stage, and determine if changes to the agreement provisions are required based on those discussions. The terms and conditions for a project, including the events that would trigger an adjustment, would be finalized in the project agreements before the proponents were to submit their financial bids for the project. The successful bidder would be contractually obligated to comply with the terms and conditions set out in the final form of the project agreements and these terms and conditions would not be renegotiated by the AESO after the acceptance of the bid, nor would any amendments to these agreements be permitted.

164. The AESO also indicated that events would occur during the term of the agreements that would necessitate adjustments to the bid price. The adjustments to the price would only be made if contemplated and permitted by the project agreements and then only through the prescribed mechanisms for making the adjustments. No adjustments would be made based on bilateral after-the-fact negotiations between the AESO and the successful proponent.<sup>85</sup>

165. The AESO identified 17 events<sup>86</sup> that could trigger a change to a payment, schedule, performance obligation or allocation of risk provision of the project agreements and listed those events along with a description of the adjustment mechanism to be used to determine the change in its Schedule 8.

166. The AESO proposed to use two methodologies to make changes to the project agreements; index and formula based adjustments and non-formulaic adjustments.

167. Eleven of the events identified by the AESO that could trigger a change to the resulting arrangement would use mechanisms that are based on a predetermined formula or index. These 11 events, and the time periods in which they could arise, are as follows:

<b>Event which may result in an adjustment</b>	<b>Time period which the event arises</b>
Inflation/deflation	Pre-construction, operations
Route changes approved by the AUC	Pre-construction
Change in financial markets	Pre-construction
Change in base interest rate on debt	Pre-construction
Change in indicative insurance costs	Pre-construction
Refinancing costs	Construction, operations

<sup>82</sup> Decision 2012-059, paragraph 54.

<sup>83</sup> Exhibits 55.01- 55.04, AESO’s Additional Evidence and Revised Competitive Process Application, March 30, 2012.

<sup>84</sup> Exhibit 55.02, AESO’s Additional Evidence and Revised Competitive Process Application – Reply to Decision, March 30, 2012, page 2, paragraph 3.

<sup>85</sup> Exhibit 55.02, AESO’s Additional Evidence and Revised Competitive Process Application – Reply to Decision, March 30, 2012, page 3, paragraph 5.

<sup>86</sup> Exhibit 176.02, AESO Argument, November 13, 2012, pages 5-7, paragraph 20.

<b>Event which may result in an adjustment</b>	<b>Time period which the event arises</b>
Early or late completion	Completion of construction
Failure to meet availability or performance standards	Operations
Termination	Any time
Cost saving proposals	Any time
Early procurement costs	Pre-construction

168. Six events identified by the AESO that could trigger a change to the resulting arrangement would use mechanisms that are principle or process based, rather than a predetermined formula or indices based. These six events, and the time periods in which they could arise, are as follows:

<b>Event which may result in an adjustment</b>	<b>Time period which the event arises</b>
Change orders	Any time
Uninsurable risks	Construction, operations
Change in law	Any time
Force majeure	Any time
Relief	Any time
Asset condition inspection	Operations

169. If the change mechanism was based on predetermined principles and processes, the successful proponent would be required to provide the AESO with details of the proposed adjustment. The AESO would make a determination whether or not to accept the price adjustment, and would involve its owner's engineer and other experts, as necessary, in making that determination. The AESO indicated that its determination would in some instances be subject to dispute resolution but in no case would an adjustment to price be made on the basis of after-the-fact bilateral negotiations between the AESO and the successful proponent.

170. ATCO Electric's evidence<sup>87</sup> noted a number of the cost adjustment mechanisms being proposed by the AESO in Schedule 8 lacked clarity regarding their ability to prevent bilateral negotiations from occurring. ATCO Electric's supplemental evidence<sup>88</sup> submitted that the AESO's reliance on undefined and uncertain principles and processes was, in fact, a bilateral negotiation process.

171. ATCO Electric's argument identified a number of events in which the adjustment mechanisms were based on principles and processes. These adjustment mechanisms included:<sup>89</sup>

- (a) Refinancing;
- (b) Change in Indicative Insurance Costs;
- (c) Change Orders;
- (d) Successful Proponent request re: Cost Savings Proposals;
- (e) Successful Proponent request re: Early Procurement Process;
- (f) Uninsurable Risks;
- (g) Change in Law;

<sup>87</sup> Exhibit 83.02, ATCO Electric Evidence, June 1, 2012, pages 5-9, paragraph 18.

