AltaGas Utilities Inc., AltaLink Management Ltd., ATCO Electric Ltd., ATCO Gas and Pipelines Ltd., ENMAX Power Corporation, EPCOR Distribution and Transmission Inc., and FortisAlberta Inc.

Decision on Preliminary Question: Application for review and variance of Decision 2191-D01-2015: 2013 Generic Cost of Capital

January 18, 2016

Alberta Utilities Commission
Decision 20456-D01-2015
AltaGas Utilities Inc., AltaLink Management Ltd. in its capacity as General partner of AltaLink, L.P., ATCO Electric Ltd., ATCO Gas and Pipelines Ltd., ENMAX Power Corporation, EPCOR Distribution and Transmission Inc., and FortisAlberta Inc.
Application for review and variance of Decision 2191-D01-2015: 2013 Generic Cost of Capital
Proceeding 20456

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Contents

1 Introduction

1. On May 21, 2015, the Alberta Utilities Commission received an application from AltaGas Utilities Inc., AltaLink Management Ltd. in its capacity as general partner of AltaLink, L.P. (AltaLink), ATCO Electric Ltd. (ATCO Electric), ATCO Gas and Pipelines Ltd., ENMAX Power Corporation, EPCOR Distribution and Transmission Inc., and FortisAlberta Inc. (the Alberta Utilities). The application requested review and variance of Decision 2191-D01-2015[1] (2013 GCOC decision) pursuant to AUC Rule 016: *Review of Commission Decisions* (the review request). The Commission assigned proceeding number 20456 to the review request and issued a process letter on June 18, 2015.

2. In its June 18, 2015 process letter, the Commission adjourned the review request pending the determination of a then ongoing appeal in respect of the Utility Asset Disposition (UAD) decision (Decision 2013-417).[2] The Office of the Utilities Consumer Advocate (the UCA) registered a statement of intent to participate on June 26, 2015.

3. On August 7, 2015, the Alberta Utilities filed a motion seeking a partial reversal of the Commission's decision to adjourn the review request on the ground that the adjournment was prejudicial to them. The Commission invited responses to the motion by way of a process schedule set out in a letter dated August 7, 2015. The UCA responded on August 28, 2015 and the Alberta Utilities replied on September 2, 2015.

4. The Court of Appeal of Alberta released its decision on the UAD appeal on September 18, 2015. The Commission subsequently dismissed the Alberta Utilities' motion as being moot and inquired as to whether the companies intended to continue to pursue their review request, as filed.

5. On September 24, 2015, the Alberta Utilities confirmed that they wished to pursue their review request on revised grounds. The companies advanced numerous grounds in support of their review request, including allegations that the hearing panel had committed various errors of fact, law or jurisdiction that caused it to fail to determination a fair return for the affected utilities. These grounds, as particularized in the Alberta Utilities' submissions, are referred to later in this decision as and when necessary.

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[1] Decision 2191-D01-2015: 2013 Generic Cost of Capital, Proceeding 2191, Application 1608918-1, March 23, 2015.

[2] Decision 2013-417: Utility Asset Disposition, Proceeding 20, Application 1566373, November 26, 2013 (the UAD decision).

6. In this decision, the Commission panel that provided its findings in Decision 2191-D01-2015 is referred to as the "hearing panel" and the Commission panel that considered the review request is referred to as the "review panel."

7. In reaching the determinations contained in this decision, the review panel has considered relevant materials comprising the record of the review and variance proceeding and the relevant portions of the record of Proceeding 2191 resulting in Decision 2191-D01-2015. Accordingly, references in this decision to specific parts of each record are intended to assist the reader in understanding the review panel's reasoning relating to particular matters and should not be taken as an indication that it did not consider all relevant portions of the records with respect to such matters.

2 Background

8. The 2011 generic cost of capital (GCOC) proceeding was concluded on December 8, 2011, with the issuance of Decision 2011-474.[3] In that decision, the Commission approved a return on equity (ROE) of 8.75 per cent for the years 2011-2012 for each of the Alberta Utilities and determined that the same ROE level would be prescribed for 2013 on an interim basis.

9. The Commission commenced Proceeding 2191, initiating the 2013 GCOC process on October 18, 2012. This proceeding was originally intended to determine both ROE and capital structures for the period 2013-2014.

10. On November 9, 2012, the Commission suspended Proceeding 2191 at the request of the Alberta Utilities. The Alberta Utilities' request, which was supported by UCA, was intended to permit parties to consider the Commission's determinations in the Performance Based Regulation (PBR) compliance proceeding (Proceeding 2130), the Capital Tracker proceeding (Proceeding 2131), and the UAD proceeding (Proceeding 20) prior to filing their evidence in the 2013 GCOC proceeding.[4]

11. On April 4, 2013, the Commission re-activated the 2013 GCOC process, citing the status of the PBR, Capital Tracker and UAD proceedings and the need to minimize regulatory lag in dealing with cost of capital matters.[5]

12. On April 23, 2013, the Commission informed participants in Proceeding 2191 that the 2013 GCOC process would proceed, and provided for the filing of evidence three weeks after the release of the later of the Capital Tracker or UAD decisions.[6] The Capital Tracker decision was ultimately issued last, on December 6, 2013.

13. On December 18, 2013, the Commission extended the date for filing evidence on the 2013 GCOC proceeding to January 31, 2014 in response to a request from the City of Calgary.

[3] Decision 2011-474: 2011 Generic Cost of Capital, Proceeding 833, December 8, 2011.
[4] Proceeding 2191, Exhibit 0003.01.AUC-2191.
[5] Proceeding 2191, Exhibit 0004.01.AUC-2191.
[6] Proceeding 2191, Exhibit 0007.01.AUC-2191.

14. On December 19, 2013, the Commission issued Decision 2013-459,[7] which provided that the ROE of 8.75 per cent approved for the Alberta Utilities in Decision 2011-474 would continue to apply on an interim basis pending further Commission direction.

15. The oral hearing for the 2013 GCOC proceeding was held from May 26 to June 3, 2014. The record of the proceeding closed on February 25, 2014, following a process for written argument that allowed for submissions on the effects, if any, of the 2012 ATCO Electric Distribution Deferral Accounts and Annual Filing for Adjustment Balances decision (Decision 2014-297[8]), which was issued on October 29, 2014, and the EPCOR Distribution and Transmission Inc. 2013 Capital Tracker True-Up decision (Decision 3100-D01-2015[9]), which was issued on January 25, 2015.

16. The Commission issued the 2013 GCOC decision on March 23, 2015. That decision provided that the newly determined ROE level of 8.30 per cent and capital structures approved for the period 2013-2015 were also "approved on an interim basis for 2016, and for each subsequent year thereafter, unless otherwise directed by the Commission."[10]

3 The Commission's Review Process

17. The Commission's discretionary authority to consider applications for review and variance of its decisions is found in Section 10 of the *Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2. In determining whether to grant an application for review of its own decisions or orders, the Commission acts in accordance with the rules promulgated by it under Section 10(2) of the same statute.

18. AUC Rule 016: *Review of Commission Decisions* is the applicable rule. A person who is directly and adversely affected by a decision may file an application for review within 60 days of the issuance of the decision, pursuant to Section 3(3) of Rule 016. The Alberta Utilities filed their review application within the required period.

19. The review and variance process has two stages. In the first stage, a review panel must decide whether there are grounds to review the original decision; this is sometimes referred to as the "preliminary question." If the review panel decides that there are grounds to review the decision, it moves to the second stage of the review process, where the Commission holds a hearing or other proceeding to decide whether to confirm, vary, or rescind the original decision.

20. Sections 4 and 6 of AUC Rule 016 prescribe the grounds for a review application and the test for determining the preliminary question. These sections provide:

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[7] Decision 2013-459: 2013 Generic Cost of Capital – 2014 Interim Return on Equity, December 19, 2013.
[8] Decision 2014-297: ATCO Electric Ltd. 2012 Distribution Deferral Accounts and Annual Filing for Adjustment Balances, October 29, 2014.
[9] Decision 3100-D01-2015: EPCOR Distribution and Transmission Inc. 2013 Capital Tracker True-Up, January 25, 2015.
[10] 2013 GCOC decision, at paragraph 506.

4 Contents to a review application

An application for a review must:

…

(d) set out the grounds for the application, which grounds may include:

i. the Commission made an error of fact, law or jurisdiction,

ii. new or previously unavailable facts or a change of circumstances have arisen that were not previously placed in evidence or identified in the proceeding and could not have been discovered at the time by the review applicant by exercising reasonable diligence,

…

6 Granting of review

(1) The Commission shall decide, with or without a hearing, whether to grant an application for review.

(2) The Commission shall grant an application for review of a decision, in whole or in part, if it determines:

(a) for an application for review pursuant to subsections 4(d)(i) and (ii), the review applicant has raised a reasonable possibility that

(i) the alleged error of fact, law or jurisdiction, or

(ii) the alleged new or previously unavailable facts or changed circumstances that were not previously placed in evidence or identified in the proceeding and could not have been discovered at the time by the review applicant by exercising reasonable diligence or changed circumstances.

could lead the Commission to materially vary or rescind the decision…

21. In the current application, both subsections 6(2)(a)(i) and 6(2)(a)(ii) are engaged.

22. As stated in Decision 2012-124,[11] applications for review and variance of Commission decisions are properly approached from the perspective that reviews and variances should be exceptional and that their granting should be strictly limited to the circumstances prescribed in

[11] Decision 2012-124: Decision on Request for Review and Variance of AUC Decision 2011-436 Heartland Transmission Project, Proceeding 1592, Application Nos. 1607924, 1607942,1607994,1608030, 1608033, May 10, 2012 at paragraph 31.