<sup>88</sup> Exhibit 167.01, ATCO Electric Supplemental Evidence, July 5, 2012.

<sup>89</sup> Exhibit 179.05 ATCO Electric Argument, November 13, 2012, pages 32-33, paragraph 95.

- (h) Force Majeure Events;
- (i) Relief Events; and
- (j) Asset Condition Inspection when work is required.

172. ATCO Electric submitted that the principles or processes proposed by the AESO as adjustment mechanisms left considerable discretion to the AESO and the successful proponent to change the payment, schedule and other obligations set out in a resulting arrangement and would not yield a result determined by competitive market forces. ATCO Electric submitted that the AESO's response to AE.AESO-21(c), supported ATCO Electric's position in that the AESO indicated that the process that will be subject to competitive market forces would be the preparation and submission of the financial bid.

173. ATCO Electric submitted that the AESO's interpretation of Section 24.3 of the *Transmission Regulation*, and how it intended to utilize this provision, would vest too much discretion on the AESO to make changes by principle or process adjustment mechanisms and without further oversight by the Commission.<sup>90</sup> ATCO Electric noted that in response to AUC.AESO-041(a), the AESO indicated that if a change to the project agreements is permitted by a principle or process, those changes would not be subject to Commission approval, even if material in nature. ATCO Electric submitted that neither Section 24.3(2) nor Section 24.3(3) permitted changes on the basis of principles and processes. Instead, ATCO Electric argued that the introduction of Section 24.3(3) clarified that where a change to the resulting arrangements is not allowed for in the resulting arrangement by a formula or other similar mechanism, the AESO may make such a change, subject to Commission approval, if the change is material.

174. Further, ATCO Electric stated that many of the principles and processes that the AESO was relying upon were undefined, did not provide any certainty to the competitive process, would permit after-the-fact bilateral negotiations and would avoid the requirement to seek Commission oversight of material changes.<sup>91</sup>

175. ATCO Electric submitted that in order for a change to be acceptable, that change must be clearly defined in the terms of the resulting arrangement. ATCO Electric considered formulaic adjustments, with defined algorithms and specified indices or parameters, to be the only adjustment mechanisms that would allow for a change to occur without further Commission oversight. ATCO Electric contended that the ambiguity surrounding the use of a principle or process was designed to benefit the AESO and the successful proponent to engage in a bilateral, after-the-fact negotiation that would not be subject to the Commission's regulatory oversight.<sup>92</sup>

176. For example, ATCO Electric, in its argument,<sup>93</sup> indicated that the change order process, because it was not formulaic, would constitute an after-the-fact negotiation that would not be completely subject to competitive market forces. ATCO Electric stated further that even if the Commission accepted that the change order process was not an after-the-fact negotiation, there would be no guarantee that the change in costs resulting from a change order request would result in costs that are completely determined by competitive market forces. ATCO Electric also believed that allowing a successful proponent to make a change order request could substantially

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<sup>90</sup> Exhibit 179.05, ATCO Electric Argument, November 13, 2012, pages 27-28, paragraphs 81-83.

<sup>91</sup> Exhibit 169.05, ATCO Electric Information Request Response to AUC.AE-15.

<sup>92</sup> Exhibit 179.05, ATCO Electric Argument, November 13, 2012, page 31, paragraph 93.

<sup>93</sup> Exhibit 179.05, ATCO Electric Argument, November 13, 2012, pages 13-15, paragraphs 40-44.

alter the essence of its bid, circumvent the whole competitive procurement process and remove the responsibility of the proponent to meet the performance standards of its original bid.

177. ATCO Electric also submitted that a materiality threshold or trigger should be identified by the AESO for all major components of the competitive process not subject to a formula-based adjustment mechanism, so that the Commission and proponents could understand when the AESO would be required to seek Commission review of material changes under Section 24.3(3) of the *Transmission Regulation*.

178. AltaLink's response to AUC.AML-001<sup>94</sup> noted that the AESO would invite comments from proponents on the project agreements during the RFP stage and that final forms of the project agreements would be available prior to the submission of the final bid. AltaLink contended that this implied that there would be the opportunity for the AESO and proponents to engage in a negotiation of the terms of the agreements after Commission approval of the competitive process. Any such negotiation, according to AltaLink, had the potential to impact risk allocation and the pricing of the bids.