Section 6 of AUC Rule 016. In Decision 2012-124, the Commission concluded that the following principles should be applied in consideration of review applications:

> • First, decisions of the Commission are intended to be final; the Commission's rules recognize that a review should only be granted in those limited circumstances described in Rule 016.
>
> • Second, the review process is not intended to provide a second opportunity for parties with notice of the application to express concerns about the application that they chose not to raise in the original proceeding.
>
> • Third, the review panel's task is not to retry the […] application based on its own interpretation of the evidence nor is it to second guess the weight assigned by the hearing panel to various pieces of evidence. Findings of fact and inferences of fact made by the hearing panel are entitled to considerable deference, absent an obvious or palpable error.

23. In applying Subsection 6(2)(a)(i) of Rule 016 to its assessment of the merits of the grounds advanced in the review request, the review panel must first determine whether the Alberta Utilities have demonstrated that the hearing panel committed any errors of fact, law or jurisdiction in its determination of Proceeding 2191. If any such errors are found to have been made, the review panel must then determine whether there is a reasonable possibility that the error could lead the Commission to materially vary or rescind Decision 2191-D01-2015.

24. The Commission considers that in order to establish that the hearing panel committed an error of fact, law or jurisdiction in its determination of Proceeding 2191, the applicants must show that such an error is either obvious on the face of Decision 2191-D01-2015, or has otherwise been shown to exist on a balance of probabilities (i.e., that the existence of the error is more likely than not). As noted, however, the mere establishment of the existence of an error is not sufficient to provide the basis for a successful review application. If an error has been shown to exist, an applicant must also demonstrate a reasonable possibility that the error could lead the Commission to materially vary or rescind the subject decision.

25. In applying subsections 4(d)(ii) and 6(2)(a)(ii) of Rule 016 to its review request, the applicant must present new or previously unavailable facts or establish changed circumstances that could demonstrate a reasonable possibility that the new information or circumstance could lead the Commission to materially vary or rescind the subject decision. The opportunity to present "new or previously unavailable facts" is restricted to facts that were in existence prior to the issuance of the decision under review but that, despite the exercise of reasonable diligence, remained undiscovered at the time of the hearing.

26. If the review panel decides the preliminary question by granting a review of a decision under Section 6 of Rule 016, Section 7 of the same rule requires the Commission to proceed to the second part of the process by issuing a notice of hearing and commencing a new hearing or other proceeding where it will determine whether the decision should be confirmed, rescinded or varied.

4 Positions of the Parties

27. The Alberta Utilities' original grounds for review of the 2013 GCOC decision were described in the application filed on May 21, 2015. These grounds were subsequently modified by correspondence filed on September 24, 2015. The revised grounds are summarized below.

4.1 The Alberta Utilities

28. The Alberta Utilities' review request stated that the Commission erred in claiming that its interpretation of the Supreme Court of Canada's decision in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* [2006] 1 S.C.R. 140 (*Stores Block*) has been known and understood by all industry participants, including credit rating agencies and capital market participants, since its release in February 2006. Further, the Commission erred in finding that while its interpretation of *Stores Block* theoretically placed utilities at a greater degree of risk, various other aspects of the regulatory and capital market environment mitigated this risk and, therefore, eliminated the need for an offsetting premium on any ROE, including that:

a. credit rating agencies have had an opportunity to consider and reflect on the regulatory impact of *Stores Block*; and

b. objective market measures including credit spreads, in the years following *Stores Block*, have not reflected increased risk for the Alberta Utilities.

29. The Alberta Utilities alleged that the Commission used hindsight, and in so doing, erred in arriving at the approved ROE value of 8.3% for 2013-2014. As a component of the error of applying hindsight, the Alberta Utilities alleged that the Commission wrongly considered 2.8% to be a reasonable lower bound for the long-term risk free rate for 2013.

30. It was also alleged that the Commission erred by failing to consider higher ROEs that were awarded to other Canadian utilities of comparable risk during the 2013- 2014 time period.

31. The Alberta Utilities also argued that the Commission erred by purporting to apply a notional price-to-book calculation for the announced acquisition of AltaLink as establishing that the previously approved ROE of 8.75% was a ceiling for the determination of ROE for 2013-2015.

32. Finally, in support of their review request, the Alberta Utilities sought to introduce evidence in the form of credit agency reports to suggest that the effect of the Commission's UAD decision, and subsequent decisions (the Slave Lake decision, Decision 2014-297[12] and the EPCOR AMI decision, Decision 3100-D01-2015[13]) has been demonstrably negative.

[12] Decision 2014-297: ATCO Electric Ltd. 2012 Distribution Deferral Accounts and Annual Filing for Adjustment Balances, October 29, 2014.

[13] Decision 3100-D01-2015: EPCOR Distribution & Transmission Inc. 2013 PBR Capital Tracker True-up and 2014-2015 PBR Capital Tracker Forecast, January 25, 2015.

4.2 The Transmission Facility Owners (TFOs)

33. The transmission facility owners (TFOs), AltaLink and ATCO Electric, alleged the following additional errors. These grounds generally alleged that the Commission erred by approving an ROE and deemed equity values for these TFOs that were inconsistent with maintaining credit metrics supportive of "A-range" ratings. The TFO's arguments in this respect were framed as follows:

a. A minimum funds from operations (FFO)/Debt ratio of 11.1% to 14.3% was required by the TFOs to allow them to continue to target credit ratings in the "A" range;

b. The combined effect of the ROE and deemed capital structure awarded to AltaLink resulted in the company having an FFO/Debt ratio of 9.8% and 9.5% for 2013 and 2014, respectively; and

c. The regulatory environment in Alberta has allegedly been impaired, as reported by credit rating agencies, which means that the FFO/Debt ratio for the TFOs should actually be in the range of 13% to 23%.

34. Finally, they alleged that the Commission erred by approving ROEs and capital structures for the TFOs that effectively vitiated the effect of "credit relief" that was provided to both companies in previously determined rate applications.

4.3 The UCA's response

35. The UCA filed responding submissions on October 13, 2015. Its arguments are summarized below.

36. The UCA argued that, contrary to the argument of the Alberta Utilities, at no time did the Commission state that its own interpretation of *Stores Block* had been appreciated by the utilities and capital markets as early as 2006, but rather that the Commission had determined that this was the first event that signalled potential changes in the regulatory environment in Alberta.

37. The UCA further submitted that the Commission presented the "first practical application of the *Stores Block* principles" upon the issuance of the 2011 GCOC decision.[14] The UCA went on to state that while the Commission's UAD decision was arguably the most definitive statement of how *Stores Block* would be interpreted and applied in Alberta, it was not the first time any attendant risk was disclosed to participants or the capital markets.

38. In addressing the issue of credit rating agencies' sensitivity to *Stores Block* and its associated treatments, the UCA stated:[15]

[14] 2013 GCOC decision, at paragraph 335.
[15] Exhibit 20456-X0018, Response submissions of the UCA, at paragraph 24.

> Credit rating agencies are required, by virtue of their function, to closely monitor changes in the regulatory environment. Thus, it is reasonable, if not correct, to assume that credit rating agencies were wholly attuned to the 'changes to the regulatory landscape in Alberta' resulting from *Stores Block* and the line of subsequent decisions.

39. The UCA proposed that the focus should not be on *when* credit rating agencies and the capital markets became aware of the full implications of *Stores Block*, but rather *whether* those entities reacted negatively to the issuance of *Stores Block* and the subsequent line of cases. The UCA stated that, consistent with the Commission's finding, there simply was no evidence that the credit rating agencies had issued downgrades. Nor, it claimed, had the Alberta Utilities presented any other "objective market measure" that would support their claims of increased risk.[16]

40. The UCA submitted the Alberta Utilities had, in fact, presented, as part of their own review request, credit metric reports that strongly suggested the credit rating agencies and capital markets were, at the very least, aware of the potential implications of *Stores Block*, even prior to the issuance of the Slave Lake Decision and EDTI Capital Tracker Decision.[17] Consequently, in its view, there is no doubt that the potential effect of the Commission's application of *Stores Block* principles was known by industry by November 2013, with the release of the UAD decision. The fact that certain credit rating agencies took a "wait and see" approach did not change this.

41. The UCA contended, on the matter of the Commission's reasonableness, that:[18]

> …In the absence of any change in credit ratings resulting from so-called "stranded asset risk", or any other ratings action, it was wholly reasonable for the Commission to conclude that there [was] "no supporting evidence that the greater degree of risk postulated by the Alberta Utilities has had any impact on their ability to raise debt capital at reasonable rates."

42. Further, on the concept of symmetry, the UCA argued that the Alberta Utilities mischaracterized the concept with regards to corporate and property law as it was applied by the Supreme Court of Canada in *Stores Block*. Namely, the Alberta Utilities failed to identify the "entitlement to gains" portion of the concept of symmetry to the arguments surrounding regulatory policy change and the surrounding risk. The UCA continued that the Alberta Utilities' argument, that a systematic application of symmetrical property rights did not have the potential to offset losses flowing from dispositions, was not valid.