179. AltaLink's argument<sup>95</sup> noted that the wording of Schedule 8 provided the AESO with broad discretion as to when and how it would use the adjustment mechanisms, especially those based on principles and processes. AltaLink contended that many of the adjustment mechanisms in Schedule 8 do not clearly define the circumstances under which a change would be allowed, nor what that change would be and the AESO's assertion that adjustments under Schedule 8 are permitted without the Commission's oversight and approval would preclude the Commission from assessing the prudence of the allocation of the risk between the ratepayers and the proponents.

180. AltaLink also argued that the AESO should not be allowed to use principles and processes as a mechanism to adjust prices but instead should have submitted pro-forma agreements which would have included the actual contractual adjustment formulae or mechanisms, so that the Commission would be able to assess whether the proposed process was in the public interest.<sup>96</sup>

181. AltaLink concluded that the permissiveness and discretionary nature in which the AESO intended to utilize Schedule 8, including the use of principles and processes, would not be consistent with the preliminary findings of the Commission in Decision 2012-059 in that the prices would not be established using a transparent mechanism.

182. LS Power did not submit evidence, but in its argument<sup>97</sup> noted that the AESO's revised application contained provisions that recognized the need for Commission approval for any after-the-fact, material change to agreements not permitted under the terms of the arrangement resulting from the competitive process. LS Power indicated that these revised provisions addressed the Commission's concerns and removed the potential for after-the-fact bilateral negotiations to take place.

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<sup>94</sup> Exhibit 109.01, AltaLink Information Request Response to AUC, AESO and TCE, June 29, 2012, AUC.AML-001, page 2.

<sup>95</sup> Exhibit 174.01, AltaLink Argument, November 13, 2012, pages 11-14, paragraphs 39-51.

<sup>96</sup> Exhibit 174.01, AltaLink Argument, November 13, 2012, pages 14-15, paragraphs 51-55.

<sup>97</sup> Exhibit 175.01, LS Power Argument, November 13, 2012, pages 3-4, paragraph 12.

## Commission findings

183. The Commission noted in Decision 2012-059, at paragraph 110, that the AESO was free to develop whatever key terms and conditions it considered necessary in order to ensure a robust, open and transparent bidding process as long as the competitive process did not include or rely on after-the-fact bilateral negotiations.

184. Notwithstanding, as noted above in this decision, the *Transmission Regulation* was amended in the fall of 2012. Included in the amendments was the addition of a new Section 24.3.<sup>98</sup> This new section reads as follows:

**24.3(1)** For the purposes of this section,

(a) “eligible person” means the person determined to be eligible to apply in accordance with section 24.2(2);

(b) “resulting arrangement” means a resulting arrangement referred to in section 24.2(4).

(2) The ISO and the eligible person may change a resulting arrangement, including the payment, schedule and other obligations set out in the resulting arrangement, if the change is allowed for by the terms of a resulting arrangement.

(3) The Commission’s approval must be obtained before the ISO and the eligible person make a change if in the opinion of the ISO

(a) a material change to the resulting arrangement is required, and

(b) the change may not be made under the terms of a resulting arrangement.

(4) If a dispute arises between the ISO and the eligible person regarding a resulting arrangement and cannot be resolved between them, the ISO and the eligible person must submit the dispute to the Commission for determination.

185. The legislative changes to the *Transmission Regulation* permit the AESO and the proponent to change an arrangement if the change is allowed by the terms of the arrangement (i.e., the project agreements) and if the change is not considered to be material in the opinion of the AESO. However, as it was expressed in paragraphs 53 and 54 of Decision 2012-059, the changes cannot be determined as a result of bilateral negotiations between the AESO and the successful proponent. The competitive process must establish, in a transparent manner, the price or prices to be charged by the successful proponent over the life of the contract along with the terms and conditions of service.

186. One objective of the *Transmission Regulation* is to subject the construction and operation of critical transmission infrastructure projects to competitive pressures. Inevitably, in preparing their bids as part of a competitive process, prospective bidders for the construction and operation of critical transmission infrastructure facilities will be confronted with considerable uncertainty about future market, political and institutional conditions, especially over the 40-year time horizon associated with the operational phase of the competitive process. There is also a level of uncertainty that arises over a shorter time horizon, especially when bids are submitted with actual construction starting at a later date. For example, cost uncertainty is created by regulatory

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<sup>98</sup> *Alberta Regulation* 156/2012.

lag and uncertainty associated with the Commission's final route selection. Each of these short-term changes can increase the costs associated with an accepted bid.

187. Firms engaged in truly competitive markets face similar risks all the time; they also develop innovative strategies to handle these risks and uncertainties. Indeed, firms are often successful because they are particularly good at competing to minimize their exposure to risk and uncertainty. In designing a competitive process, access to this type of innovative decision making is particularly important and valuable.

188. This suggests that, in designing a competitive process, it is important to allow proponents to compete on multiple and varied dimensions, especially those that involve higher orders of uncertainty and risk; that is, the design of a competitive process should maximize its reliance on market forces to mitigate risk and uncertainty. The reason for this is market participants are in the best position to accomplish these types of innovations and have at their disposal better information about alternatives, professionals or strategies than do non-market participants. This reasoning appears to be reflected in some of the AESO's stated objectives for a competitive process including objective (d) above, which states the competitive process "must allocate risk to most efficiently and effectively reduce costs and mitigate risk." Industry proponents voice a similar opinion regarding the important role to be played by firms in analyzing, allocating and mitigating risk and uncertainty.

189. The AESO is clearly aware of the important role to be played by risk and uncertainty in the design and implementation of a competitive process. Appendix 1, Schedule 8, of the AESO's competitive process application focusses squarely on adjustments to be made to the successful proponent's project agreement in the event of a variety of market and regulatory uncertainties. For example, the AESO notes that a successful bid will face uncertain future costs for major components of the operation of critical transmission infrastructure including future labour costs. As a result of this uncertainty, the AESO has proposed that the operating and maintenance costs be indexed according to a pre-specified index to be included in the project agreement. The AESO states further that this index is to be fixed and not subject to bilateral negotiation once the bid is submitted.

190. Specifying an index to be used does not actually resolve any uncertainty for the proponent when designing its bid. The index does not resolve the uncertain future prices for the proponent. Specifying an index to be used is different from stating the value of the index to be used on some date in the future. The proponent may use information about which index will be used by the AESO to construct a forecast of future prices for labour, but this forecast may not be informative for the proponent, especially when competing with other proponents, and given the unique nature of the proponent's use of labour in providing operation and maintenance services going forward. Given that the specification of the index will likely have very little impact on the competitive bid of a proponent, it makes sense to allow the proponents to specify how they will escalate their prices for the operation of the critical transmission infrastructure facilities in the future; i.e., simply allow the proponents to compete on this dimension of their bids as well, and allow them to specify the indexing procedure they believe works best for them. In certain circumstances, it may be optimal for the proponent to absorb increases in labour costs; i.e., in order to compete, they may be willing to shift the risk away from ratepayers.



191. Consider objective (e) which states the competitive process “must foster efficient investment, operation and maintenance of assets across the life cycle of the facilities.” In light of this objective, the AESO states that future cost savings will be shared with ratepayers according to a pre-specified sharing rule. Since the intent of the legislation is to promote competition for these transmission facilities on all dimensions, it is worthwhile to allow the proponents to offer their own sharing rule. Thus, competition will decide how future cost savings are shared between the specified proponent and ratepayers.

192. Consider again Appendix 1 of AESO’s application and its discussion of inflation/deflations where it states:

The PDA [Project Development Agreement] contemplates that since the Successful Proponent is required to make a facilities application to the Alberta Utilities Commission (the "**Commission**") and Commission approval will significantly post-date submission of the final RFP Submission, certain adjustments to the Successful Proponent's financial proposal may be required to reflect the consequences of the passage of time between delivery of the final RFP Submission and financial closing (the "**Development Period**") for the component costs and financing of the Project, and the consequences of any route adjustment required by the Commission for the major components and lands required for the Project.

Generally, with respect to construction costs for major components of the Project, adjustment mechanisms will be specified in the PDA which provide a pre-determined indices-based method of varying the costs of such major components to account for commodity, labour, and other price changes, including foreign exchange changes, over the Development Period. Once those costs are adjusted and updated, the proposed construction price set forth in the final RFP Submission will be updated and a revised construction price will be calculated which accounts for such changes (the "**Index Adjusted Construction Price**" or "**IACP**"). (bolding in original)

193. Competition at the pre-construction phase would allow the proponent to determine exactly how it wishes the AESO to escalate its costs over this period, and would state this as part of their bid. For example, one index for all proponents may not express the change in a particular proponent’s prices. Indeed, a proponent may, as part of its competitive strategy, want to absorb the uncertainty, even if its prices change. This may be optimal, for example, if the proponent is already able to hedge the price risk.