43. The UCA stated that the Commission's use of historical information in its determination of ROE and capital structures for 2013 and 2014 was not improper and did not equate to "retroactive ratemaking." It claimed the Alberta Utilities' characterization of the use of this

[16] Exhibit 20456-X0018, Response submissions of the UCA, at paragraph 27.
[17] Exhibit 20456-X0018, Response submissions of the UCA, at paragraph 37.
[18] Exhibit 20456-X0018, Response submissions of the UCA, at paragraph 46.

information as being contrary to principles of prospective ratemaking did not align with judicial considerations of the concept, nor past Commission practice.

44. On the issue of weight given to any particular piece of evidence presented to the Commission, the UCA argued that the Commission's refusal to ascribe significant, or any weight, to returns permitted in respect of other Canadian utilities of comparable risk did not constitute an error. In fact, the UCA pointed out, the Commission clearly indicated its consideration of all the material before it, which included the awarded returns of other Canadian regulators. In its view, a failure to ascribe weight to a particular piece of evidence was not, itself, an error.

45. The UCA stated that the Commission fully considered the concerns identified by the Alberta Utilities when it assessed the probity of the price-to-book ratio associated with the AltaLink purchase. The fact that it arrived at a conclusion the utilities did not agree with does not create a reviewable error.

46. Finally, the UCA stated that the Alberta Utilities' reliance on "fresh evidence" in the form of credit rating agency reports that communicate concerns regarding developments in the Alberta regulatory environment was not sufficient to warrant a variance of the 2013 GCOC. The UCA went on to note that the fact remains that, while concerns have been expressed, no downgrades have occurred. Further, the test period over which the 2013 GCOC values applied on a final basis ended in 2015. As a result, while the credit report evidence may inform the Commission's determination of the next GCOC, it should not be permitted to form the basis for a variance of the 2013 GCOC decision.

4.4 The UCA's response to TFO-specific grounds

47. The UCA stated that the approval of the ROE and capital structure values for Alberta Utilities, designed to achieve minimum FFO/Debt ratios of ~11%, was within the Commission's prerogative in its determination of the 2013 GCOC.

48. The UCA noted that ATCO Electric, in particular, had confirmed that its approved ROE and capital structure resulted in its having an FFO/Debt ratio in the targeted range and now simply disagreed that the ~11% level was adequate when other factors were considered (i.e., exposure to possible risk resulting from the UAD decision). The UCA also noted that, despite AltaLink's claim that its awarded ROE and capital structure left it with an FFO/Debt ratio that was below the ~11% target (~9.5%), it did not provide submissions explaining its theory of why such an outcome had resulted, or otherwise provide calculations supporting its claims.

4.5 The Alberta Utilities' reply

49. The Alberta Utilities began their reply by stating that *Stores Block* did not deal with regulatory treatment of stranded assets. In their view, the fact that no credit rating agencies issued unfavourable reports upon the release of that decision in 2006, was indicative of the fact that the issue was not alive in the mind of the market or industry at the time.

50. The Alberta Utilities contended that the first Commission treatment of stranded asset costs was contained in the 2011 GCOC decision and that at least two credit rating agencies issued reports containing "negative reactions" in the wake of that decision. They argued that the first real awareness that the rating agencies had concerning the potential effect of the Commission's appreciation of the principles contained in *Stores Block* came with the issuance of the UAD decision in late 2013. This information was supplemented by the successive releases of the Commission's decisions in the Slave Lake and EDTI AMI cases.

51. Further, and in the alternative, the Alberta Utilities argued that an actual credit downgrade is not required before there is an adverse effect on a company's ability to raise capital.

52. The Alberta Utilities also stated that if the UAD decision and the 2013 GCOC decision actually resulted in downgrades, the corresponding spread widening could be as much as 15 basis points. They claimed that a discount spread of ~20 basis points in respect of Alberta utilities has already been observed. Consequently, the Alberta Utilities claimed that the UCA's submission that the rating agencies have adopted a relatively harmless "wait and see" approach was not valid.

53. The Alberta Utilities reaffirmed their disagreement with the proposition that potential increases in risk flowing from dispositions of regulated assets is offset by the potential for gains arising from disposition of assets. The Alberta Utilities asserted: "[t]he Commission cannot rely on non-utility revenues or proceeds to subsidize rates; where it does so, it deprives the utilities of a compensatory return."[19] Further, the Alberta Utilities argued that there was nothing on the record to suggest that this dynamic, if permitted, would sufficiently placate investors.

54. The utilities also confirmed their position that the Commission had used impermissible hindsight in setting approved ROE values for 2013 and 2014 and that this was both unnecessary and improper. They challenged the UCA's position stating: "[i]n essence, the UCA invite[d] the Commission to use regulatory lag as a justification for abandoning the prospective regulatory framework, when there was no necessary connection between the two."[20]

55. The Alberta Utilities also repeated their position that the Commission's failure to consider the returns permitted to comparable utilities in other jurisdictions and explain the differences between those values and the values it approved is a reviewable error. They also maintained that their reference to this information in the GCOC proceeding was not limited to supporting adjustments to the Risk-free Rate in CAPM models, as suggested by the UCA.

56. The Alberta Utilities disputed the ability of the UCA to comment on credit rating agencies' perceptions of risk. They stated:

> It does not lie in the mouth of the UCA to make categorical factual statements, purporting to speak conclusively on behalf of credit rating agencies and other capital market

[19] Exhibit 20456-X0020, Reply submissions of the Alberta Utilities, at paragraph 29.
[20] Exhibit 20456-X0020, Reply submissions of the Alberta Utilities, at paragraph 36.

> participants, as to what they intended by their stated concerns, especially when the UCA's interpretation flies in the face of what are clear, uncontradicted statements.[21]

57. Finally, the Alberta Utilities submitted that, in any event, an assessment of credit rating agencies' views should be conducted at the variance stage of the proceeding and was not germane at the review stage.

4.6 The Transmission Facility Owners' reply

58. The TFOs re-iterated that their complaint with the 2013 GCOC decision was three-fold. Firstly, the Commission's determination that the affected TFOs could successfully target credit ratings in the A-range by maintaining a minimum FFO/Debt ratio of 11.3% was not supported by the credit rating agencies themselves. Secondly, the combined effect of the ROE and capital structure assigned to AltaLink actually lowered its FFO/Debt ratio to ~9.4%, which was below the level targeted by the Commission. Finally, they claimed that the 2013 GCOC determinations vitiated previously granted credit relief provided to both companies.

59. The TFOs also noted that the Commission has previously found the actions of credit rating agencies to be unpredictable, and stated that a rating downgrade carried "serious consequences in term of cost of capital and access to financial markets."[22]

5 Review panel findings

60. The findings of the review panel provided below are organized in accordance with the order in which grounds were identified in the Alberta Utilities' original review application, as subsequently modified in their correspondence of September 24, 2015.[23] In the interest of organizational efficiency, the review panel has elected to consider certain substantively related grounds jointly as opposed to issuing separate reasons for each discrete ground advanced in the application. The instances in which this has occurred are identified.

61. For the reasons that follow, the review panel has determined that the Alberta Utilities' review request must be dismissed in its entirety.

5.1 Grounds applicable to the Alberta Utilities, generally

62. The following grounds were advanced on behalf of the Alberta Utilities, generally:

a. The Commission erred in fact, law or jurisdiction by claiming that its [interpretation] of *Stores Block* was understood by others;

   i. The Commission erred in claiming that credit rating agencies and capital markets have had the opportunity to consider and reflect upon the regulatory impacts of *Stores Block* for some time;

[21] Exhibit 20456-X0020, Reply submissions of the Alberta Utilities, at paragraph 45.
[22] Exhibit 20456-X0020, Reply submissions of the Alberta Utilities, at paragraph 61.
[23] Exhibit 20456-X0016.

ii. The Commission erred in finding that "objective market measures," including "utility credit spreads," have not reflected increased risk for the Alberta Utilities.

iii. The Commission erred in finding that credit rating agencies have not reacted to increased risk caused by the Commission's interpretation of *Stores Block.*

iv. The Commission erred in finding, without evidence, and without any basis whatsoever, that utility gains on dispositions of assets surplus to utility service would be seen as an offset or a mitigating factor to placing the risk of "extraordinary retirements" upon the Alberta Utilities.

b. The Commission erred in fact, law or jurisdiction by applying impermissible hindsight to determine the ROE for 2013 and 2014.

c. The Commission erred in failing to consider the ROEs awarded to other Canadian utilities of comparable risk.

d. The Commission erred in fact and law in purporting to apply a notional price-to-book calculation pertaining to the announced acquisition of AltaLink, as establishing that the approved ROE of 8.75% was a ceiling.

e. New and previously unavailable facts have arisen that were not previously placed in evidence or identified in Proceeding 2191 and could not have been discovered at the time by the Alberta Utilities by exercising reasonable diligence, that demonstrate that the Commission fundamentally erred in its interpretation of the views of credit rating agencies.[24]

5.1.1 Review panel findings

63. The review panel's findings with respect to the grounds of review advanced by the Alberta Utilities, generally, are set out below.

5.1.1.1 The first ground – alleged errors regarding the capital market's appreciation of, and reaction to, the Commission's appreciation of the *Stores Block* decision.