194. The same risk management strategy could apply for exchange rate changes. Proponents may already hedge this risk in the currency market and want their price to be immune to currency changes. These types of decisions should be at the proponent’s level, since they are in the best position to process the available information.

195. In directing this change to the AESO’s competitive process application, the Commission agrees with the view put forward by LS Power to the AESO’s Competitive Process Recommendation Paper:

In addition LS Power believes that it would be beneficial to allow Proponents to propose their own risk sharing model in addition to a conforming bid. For example a proposal may say the price is X in a conforming bid and Y if risks are shared in an alternative

model. This would allow Proponents to submit innovative approaches for consideration by the AESO while still ensuring that conforming bids are received.<sup>99</sup>

196. TCE also highlighted concerns about commodity price risk. In its submission to the AESO's Competitive Process Recommendation Paper, TCE stated:

TCE is concerned with the AESO assumption that commodity risk is best held by the project proponent at the time of the RFP submission. Foreign exchange risk is also an issue given the global nature of suppliers for transmission towers and insulators. While it may be possible to mitigate some of these risks through the use of various mechanisms, few potential proponents, if any, would enter into such hedges on the basis of bidding on a prospective project. In order to manage these risks, proponents may incorporate substantial risk premiums into their bids under the currently proposed risk sharing structure.

Typically, material suppliers do not provide fixed price quotes until materials are ordered (or even later, upon delivery). Accordingly, commodity price escalation is one of the largest risks in the capital costs. Further, raw steel, aluminum, copper, as inputs to finished goods are just a few of the many drivers influencing the delivered cost of transmission infrastructure. Suppliers normally seek greater pricing margins during periods of significant global demand. A rise in commodity indexes could be further inflated by increasing supplier margins, a risk that project proponents could not effectively mitigate during the development phase.

Commodity and foreign exchange risks should be transferred to the project proponent when there is project certainty after the AUC approves the FA. There are several means to accomplishing this transfer, one of which is the provision of an escalation table to be used during the RFP process, with an adjustment once the FA is approved for actual deviations from the escalation table.<sup>100</sup>

197. TCE's proposal was to have the AESO eliminate this risk, whereas the Commission believes the proponents subject to competitive pressures should propose how to resolve this risk.

198. The AESO's responded to the comments of TCE by stating:

Commodity price risk will be shared. Ratepayers will retain the risk until AUC FA approval. The AESO is developing the bundle of indices that will be used.<sup>101</sup>

199. While the AESO is proposing to resolve TCE's problem, the Commission considers that the proponents collectively, in competition, should solve this problem. Clearly, proponents understand the risks they face. They should then be able to propose solutions that they believe will ensure a winning bid.

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<sup>99</sup> Exhibit 27.03, AESO Information Request Responses to AUC, Attachment AUC.AESO-001(a) – Response to Stakeholder Comments on CPRP, August 19, 2011, pages 9-10.

<sup>100</sup> Exhibit 27.03, AESO Information Request Responses to AUC, Attachment AUC.AESO-001(a) – Response to Stakeholder Comments on CPRP, August 19, 2011, pages 11-12.

<sup>101</sup> Exhibit 27.03, AESO Information Request Responses to AUC, Attachment AUC.AESO-001(a) – Response to Stakeholder Comments on CPRP, August 19, 2011, pages 11.

200. This principle of competition can be applied to virtually every category in Schedule 8 of Appendix 1 of the AESO's competitive process application regardless as to whether the adjustment is proposed to be made through a formula, index, process or principle.

201. Consequently the Commission directs the AESO to structure its competitive process such that the proponents will be responsible for assessing the various risks they will face rather than having the AESO make the determination, as it has done in Schedule 8. Should all proponents be in agreement with the AESO's proposed formulaic adjustment mechanism for a specific event, then the AESO will be free to use their proposed adjustment mechanism. Otherwise, the proponents will have the opportunity to choose whatever adjustment mechanism suits their risk tolerance for a specific event. In this way, the Commission could be assured that any changes to the arrangement was the result of competitive forces since the proponents will have known the magnitude of the risk and would have factored this assessment in their financial bids.