64. The review panel considers that the first three "sub-grounds" advanced in relation to the timing and nature of capital market participants' appreciation of, and reaction to, changes in the Alberta regulatory landscape flowing from the issuance of the *Stores Block* decision and its subsequent judicial and regulatory treatment are sufficiently related that they can be determined jointly.

[24] Exhibit 20456-X0001, Application for Review and Variance.

65. The Alberta Utilities' argument in this regard is based on the assertion that it was not the issuance of the *Stores Block* decision in 2006, or its subsequent appellate treatment in Alberta that subjected shareholders to increased risk. In the utilities' view, it was the Commission's subsequent communication of its appreciation of the regulatory consequences of *Stores Block* in the UAD decision that signalled to the markets that they were now exposed to increased regulatory risk.[25]

66. In its responding submissions, the UCA suggested that the hearing panel did not, in fact, claim that its interpretation and future application of the *Stores Block* decision could have been appreciated by the markets as early as 2006. In its view, what the hearing panel communicated was that the issuance of the *Stores Block* decision represented a signal of potential changes in the Alberta regulatory landscape, which would have been received by the market.[26]

67. The UCA also submitted that issues of timing amounted to a "red herring." It claimed that the central issue was not when any additional risk was actually perceived, but rather the fact that no adverse credit consequences at all were visited upon the utilities in the time following the issuance of the *Stores Block* decision.[27]

68. The Alberta Utilities' complaint with respect to the hearing panel's consideration of "objective market measures" was two-fold. They claimed that the hearing panel's considerations of measures such as credit spreads were too superficial to form an adequate basis for its determinations. They also argued that the hearing panel's reliance on this information was, in any event, based on the previously-described alleged error concerning the market's appreciation of risk, and was therefore unfounded.[28]

69. For its part, the UCA argued that the hearing panel's consideration of credit spreads was reasoned and reasonable. It pointed to the fact that one of the Alberta Utilities' own witnesses, Ms. Kathleen McShane, acknowledged the informational value of credit spreads in her evidence by stating that "[t]he magnitude of the spread between corporate bond yields and government bond yields is frequently used as a proxy for changes in investors' risk perception or willingness to take risk."[29]

70. The third aspect of the first ground of review relates to an allegation that the hearing panel erred by finding that credit rating agencies had not reacted to risk resulting from the Commission's interpretation of the *Stores Block* decision. The Alberta Utilities argued that there was evidence on the record of the 2013 GCOC proceeding clearly demonstrating that this was not the case.[30]

71. In responding to this argument, the UCA suggested that the Alberta Utilities had mischaracterized the hearing panel's actual findings regarding the behaviour of credit rating

[25] Exhibit 20456-X0001, Application for Review and Variance, at paragraph 36.
[26] Exhibit 20456-X0018, Response submissions of the UCA , at paragraphs 23 to 24.
[27] Exhibit 20456-X0018, Response submissions of the UCA , at paragraphs 25 and 27.
[28] Exhibit 20456-X0001, Application for Review and Variance, at paragraphs 39 and 40.
[29] Exhibit 20456-X0018, Response submissions of the UCA , at paragraph 30.
[30] Exhibit 20456-X0001, Application for Review and Variance, at paragraphs 43 to 45.

agencies. It claimed that the panel's finding was not that credit rating agencies had failed to react but rather, they had failed to react by downgrading affected companies' credit ratings.[31]

72. In reply, the Alberta Utilities urged that "[c]ontrary to the suggestion by the UCA, a 'credit downgrade, or any other negative rating action' is not required for there to be an adverse impact on the Alberta Utilities' ability to raise debt capital at reasonable rates."[32]

73. The relevant portion of the 2013 GCOC decision states:

> **334** Given this, the Commission accepts that, in theory, utility shareholders in the period since the *Stores Block* decision may be subject to a greater degree of risk, than they were prior to the issuance of the that [*sic*] decision. The question before the Commission in this proceeding is whether any variability of returns that may be occasioned by the *Stores Block* decision, subsequent Alberta Court of Appeal decisions, and related Commission decisions, warrants an adjustment to the allowed ROE or capital structure, or both, for the Alberta Utilities.
>
> **335** Since 2006, the *Stores Block* decision and subsequent Alberta Court of Appeal decisions, as well as the above-noted decisions of the Commission applying the findings of the Supreme Court and the Alberta Court of Appeal, signalled to credit rating agencies and capital markets in general, information regarding changes to the regulatory landscape in Alberta. The Commission considers that credit rating agencies and capital markets have had an opportunity to consider and reflect upon, the regulatory impacts resulting from the Supreme Court of Canada's 2006 *Stores Block* decision and the subsequent line of related decisions for some time now.
>
> **336** The Commission considers that if these signals had been perceived as significantly increasing the overall riskiness of investments in Alberta utilities, any such perception could reasonably have been expected to be reflected in objective market measures. In the case of debt issues, any perceived increase in risk would have been reflected in utility credit spreads since 2006. As shown in figures 1 and 2 in Section 4 of this decision, as of the close of record of this proceeding, credit spreads for the Alberta Utilities are currently similar to those in 2006.
>
> **337** The Commission also considers that any regulatory risk specifically attributable to its own treatment of stranded assets, in light of the *Stores Block* decision, has been appreciated by capital market participants since at least the end of 2011, when Decision 2011-474 was issued. Similarly, the determinations in the UAD decision have been known to the investing public since the end of 2013. The Commission notes, however, there was no perceptible increase in credit spreads for the Alberta Utilities in either 2011 or 2013, when these decisions were issued.
>
> **338** The Commission finds no supporting evidence that the greater degree of risk postulated by the Alberta Utilities has had any impact on their ability to raise debt capital at reasonable rates, as demonstrated by the history of credit spreads for these utilities. In addition, credit rating reports available since at least 2011 do not indicate any changes to

[31] Exhibit 20456-X0018, Response submissions of the UCA, at paragraph 43.
[32] Exhibit 20456-X0020, Reply submissions of the Alberta Utilities, at paragraph 22.

> ratings for the utilities, arising from the asserted increase in risk. In this regard, the Commission agrees with Dr. Booth that the credit rating agencies have not reacted to the perception of risk that the utilities have put forward. [citations removed][33]

74. The Commission is an expert tribunal that may draw upon its own knowledge base in fulfilling its mandate to ensure just and reasonable rates. The review panel considers that that the Commission's expertise provides it with an appreciation of how information might be communicated to, and appreciated by, capital market participants. The question in the current instance is whether the hearing panel committed one or more errors by, for example, proceeding from an unreasonable premise to arrive at conclusions that were not supported by the evidence before it. The review panel is not persuaded that any such error was committed in this case.

75. The review panel does not consider that the Alberta Utilities have proven on a balance of probabilities, or that it is obvious on the face of the subject decision, that the hearing panel's findings concerning the time at which the capital markets would reasonably have been expected to have learned of the potential for change in Alberta's regulatory environment resulting from the issuance of the *Stores Block* decision amounts to an error of fact, law or jurisdiction that could lead the Commission to materially vary or rescind its findings.

76. The review panel observes that the Alberta Utilities have not provided evidence demonstrating that capital market participants were not aware of ongoing court and regulatory developments applicable to the Alberta regulatory framework. To the contrary, the evidence shows that such information could reasonably have been expected to be accessed and considered by credit rating agencies as it developed. As noted by the Alberta Utilities' consultant, Mr. Fetter, "[c]redit rating determinations are made by credit rating agencies through a committee process involving individuals with knowledge of a company, its industry and its regulatory environment."[34]

77. Numerous judicial considerations of the principles identified the *Store Block* decision followed its release in 2006. In Alberta, cases included:

a. *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 2008 ABCA 2000 ("*Carbon*"), in which the court confirmed that assets no longer used or required to be used to provide utility service cannot remain in rate base;

b. *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 2009 ABCA 171 ("*Harvest Hills*"), which confirmed and expanded upon certain findings made in the *Carbon* case; and

c. *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)* 2009 ABCA 246 ("*Salt Caverns")*, which confirmed certain principles described in the *Carbon* case and provided further guidance on the concept of "dispositions" regarding utility assets.

[33] 2013 GCOC decision, at paragraphs 334 to 338.
[34] Exhibit 0042.05.AG-2191, evidence of Steven M. Fetter, page 6, lines 11-13.

78. The review panel is unable to conclude that credit rating agencies' knowledge of a company's regulatory environment can reasonably exclude some degree of knowledge of the importance of judicial determinations that bear on that environment. In any event, there is no basis upon which to conclude that market participants had insufficient time to consider and act upon whatever information was made available to them. This is true regardless of the actual amount of information disseminated to and whether, in fact, it was correctly appreciated by individual participants. Credit ratings and spreads can reasonably be appreciated to reflect the market's assessment of, and attitude towards, the risk inherent in a given security at a particular point in time.