202. The AESO has also taken the position that with the provisions proposed in Schedule 8, there will be no circumstances that would require it to bring forward a material change to the Commission for approval. The AESO stated that the determination of price adjustments made in compliance with the terms and conditions of the project agreements would be the result of the competitive process and that it would be inappropriate for the Commission to conduct an after-the-fact review of the prudence of price adjustments made in accordance with the adjustment provisions in the project agreements. The AESO contended that the proponents would have factored the Schedule 8 wording into their financial bids and having further Commission oversight might limit potential bidder interest, reduce the proponents' confidence in the competitive process and result in increased risk premiums and higher financial bids.<sup>102</sup>

203. Indeed, in responses to an AUC information request, the AESO stated:

The determination of price adjustments will be made in compliance with the terms and conditions of the CP Project Agreements.<sup>103</sup>

204. As noted above, Schedule 8 of the AESO's process attempts to identify future issues that may arise over the life of the project which may require changes to be made to the resulting arrangement. The AESO has proposed that these future changes can be determined through a formula, through a process or through the application of a principle. The position of the AESO is that so long as the change is identified, that satisfies the requirement for competitive forces to determine the costs arising for the construction and operation of the project. This means that there will be no changes subject to a materiality threshold, since all changes are accounted for within the resulting arrangement. The position taken by the AESO in its interpretation of Section 24(2) of the *Transmission Regulation*, would have the effect of rendering Section 24(3) of the *Transmission Regulation* to have no force as, under the AESO's interpretation of this section, it will never be utilized.

205. The Commission considers the AESO's interpretation of the amended provisions to be unsupported. In the Commission's view, Section 24(3) of the *Transmission Regulation* must have been included for a purpose and any interpretation or application of these revised provisions

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<sup>102</sup> Exhibit 66.01, AESO Information Request Response Round 2 to AUC, May 4, 2012, AUC.AESO-033(c), page 2.

<sup>103</sup> Exhibit 66.01, AESO Information Request Response Round 2 to AUC, May 4, 2012, AUC.AESO-33(d), page 2.

must be considered in their totality and in the context of the legislative scheme regarding the competitive procurement process. These provisions are intended to limit the AESO's ability to engage in bilateral negotiations with any bidders at any stage of the competitive process. That is, it is not enough to simply have a provision in the resulting arrangement to the effect that "the parties agree that they can make any changes to the agreement as may be necessary and the parties agree that none of these changes will be considered to be material changes". The approach taken by the AESO would be similar to including such a clause.

206. Section 24(2) and Section 24(3) of the *Transmission Regulation* when read together recognize that circumstances will arise in which, despite the parties' intention to provide for every eventuality in the competitive process and resulting arrangement, changes may be required to be made to the agreement and these changes cannot be pre-determined through the terms of the resulting arrangement. The legislative scheme requires those changes to be approved by the Commission where such changes will have a material impact on the resulting agreement.

207. While the Commission recognizes that Section 24(3) of the *Transmission Regulation* enables the AESO to determine what a material change would be, the Commission's responsibility under the legislation is to approve the entire competitive process. The AESO's response in their revised application has left the materiality constraint undefined. Thus, the information available to proponents after the AESO's submission of Additional Evidence and Revised Competitive Process Application is the same as it was in its original submission; i.e., stakeholders do not know what is the materiality threshold.

208. Consequently, in order to approve the entire competitive process, the Commission considers it necessary for the AESO to provide a materiality threshold and the basis for the selection of such a threshold for the events that could trigger an adjustment to the resulting arrangement, including the six events already identified, where such changes are not adjusted through a formula and directs the AESO to provide these thresholds as part of its competitive process.

209. Subject to providing the above directed materiality thresholds and support for those thresholds in the competitive process documentation, the Commission approves the adjustment methodologies proposed in the competitive process.

210. Finally, there may be events that arise over the life of the transmission project which have not been accounted for in a proponent's bid. The Commission considers that these are also the types of changes to the resulting arrangement, assuming such changes were material, that the legislation contemplated would come before the Commission for consideration. Consequently, for this changes that are considered to be material, they should be subject to the Commission's oversight. Otherwise, there is the possibility for ex-post, bilateral negotiations to take place. Since bilateral negotiations are not allowed under the auspices of a competitive process, any material changes that arise from a bilateral negotiation to the project agreement must be approved by the Commission.