79. Dr. Booth, on behalf of the Canadian Association of Petroleum Producers, appeared to provide support for the use of such an operating assumption when, addressing the general issues of "bond ratings and financial market access" he observed that what is "[o]f interest is that not one rating has changed since 2004. If there was any stress in the system you would expect a downgrade to reflect this but, on the contrary, there is no indication of any rating concerns and the market is buying utility debt on incredibly good terms."[35]

80. The hearing panel's reliance on objective market measures, including utility credit spreads, to establish or provide directional confirmation of the fact that capital market participants did not appreciate a significant increase in the riskiness of investment in Alberta utilities in the time period following the issuance of the *Stores Block* decision, does not constitute a reviewable error. The review panel considers that the informational value of credit spreads in determinations of investment risk cannot be reasonably disputed. As Ms. McShane, on behalf of the Alberta Utilities, noted in evidence tendered during the proceeding, credit spreads are "frequently used as a proxy for changes in investors' risk perception or willingness to take risk."[36]

81. The applicants' assertion that the hearing panel failed to account for "other relevant factors" in its consideration of credit spreads is undermined by the fact that the decision maker in this case was an expert tribunal with previous experience in assessing the probative value of such information. The applicants cannot demonstrate an obvious error on the part of the hearing panel by merely alleging one without describing the nature of the error in sufficient particularity to allow the review panel to find that one exists. The Alberta Utilities' allegation in this respect is neither sufficiently particularised nor supported to provide a foundation for review.

82. Finally, the Alberta Utilities' characterization of the hearing panel's finding with respect to credit rating agencies' responses to increased risk resulting from the Commission's interpretation of the *Stores Block* decision is not supported by the above-referenced excerpt from the 2013 GCOC decision. As noted by the UCA, at paragraph 338 of the decision, the hearing panel stated that "credit rating reports available since at least 2011 do not indicate any *changes to ratings* for the utilities, arising from the asserted increase in risk."[37] [emphasis added] Later in the same paragraph, the hearing panel stated that it agreed with Dr. Booth, that "the credit rating

[35] Exhibit 0080.01.CAPP-2191, CAPP rebuttal evidence of Laurence Booth, page 16, paragraph 31.
[36] Exhibit 0042.02.AG-2191, evidence of Kathleen McShane, page 112, lines 2905-2907.
[37] GCOC decision, at paragraph 338.

agencies have not reacted to the perception of risk that the utilities have put forward."[38] There was no evidence on the record of Proceeding 2191 demonstrating that an Alberta utility had suffered a credit rating downgrade during the material time period. This circumstance provided the basis for the impugned finding. Consequently, the hearing panel's statement regarding the behaviour of credit rating agencies in the post-2011 time period was not only reasonable, but demonstrably correct.

83. The final aspect of the first ground that must be considered relates to the Alberta Utilities' allegation that the hearing panel erred insofar as it "speculated that gains on sales of assets not required for utility service would be seen as an offset or mitigating factor."[39] The applicants argued that the hearing panel had no basis to arrive at such a conclusion. They also asserted that if such a dynamic was permitted to exist, it would be contrary to established law preventing the subsidization of customer rates by accounting for proceeds from the disposition of non-utility assets in revenue requirement and the determination of a fair return.

84. The applicants further alleged that the only relevant expert evidence on the record of the proceeding regarding this issue was provided by one of their consultants, Mr. Fetter, and that this evidence, though uncontroverted, appeared to have been ignored.[40]

85. The UCA submitted that the Alberta Utilities' assertion that Mr. Fetter's evidence was dispositive was erroneous. In the UCA's view, the applicants' position "disregards and minimizes the symmetrical relationship between risk and reward which underlies the corporate and property law principles embraced by the Supreme Court of Canada in *Stores Block.*"[41] It went on to say that:

> **52**… The suggestion that the "entitlement to losses" associated with utility asset ownership is a significant "regulatory policy change" which impacts on credit ratings, whereas the "entitlement to gains" is a "one-time charge" irrelevant to credit ratings is self-serving and disingenuous. Both "entitlements" arise as a result of a systematic application of common law and regulatory principles which stand to impact utility revenues and both should therefore engage "qualitative and quantitative credit rating factors".

86. In reply, the Alberta Utilities argued that "[w]hile [the UCA] now purports to minimize Mr. Fetter's evidence, it cannot dispute, as the Alberta Utilities point out, that it was the only evidence on the record regarding the relevance of the proceeds of the disposition of surplus assets as an offset or mitigating factor to the risk imposed by the Commission's new interpretation and application of the concept of an "extraordinary retirement."[42]

87. The review panel considers that a careful assessment of the following extracts from the impugned decision is determinative of this issue.

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[38] Ibid.
[39] Exhibit 20456-X0001, Application for Review and Variance, at paragraph 45.
[40] Exhibit 20456-X0001, Application for Review and Variance, at paragraph 47.
[41] Exhibit 20456-X0018, Response submissions of the UCA, at paragraphs 51 and 52.
[42] Exhibit 20456-X0020, Reply submissions of the Alberta Utilities, at paragraphs 30 and 31.

> **349** Ms. McShane argued that the Slave Lake fire and EDTI AMI cases resulted in increased uncertainty and risk for Alberta utilities, which support the granting of a risk premium. However, a broader assessment of the regulatory treatment of utility asset dispositions in the post *Stores Block* period illustrates that any increased uncertainty regarding the possibility of companies realising earnings below their allowed return may reasonably be expected to be offset at least to some extent by the potential for the utilities to retain profits flowing from eligible dispositions.
>
> **350** Therefore, the Commission finds that Ms. McShane's assertion that, "with the imposition of stranded asset risk on shareholders, the likelihood that the utility will not be able to earn a compensatory return on or fully recover the invested capital increases, without any offsetting upside potential afforded" is not supported. There is no pattern of gains and losses that would lead to the conclusion that an offsetting upside potential has not been afforded by the *Stores Block* decision. The *Stores Block* decision clearly sets out that both gains and losses on disposition are to the account of the shareholder.[43]

88. Based on a plain reading of the foregoing, the review panel is unable to conclude that the hearing panel erred in its consideration of the potential outcomes that may flow from the Commission's ongoing application of *Stores Block* principles. In the review panel's view, the hearing panel's finding that "the possibility of companies realising earnings below their allowed return may reasonably be expected to be offset at least to some extent by the potential for the utilities to retain profits flowing from eligible dispositions" does not amount to a determination that revenues from dispositions of non-utility assets should be used to subsidize customer rates.

89. What the hearing panel communicated and confirmed was simply that the application of the *Stores Block* principles, as interpreted by the Court of Appeal of Alberta, required that gains and losses be treated in a symmetrical manner and that the record did not support a contrary finding. That is, just as shareholders are entitled to the gains on disposition of assets, they are also responsible for losses. Therefore, there exists the possibility for both "upside" and "downside" outcomes for shareholders over time. The Commission routinely evaluates and applies such legal principles in performing its ratemaking function. The review panel is unable to find fault with the hearing panel's conclusion.

90. The Alberta Utilities have failed to demonstrate that the hearing panel's findings in connection with the matters identified in the first ground of review disclosed errors of fact, law or jurisdiction, either established on a balance of probabilities or otherwise obvious on the face of the subject decision, that could lead the Commission to materially vary or rescind the 2013 GCOC decision.

5.1.1.2 The second ground – The Commission erred in fact, law or jurisdiction by applying impermissible hindsight to determine the ROE for 2013 and 2014.

91. The Alberta Utilities alleged that the hearing panel erred by considering impermissible hindsight in arriving at its determination of an approved ROE for the years 2013 and 2014 and,

[43] 2013 GCOC, at paragraphs 349 and 350.

in doing so, departed from a "principle of prospectivity" otherwise applicable to ratemaking in Alberta.

92. The applicants stated the hearing panel's demonstrable departures from the "principle of prospectivity" included the following instances:

a. at paragraph 50 of the decision, where actual credit spreads observed during 2013 and early 2014 were assessed in a hindsight manner as bearing on a prospective determination of fair ROE for those years;

b. at paragraph 93 of the decision, where the actual long-term Canada bond rate of 2.8 per cent experienced during 2013 was used in a hindsight manner as bearing on a prospective determination of fair ROE for those years;

c. at Section 5.3 of the decision where a transaction that occurred during 2014 (Berkshire Hathaway Energy Co.'s acquisition of AltaLink) was used by the Commission as a matter that bore on the prospective determination of fair return for 2013 and 2014; and

d. at paragraph 378 of the decision, where the actual returns achieved during 2013 by many of the Alberta Utilities were assessed by the Commission as a factor in the determination of a prospective fair return for 2013 for those utilities.[44]

93. In the Alberta Utilities' view, these occurrences resulted in the hearing panel "failing to apply the fundamental basis of Alberta regulation, that fair return is set prospectively and not retroactively with hindsight."[45]

94. The UCA agreed that the existing regulatory framework in Alberta has a "prospective nature." However, it disagreed with the Alberta Utilities' assertion that the Commission departed from a prospective approach in considering actual financial results from 2013 and 2014 in determining a fair return for those years.[46]

95. The UCA also suggested that while prospectivity is a goal to be striven for, it is often not fully achievable as a result of normal course regulatory lag. It submitted that the Commission has previously approved revenue requirements for elapsed years on the basis of actual data and that the current case was directly analogous to such a situation and that "[t]he Commission's reliance upon updated financial results and parameters which became available prior to the close of the evidentiary record was both fair and reasonable and allowed the Commission to establish a fair return for the Alberta Utilities which 'most closely matches current expectations and conditions.'"[47]

[44] Exhibit 20456-X0001, Application for Review and Variance, at paragraph 52.
[45] Exhibit 20456-X0001, Application for Review and Variance, at paragraph 55.
[46] Exhibit 20456-X0018, Response submissions of the UCA, at paragraphs 57 and 58.
[47] Exhibit 20456-X0018, Response submissions of the UCA, at paragraph 63.

96. Finally, the UCA responded to the Alberta Utilities' allegation that the hearing panel had engaged in retroactive ratemaking by noting that the affected companies were operating under interim approved ROE values for each of 2013, 2014 and 2015 prior to the release of the 2013 GCOC decision. Consequently, in its assessment, there was no basis upon which to demonstrate retroactive ratemaking in this case.[48]

97. In reply, the applicants argued that the UCA's position essentially "invited the Commission to use regulatory lag as a justification for abandoning the prospective regulatory framework, when there was no necessary connection between the two."[49]

98. The hearing panel did not commit an error by considering actual information from the 2013 to 2014 time period in its determination of a fair return for those years. The Alberta regulatory framework operates on a prospective basis insofar as rates are, to the extent possible, approved on a forecast basis prior to their actual collection. However, full prospectivity of ratemaking decisions is very difficult to achieve in many cases as a result of the occurrence of regulatory lag.

99. The 2013 GCOC proceeding faced unusually difficult challenges in achieving prospectivity for its determinations because of an inordinately large amount of regulatory lag. This lag was precipitated by various factors, including several discrete developments in the Alberta regulatory environment that occurred in the time following the initiation of the 2013 GCOC process in October 2012. Some of these developments, including the Commission's initiation of its generic PBR and UAD proceedings, led to requests for significant adjournments of the 2013 GCOC application being made by the participants, including the Alberta Utilities.

100. The experienced delays created a situation in which portions of the originally filed forecast information had become outdated by the time the panel was required to make its final determination. In such circumstances, the hearing panel was justified in considering actual credit spreads, long-term Canada bond rates, and earned returns realised in 2013 and 2014 in arriving at a conclusion regarding a fair return for those years to be included in the Commission's determination of just and reasonable rates. As noted by the UCA, in Decision 2957-D01-2015,[50] the Commission expressly endorsed an earlier decision of the Alberta Energy and Utilities Board in which such an approach was adopted in rejecting an applicant's argument that assessing its submitted forecasts in light of subsequently available actual financial results was unfair.[51]

101. The hearing panel stated that its consideration of Berkshire Hathaway Energy Co.'s announced 2014 acquisition of AltaLink was used to provide directional confirmation for its finding regarding the adequacy of the 8.75 per cent ROE that was applied on an interim basis for those years. This fact is borne out in the following passages from the 2013 GCOC decision:

[48] Exhibit 20456-X0018, Response submissions of the UCA, at paragraphs 64 and 65.
[49] Exhibit 20456-X0020, Reply submissions of the Alberta Utilities, at paragraphs34 to 36.
[50] Decision 2957-D01-2015: Direct Energy Regulated Services – 2012-2016 Default Rate Tariff and Regulated Rate Tariff, July 7, 2015.
[51] Exhibit 000-X0018, Response submissions of the UCA, at paragraphs 60 and 61.

> **222** The implied P/B ratio associated with the proposed purchase of AltaLink by BHE gives the Commission comfort that its previous ROE awards have not been too low. As stated in previous GCOC decisions, and most recently in Decision 2011-474, the "payment of premiums in such transactions for assets that are earning returns based on ROE awards that are allegedly below market would not appear rational."
>
> **223** Directionally, the Commission concludes that the implied P/B ratio associated with the proposed purchase of AltaLink by BHE is relevant and supports the continuation of an ROE no higher than the Commission's allowed ROE of 8.75 per cent awarded in Decision 2011-474, all other things being equal.[52] [citations omitted]

102. In accordance with its previous findings, the review panel has determined that there is nothing demonstrably improper in the hearing panel's use of this information. Further, and in any event, a careful reading of the entirety of the 2013 GCOC decision reveals that the weight ultimately assigned to this information by the hearing panel in its final ROE determination is not sufficient to create a reasonable possibility that its exclusion could lead the Commission to materially vary or revoke the 2013 GCOC decision.

103. Finally, the review panel finds that the hearing panel's approval of an ROE of 8.3 per cent for each of 2013 and 2014 did not amount to retroactive ratemaking. The previously approved ROE of 8.75 per cent was applied during 2013 and 2014 on an interim basis. As noted by the UCA, the Court of Appeal of Alberta has recently confirmed that:

> **56** Simply because a ratemaking decision has an impact on a past rate does not mean that it is an impermissible retroactive decision. The critical factor for determining whether the regulator is engaging in retroactive ratemaking is the parties' knowledge…
>
> **57** If a utility is aware that a rate is interim and subject to change, then a regulator's revision of the rate will not be disallowed for impermissible retroactive ratemaking. This was the conclusion reached by the Supreme Court of Canada in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission).*
>
> **58** According to the Supreme Court of Canada…, alteration of an interim rate by a regulator is simply a function of regulators who have a mandate to ensure rates and tariffs are, at all times, just and reasonable.[53] [citations omitted]

104. The Alberta Utilities have failed to demonstrate that the hearing panel's findings in connection with the matters identified in the second ground of review disclosed errors of fact, law or jurisdiction, either established on a balance of probabilities or otherwise obvious on the face of the subject decision, that could lead the Commission to materially vary or rescind the 2013 GCOC decision.

[52] 2013 GCOC decision , at paragraphs 222 and 223.
[53] ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission), et al. 2014 ABCA 28 at paragraphs 56 to 58.

5.1.1.3 The third ground - The Commission erred by not considering the ROEs awarded to other Canadian utilities of comparable risk.

105. The Alberta Utilities alleged that the Commission committed a reviewable error by not considering ROEs awarded to utilities of comparable risk in other jurisdictions. This approach to the establishment of approved ROE values was considered and expressly rejected by the Commission in its determination of both Decision 2009-216 (the 2009 GCOC decision)[54] and Decision 2011-474 (the 2011 GCOC decision).[55] The Alberta Utilities complaint in this case was that the comparable return evidence they filed does not appear to have been considered at all in the determination of the 2013 proceeding, or alternatively, it was considered and entirely discounted in the absence of reasons.

106. Evidence concerning returns approved in other jurisdictions was entered onto the record of Proceeding 2191 and was discussed with expert witnesses during the oral hearing. The hearing panel ultimately did not ascribe any weight to this evidence and it was not specifically mentioned in the reasons provided in the decision.

107. In the 2009 GCOC decision, the Commission found:[56]

> CAPP took the position that awards by other regulators, in both Canada and the U.S., should not be considered:
>
> > …reference to either sets of decisions – Canadian and U.S. – as benchmarks of what is a fair return is unnecessary since the better approach is to examine the evidence of required returns estimated by experts using techniques founded on sound principles of finance.
>
> The Commission agrees with CAPP that the better approach is to examine the direct evidence of the experts in this proceeding, particularly because the awards of other regulators were established on the basis of a different record.

108. The hearing panel's decision to assign no weight to returns awarded by other regulators stems from previous repeated Commission findings regarding the probative value of such evidence made in previous GCOC decisions. The 2013 GCOC decision is consistent with these previous findings on this form of evidence. The fact that the hearing panel did not specifically address the issue in the 2013 GCOC decision is not a reviewable error given its repeated rejection of this form of evidence in prior proceedings. As noted in the 2013 decision, the hearing panel considered all relevant materials constituting the record of the proceeding.[57]

109. As the Supreme Court of Canada confirmed in the case of *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*:

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[54] Decision 2009-216 2009 Generic Cost of Capital, November 12, 2009.
[55] Decision 2011-474 2011 Generic Cost of Capital, December 8, 2011.
[56] Decision 2009-216 2009 Generic Cost of Capital, at paragraphs 283-284.
[57] 2013 GCOC decision, at paragraph 28.

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn*., [1975] 1 S.C.R. 382, at p. 391).[58]

110. The Alberta Utilities have failed to demonstrate that the hearing panel's findings in connection with the matters identified in the third ground of review disclosed errors of fact, law or jurisdiction, either established on a balance of probabilities or otherwise obvious on the face of the subject decision, that could lead the Commission to materially vary or rescind the 2013 GCOC decision.

5.1.1.4 The fourth ground - The Commission erred by applying a notional price-to-book ratio in respect of the purchase of AltaLink as establishing that the previously approved ROE of 8.75% was a functional maximum.

111. The Alberta Utilities allege that "the Commission erred by relying on the notional views of one investor in setting a ceiling for the approved return on equity" and that "the amount paid by an investor in AltaLink is irrelevant to the Commission's obligation to establish a fair return for the Alberta Utilities."[59] The Alberta Utilities challenged the probative value of a notional price-to-book ratio calculated in respect of the purchase of AltaLink by Berkshire Hathaway Energy Co., suggesting that the hearing panel used only this piece of information to inform their findings on an upper limit to the ROE.

112. The impugned findings are reproduced below:[60]

> 222 The implied P/B ratio associated with the [2014] purchase of AltaLink by BHE gives the Commission comfort that its previous ROE awards have not been too low. As stated in previous GCOC decisions, and most recently in Decision 2011-474, the "payment of premiums in such transactions for assets that are earning returns based on ROE awards that are allegedly below market would not appear rational."
>
> 223 Directionally, the Commission concludes that the implied P/B ratio associated with the proposed purchase of AltaLink by BHE is relevant and supports continuation of an ROE no higher than the Commission's previously allowed ROE of 8.75 per cent awarded in Decision 2011-474, all other things being equal.