## 4 Order

211. It is hereby ordered that, pursuant to Section 24.2(3) of the *Transmission Regulation*, that the competitive process to determine who is eligible to apply to the Commission for the construction and operation of certain transmission facilities pursuant to Section 24.2 of the *Transmission Regulation*, as filed by the AESO on September 15, 2011, revised on March 30, 2012, and modified by the AESO in its submissions during this proceeding, is approved by the Commission subject to the following :

- (1) The application of the approved competitive process is restricted to those projects currently contemplated in the *Transmission Regulation* and the *Electric Utilities Act*.
- (2) The competitive process objective identified by the AESO as “must create opportunity of new market entry” be revised to read as “must not create barriers for entry to the market.”
- (3) The AESO limit the exercise of its discretion to vary or refrain from using any of the schedules included in the description of the competitive process when implementing the competitive process for a project.
- (4) The request for expressions of interest stage be mandatory.
- (5) The AESO allow five proponents to move forward to the RFP stage unless there is a clear distinction in the qualifications for the fourth and fifth highest ranking proponents in which case the AESO allow four proponents to move forward.
- (6) The AESO cancel a competitive process where there is only one proponent remaining after the evaluation of proponent’s technical submissions and indicative financial bids.
- (7) The AESO remove the payment of honoraria to unsuccessful proponents of the competitive process.
- (8) The AESO retain the ability to cancel the competitive process for a project based on its assessment of the RFP submissions.
- (9) The AESO structure its competitive process such that the proponents will be responsible for assessing the various risks they will face rather than having the AESO make the determination unless all proponents are in agreement with the AESO’s proposed formulaic adjustment mechanism.
- (10) The AESO provide a materiality threshold and the basis for the selection of such a threshold for the events that could trigger an adjustment to the resulting arrangement where such changes are not adjusted through a formula and further directs the AESO to provide these as part of its competitive process.

Dated on February 14, 2013.

**The Alberta Utilities Commission**

*(original signed by)*

Tudor Beattie, QC  
Panel Chair

*(original signed by)*

Henry van Egteren  
Commission Member

*(original signed by)*

Dr. Patrick Brennan  
Acting Commission Member

## Appendix 1 – Proceeding participants

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## Appendix 2 – Legislative provisions

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### *Electric Utilities Act*

#### Interpretation

1(1) In this Act,

(f.1) “critical transmission infrastructure” means a transmission facility designed under the Schedule as critical transmission infrastructure.

(o) “electric utility” means an isolated generating unit, a transmission facility or an electric distribution system that is used

(i) directly or indirectly for the public, or

(ii) to supply electricity to members of an association whose principal object is to supply electricity to its members, the owner of which

(iii) is required by this Act or the regulations to apply to the Commission for approval of a tariff,

(iv) is permitted by this Act or the regulations to apply to the Commission for approval of a tariff, and has applied for that approval, or

(v) passes a bylaw that has been approved by the Lieutenant Governor in Council under section 138, but does not include an arrangement of conductors intended to distribute electricity solely on property of which a person is the owner or a tenant, for use solely by that person and solely on that property or a facility exempted by Commission rules made under section 117;

(jj) “owner”, in respect of a generating unit, a transmission facility or an electric distribution system, means the owner, operator, manager or lessee of that unit, facility or system, or any person who is acting as an agent for the owner, operator, manager or lessee, and in the event that one of those persons becomes bankrupt or insolvent, includes any trustee, liquidator or receiver appointed in respect of the bankruptcy or insolvency;

#### Purposes of the Act

5. The purposes of this Act are:

(h) to provide for a framework so that the Alberta electric industry can, where necessary, be effectively regulated in a manner that minimizes the cost of regulation and provides incentives for efficiency.

#### Critical Transmission Infrastructure

##### Designation of critical transmission infrastructure

41.1 Repealed 2012 c6 s3.

##### Non-application of ss 34 to 36

41.2 Sections 34, 35 and 36 do not apply to critical transmission infrastructure.

### **Direction to apply**

**41.3** Subject to the regulations and an order under section 41.1(1), the Independent System Operator must, in a timely manner, direct a person determined under the regulations to make an application in a timely manner to the Commission under the *Hydro and Electric Energy Act* for an approval of critical transmission infrastructure

### **Staged development of CTI referred to in Schedule**

**41.4(1)** The Independent System Operator, with respect to the critical transmission infrastructure referred to in section 1(1) of the Schedule, shall, subject to the regulations, specify and make available to the public milestones that the Independent System Operator will use to determine the timing of the stages of the expansion of the terminals referred to in section 1(1)(a) and (b) of the Schedule.