113. The UCA submitted that the Alberta Utilities had already advanced multiple arguments against the use of the notional price-to-book ratio, each of which was duly considered and disposed of by the hearing panel in the decision. The UCA went on to argue that the Alberta Utilities were attempting to re-litigate already settled arguments in their review application. The review panel agrees.

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[58] [2011] S.C.J. No. 62, at paragraph 16.
[59] Exhibit 20456-X0001, Application for Review and Variance, at paragraph 13.
[60] 2013 GCOC decision, at paragraphs 222-223.

114. The review panel finds that due weight was given to the information on the notional price-to-book ratio as well as the other information in evidence during the proceeding. Notional price-to-book ratios have been considered in previous GCOC proceedings when contemporaneous transactions were available for comparison.[61] In any event, the review panel finds that the hearing panel's findings clearly indicate that it simply relied on this information to provide directional confirmation of its overall ROE determination, which was primarily based on an exhaustive examination of other financial evidence including but not limited to the results of application of both the Capital Asset Pricing Model (CAPM), Discounted Cash Flow model (DCF), and world economic conditions.

115. The Alberta Utilities have failed to demonstrate that the hearing panel's findings in connection with the matters identified in the fourth ground of review disclosed errors of fact, law or jurisdiction, either established on a balance of probabilities or otherwise obvious on the face of the subject decision, that could lead the Commission to materially vary or rescind the 2013 GCOC decision.

5.1.1.5 The fifth ground - New evidence demonstrates that the Commission erred in its interpretation of the views of credit rating agencies.

116. The Alberta Utilities argued that new and previously unavailable facts confirmed that the hearing panel had misapprehended the reactions of credit rating agencies in its assessment of UAD effects. They contended that the Commission "fundamentally erred in its interpretation of or ignored the evidence on the record of the views of credit rating agencies and other capital market participants."[62] In particular, they argued that the Commission misapprehended how credit rating agencies would assess and react to the heightened risk resulting from the issuance of the UAD decision and the possibility that the UAD decision would be upheld by the Court of Appeal of Alberta.

117. The new evidence tendered by the Alberta Utilities consisted of a number of credit rating agency reports detailing negative comments made in response to the Commission's application of UAD decision principles in the Slave Lake and EDTI AMI decisions.

118. The Alberta Utilities based this ground for review upon AUC Rule 16, Subsection 4(d)(ii), which states that an application for review may include "new or previously unavailable facts or a change of circumstances have arisen that were not previously placed in evidence or identified in the proceeding and could not have been discovered at the time by the review applicant by exercising reasonable diligence." They contended that while these reports were not reasonably available when Proceeding 2191was ongoing but that they should now be received and considered by the Commission as proof of errors committed by the hearing panel.

119. The UCA admitted that the new evidence submitted by the Alberta Utilities demonstrated continuing (and possibly heightened concerns) on the part of credit rating agencies. However, it argued that the overriding attitude of the credit rating agencies appeared to be one of "wait and

[61] For example, see 2011 GCOC decision, at paragraphs 104-128.
[62] Exhibit 20456-X0001, Application for Review and Variance, at paragraph 14.

see." The review panel agrees. There is no evidence on the record of Proceeding 2191, nor has there been any evidence submitted subsequently by the Alberta Utilities, to demonstrate that any of their constituent companies have suffered credit rating downgrades. Consequently, no error in the hearing panel's determinations regarding the absence of such adverse consequences has been demonstrated. By the same token, the Alberta Utilities have not submitted any evidence indicating that their actual costs of borrowing have otherwise increased.

120. Further, and in any event, the basis of a successful argument under Subsection 4(d)(ii) of AUC Rule 16 must be premised on the tabling of previously undiscoverable evidence that, nonetheless, existed prior to the issuance of the subject decision. If the information did not exist at the time the hearing panel made its determination, it may constitute evidence of new or changed circumstances warranting review, but it cannot be "new or previously unavailable facts" (i.e., fresh evidence) as contemplated by the wording of Section 6 of Rule 016. This being said, the review panel confirms that characterization of this information as being either fresh evidence or evidence of a changed circumstance would not alter its final determination in this case. In any event, the information is not sufficient to provide a foundation for a variance proceeding in respect of the 2013 GCOC decision as disclosing errors made at first instance that could lead the Commission to materially vary or rescind that determination.

121. The evidence that comprised the record of Proceeding 2191 was presented to the hearing panel and fully and duly considered at the time that matter was ongoing. While this new evidence may inform the Commission's determination of the next GCOC decision, it could not have been germane to the decisions made by the hearing panel in respect of the applicable test period because it did not exist at the time. Its provision at this point in time cannot go to the proof of an earlier error on the part of the hearing panel.

122. The Alberta Utilities have failed to demonstrate that the hearing panel's findings in connection with the matters identified in the fifth ground of review disclosed errors of fact, law or jurisdiction, either established on a balance of probabilities or otherwise obvious on the face of the subject decision, that could lead the Commission to materially vary or rescind the 2013 GCOC decision.

5.2 Grounds specifically applicable to AltaLink and ATCO Electric- Transmission

123. The following grounds were identified as being advanced on behalf of AltaLink and ATCO Electric – Transmission, specifically:

a. The Commission erred in fact and law in failing to establish a fair return:

   i. for AltaLink, by awarding an ROE and deemed equity component inconsistent with what it had determined to be the minimum acceptable FFO/Debt ratio of 11.1% to 14.3% to maintain an A-category credit rating;

   ii. for ATCO Electric (and AltaLink), by awarding an ROE and deemed equity component inconsistent with the minimum acceptable FFO/Debt ratio of 13% to 23% now required for an A-category rating given that the rating agencies

have signalled that the Alberta regulatory advantage rating will slip below "strong" unless the Courts overturn the Commission's recent decisions; and

iii. for AltaLink and ATCO Electric, by awarding an ROE and deemed equity component inconsistent with previously awarded credit metric relief.

5.2.1 Review panel findings on TFO-specific grounds

124. The review panel's findings with respect to the grounds of review advanced by the Alberta Utilities as being specific to either AltaLink, ATCO Electric – Transmission, or both, are set out below.

5.2.1.1 The first ground – The Commission erred in fact and law in failing to establish a fair return for AltaLink by awarding an ROE and deemed equity component inconsistent with what it had determined to be the minimum acceptable FFO/Debt ratio of 11.1% to 14.3% to maintain an A-category credit rating.

125. AltaLink asserted that, despite the Commission's stated intention to ensure that the company was positioned to maintain a minimum FFO/Debt ratio of no less than 11.1 per cent in each of 2013 and 2014, the final ROE and deemed capital structure approved by the hearing panel were only sufficient to permit it to realise FFO/Debt ratios of 9.8 per cent and 9.5 percent for each respective year. In AltaLink's view, this result was precipitated by a failure on the Commission's part to provide it with a fair return in each of 2013 and 2014.[63]

126. AltaLink did not specifically identify the source of the alleged discrepancy between the FFO/Debt ratios targeted for it by the hearing panel and those it claims to have resulted from the combined effect of the ROE and deemed capital structure approved in Decision 2191-D0-2015.

127. The UCA argued that AltaLink's failure to provide any supporting analyses in support of its allegations was fatal to its claim for review on this ground.[64]

128. By way of reply, AltaLink submitted that it did not have to provide supporting analyses for its assertions concerning FFO/Debt ratios at this stage in the process to justify its claim for relief. In its view, all that it was required to do was satisfy the review panel that an issue existed, which was sufficient to warrant the Commission's further consideration in a variance proceeding. It maintained that it had sufficiently demonstrated the existence of an issue warranting further consideration in a variance proceeding.

129. The review panel considers that the alleged circumstance is not one in which the hearing panel committed a reviewable error. Rather, it is one in which AltaLink has potentially suffered an unforeseen consequence of failing to distinguish itself adequately from the balance of the Alberta Utilities in the Commission's established methodology for the determination of deemed capital structures.

[63] Exhibit 20456-X0001, Application for Review and Variance, at paragraphs 72 and 76.
[64] Exhibit 20456-X0018, Response submissions of the UCA, at paragraph 92.

130. A review of the 2013 GCOC decision does not indicate that the hearing panel deviated from its previously established practice in determining the affected utilities' deemed capital structures for 2013 and 2014. It indicates that the Commission proceeded from the establishment of a theoretical baseline capital structure intended to be representative of a "typical pure-play regulated utility" and then considered whether any company-specific adjustments were required to account for individual differences in risk.[65]

131. The hearing panel then proceeded to conduct an analysis of equity ratios associated with minimum credit ratios. Inputs for the hearing panel's analysis in this regard were determined following a consideration of values proposed by both the Alberta Utilities and interveners. The values proposed by each group and the data ultimately used by the hearing panel in its determinations are found in Table 6 in the decision, which is reproduced below:

Parameter	Parameter values applied in Decision 2011-474	Proposed by the Alberta Utilities	Proposed by the UCA	Parameter values applied in this decision
	(%)			
Embedded average debt cost	6.4	5.7	5.1	5.1
ROE	8.75	8.75	8.0	8.3
Income tax rate	25.0	25.0	25.0	25.0
Depreciation	6.0	5.0	6.0	5.0
Construction work in progress (CWIP)	5.0	8.0	5.0	5.0

132. As can be seen, the Alberta Utilities, including AltaLink, proposed a common set of parameters for the Commission's consideration. The hearing panel, after evaluating the jointly submitted utility parameters and actual values from 2013 Rule 005 filings, decided to apply the values illustrated in the right-most column.