**(2)** The transmission facilities referred to in section 4 of the Schedule shall be developed in stages in accordance with subsection (3).

**(3)** The facility referred to in section 4(a) of the Schedule shall be developed first, which may initially be energized at 240 kV, and the Independent System Operator shall, subject to the regulations, specify and make available to the public milestones that the Independent System Operator will use to determine the timing of

## ***Transmission Regulation***

### **Interpretation**

**1(1)** In this Regulation,

(g) “ISO’s own administrative costs” means

(iii) the transmission-related costs and expenses required to be paid, or otherwise appropriately paid, by the ISO, except for the following:

(A) costs for the provision of ancillary services;

(B) costs of transmission line losses;

(C) amounts payable under TFO transmission tariffs

(k) “TFO” means the owner of a transmission facility;

### **Transmission facility project cost reporting**

#### **General rules for constructing transmission facilities**

**24(1)** Subject to subsections (2) and (3), when making rules under section 20 of the Act and in exercising its duties under section 17 of the Act, the ISO must

(a) determine, on the basis of geographic areas under sections 28 and 29 of the Hydro and Electric Energy Act, who is eligible to apply for the construction or operation, or both, of transmission facilities in those areas after August 12, 2004, based on which TFO is operating in those areas, and

(b) with respect to a transmission facility that existed on August 12, 2004, provide that the owner of that transmission facility, or any successor of the owner of that transmission facility, continues to be responsible for upgrades and enhancement to the transmission facility.

(2) The ISO may grant or provide for exceptions to subsection (1), including authorizing alternative arrangements or agreements between TFOs, if

(a) those arrangements or agreements result in the safe, reliable and efficient operation of the transmission system, and

(b) those arrangements or agreements are filed with the Commission for information.

(3) Subsection (1) does not apply in respect of

(a) a transmission facility to which section 27 applies,

(b) critical transmission infrastructure in respect of which the Minister has made a determination under section 24.1(1),

(c) section 4 of the Schedule to the Act, or

(d) other critical transmission infrastructure that is designated under section 41.1 of the Act after June 1, 2010.

### **Critical transmission infrastructure**

**24.1(1)** The Minister may determine who is eligible to apply for the construction or operation, or both, of critical transmission infrastructure.

(2) The ISO must have regard to a determination made by the Minister under subsection (1) when carrying out the ISO's functions under the Act and regulations, including when giving a direction under section 41.3 of the Act.

(3) The Commission, when considering approval of the matters in section 142(1)(l)(iii)(B) and (C) of the Act, must have regard to a determination made by the Minister under subsection (1).

(4) Any determination made by the Minister on or before December 9, 2009 under this section continues in effect.

### **Competitive process to develop certain transmission facilities**

**24.2(1)** For the purposes of this section, "competitive process" means a fair and open process that allows any qualified person, as determined by the ISO, to submit a proposal in respect of a transmission facility, including a financial bid, as the method to determine the person referred to in subsection (2).

(2) The ISO must develop a competitive process to determine the person who is eligible to apply for the construction and operation of the transmission facilities referred to in section 24(3)(a), (c) and (d).

(3) Before the ISO implements a competitive process developed under subsection (2), the ISO must obtain the Commission's approval of the competitive process.

(4) Where the Commission approves a competitive process developed under subsection (2), the Commission must consider any resulting arrangements, including any changes requiring the Commission's approval or determination pursuant to section 24.3(3) or (4), as prudent.

(5) The competitive process developed under subsection (2) must not exclude

(a) a TFO, whether or not the TFO has undertaken any work or provided any services to the ISO in respect of a proposed transmission facility, or

(b) any other person that has undertaken any work or provided any services to the ISO in respect of a proposed transmission facility

unless the TFO or other person does not have the necessary qualifications to participate in the competitive process.

**(6)** Subject to subsection (7), the ISO may request, and a TFO or other person must provide, any records to the ISO that are necessary to develop and implement a competitive process.

**(7)** If there is a dispute between the ISO and a TFO or other person regarding whether a record is necessary for the purposes of the ISO as referred to in subsection (6), the matter must be determined by the Commission.

**(8)** A competitive process that is approved by the Commission may be used by the ISO for more than one transmission facility project.