133. The review panel has reviewed the arithmetical calculations performed by the hearing panel and is satisfied that the hearing panel made no error in its subsequent determinations based on the parameter values submitted by the Alberta Utilities in the 2013 GCOC. It further considers that its determination in this regard is consistent with the fact that the application of the methodology to ATCO Electric –Transmission resulted in that company being positioned to maintain an FFO/Debt ratio in the target range. This fact provides it with significant assurance regarding the reasonableness of its determinations with respect to the hearing panel's application of the methodology to AltaLink.

134. AltaLink has elected not to provide specific details of the source of the alleged disparity between is targeted and actual FFO/Debt ratios for each of 2013 and 2014. Given this fact, the review panel considers that the utility has failed to discharge the onus imposed by operation of Section 6 of Rule 016 in this case, by establishing, as opposed to merely alleging, that an error was committed.

[65] 2013 GCOC decision, at paragraph 421.

135. For the reasons above, the review panel finds that AltaLink has failed to prove on a balance of probabilities, or otherwise, that the hearing panel's findings in connection with its assessment of equity ratios associated with minimum credit metrics amounted to an error of fact, law or jurisdiction that could lead the Commission to materially vary or rescind the 2013 GCOC decision. AltaLink has likewise failed to prove that new or previously unavailable facts or a change of circumstances exist that could lead the Commission to materially vary or rescind the hearing panel's findings in connection with this ground of review.

5.2.1.2 The second ground – The Commission erred in fact and law in failing to establish a fair return for both AltaLink and ATCO Electric, by awarding an ROE and deemed equity component inconsistent with the minimum acceptable FFO/Debt ratio of 13% to 23% now required for an A-category rating given that the rating agencies have signalled that the Alberta regulatory advantage rating will slip below "strong" unless the Courts overturn the Commission's recent decisions.

136. This ground is advanced jointly by AltaLink and ATCO Electric – Transmission. The companies base their assertion concerning the range of FFO/Debt ratios currently required by the Alberta Utilities to target A-range credit ratings on the following excerpt from an April 23, 2015 article published by Standard & Poor's Financial Services LLC:

> All else being equal, companies with lower regulatory advantage scores must have significantly lower debt leverage to qualify for the same financial risk assessment as those with stronger scores.
>
> Given the allowed returns and funds from operations-to-debt in most Canadian regulatory jurisdictions, it is difficult to attain an 'a' category rating if we view the issuer's regulatory advantage as less than "strong".
>
> With a regulatory advantage less than strong, a company would need to maintain a higher adjusted FFO-to-debt ratio, in the range of 13%-23%, to warrant a "significant" financial risk profile score and achieve a similar rating outcome of 'a-'. [citations omitted][66]

137. In response, the UCA maintained that while the Standard & Poor's comment is "ominous" in respect of the agency's assessment of the Alberta regulatory environment, there is still no evidence that either of the TFOs "has, will, or should be downgraded or placed on credit watch." It went on to argue that unless and until this happens, there is no reason for the Commission to adopt the new, higher range of FFO/debt ratios as being minimally sufficient to permit the companies to maintain A-range credit ratings and that, in any event, the issue would be best considered in the upcoming 2016 GCOC proceeding.[67]

138. In reply, the utilities argue that the UCA has "incorrectly downplayed the significance of S&P's clear and unequivocal comments…, [which] reflect an adverse reaction to increased

[66] Exhibit 20456-X0001, Application for Review and Variance, at paragraph 69.
[67] Exhibit 20456-X0018, Response submissions of the UCA, at paragraph 95.

regulatory risk, whether or not the UCA agrees with it." The companies also identified, for the first time in reply, an additional report generated by Standard & Poor's on October 2, 2015, which "(a) changed the ratings outlook of ATCO Ltd. and its subsidiaries from stable to negative, expressly based on recent regulatory decisions including the UAD ruling, among other things; and (b) noted that if the AFFO-to-debt ratio falls to, or below 14% on a consistent basis, then a downgrade would be issued."[68]

139. The review panel considers that AltaLink and ATCO Electric- Transmission's provision of information obtained from Standard & Poor's articles that post-date the issuance of the 2013 GCOC decision on March 23, 2015 is not a sufficient basis upon which to demonstrate that the Commission's findings relating to 2013 and 2014 should be subjected to re-examination in a variance proceeding.

140. The hearing panel's determinations regarding minimum credit metrics required to permit affected utilities to target credit-ratings in the A-range for the 2013 – 2015 time period are not demonstrably incorrect on a *prima facie* basis, or otherwise. The information tendered by AltaLink and ATCO Electric – Transmission, while potentially relevant to the prospective determinations of ROE and deemed capital structure that will be undertaken in the upcoming 2016 GCOC, does not provide a sufficient basis upon which to consider varying the determinations contained in the 2013 GCOC decision. The conclusions arrived at by the hearing panel are not demonstrably incorrect in light of the information that comprised the record of Proceeding 2191 at the time that they were made, or the characteristics of the time period to which they were intended to apply.

141. The review panel finds that AltaLink and ATCO Electric have failed to demonstrate an error on the part of the hearing panel, or, alternatively, new or previously unavailable facts or a change of circumstances that could lead the Commission to materially vary or rescind the hearing panel's findings in connection with the matters identified in this second TFO ground of review.

5.2.1.3 The third ground – The Commission erred in fact and law in failing to establish a fair return for both AltaLink and ATCO Electric by awarding and ROE and deemed equity component inconsistent with previously awarded credit metric relief.

142. AltaLink and ATCO Electric – Transmission both submitted that the ROE and deemed capital structure determinations in the 2013 GCOC decision essentially vitiated the effect of other "credit metric relief" previously granted to them in their respective 2013-2014 GTAs. They further claimed that "capital market participants relied on this regulatory support" and that the alleged inconsistency "seriously undermines the credibility of the Commission."[69]

143. The UCA agreed that consistency in Commission decisions is generally desirable. However, it also took the position that the applicants' claim for relief on this ground was

[68] Exhibit 20456-X0020, Reply submissions of the Alberta Utilities, at paragraph 60.
[69] Exhibit 20456-X0001, Application for Review and Variance, at paragraph 86.

undermined by their failure to describe adequately the exact nature, source, or effect of the alleged inconsistencies. The UCA further noted that the 2013 GCOC decision expressly continued the inclusion of a two per cent addition to the companies' respective equity thicknesses that was previously attributed to their participation in large capital programs.[70]

144. In reply, the utilities emphasized that the effect of the 2013 GCOC decision was to "undercut the earlier GTA determinations…(i.e., the measures earlier approved as properly supportive), thereby contradicting those final, utility-specific GTA decisions which clearly accepted the need for that level of financial support."[71]

145. The review panel agrees that consistency in Commission determinations is desirable, and important for the creation and maintenance of confidence in the Alberta regulatory environment. However, it cannot agree that the identified interplay between the credit metric relief previously granted to AltaLink and ATCO Electric – Transmission in their respective 2013-2014 general tariff applications (GTAs) and the credit metric analysis contained in the 2013 GCOC creates an actual inconsistency warranting further consideration. The credit metric relief granted to both AltaLink and ATCO Electric – Transmission in previous GTAs was specifically intended to provide these companies with increased cash flow during a time period in which these companies were fully engaged in the completion of large-scale capital projects. The review panel views the form of relief provided in these proceedings (e.g., the inclusion of Construction Work in Progress (CWIP) in rate base and allowances for federal Future Income Tax (FIT)) to be significant.[72] These measures were expressly intended to support credit metrics in a way that was unrelated to the companies' cost of capital as determined by ROE and deemed capital structure (e.g., by enhancement of cash flow). The review panel does not consider, therefore, that the relevant decisions are fundamentally inconsistent.

146. The review panel also considers that basic differences between the nature of the inquiries conducted in the 2013 GCOC decision and the identified GTAs further belie the claim of inconsistency advanced by AltaLink and ATCO Electric – Transmission. The fact that the results of one decision subsequently could have reduced the ameliorative effects of credit metric relief granted in other decisions, on a cash flow basis, does not support a conclusion that any of the proceedings were determined incorrectly, on their merits.

147. AltaLink and ATCO Electric – Transmission have failed to demonstrate that the hearing panel's findings in connection with the matters identified in this ground of review disclosed errors of fact, law or jurisdiction, either established on a balance of probabilities or otherwise obvious on the face of the subject decision, that could lead the Commission to materially vary or rescind the 2013 GCOC decision.

[70] Exhibit 20456-X0018, Response submissions of the UCA, at paragraphs 99 and 100.
[71] Exhibit 20456-X0020, Reply submissions of the Alberta Utilities, at paragraph 68
[72] See Decision 2013-358, ATCO Electric Ltd. 2013-2014 Transmission General Tariff Application, September 24, 2013, at paragraphs 986 and Decision 2013-407, AltaLink Management Ltd. 2013-2014 General Tariff Application, November 12, 2013, at paragraph 982.

6 Order

148. It is hereby ordered that:

(1) The Alberta Utilities' application for review and variance of Decision 2191-D01-2015: 2013 Generic Cost of Capital, is dismissed in its entirety.

Dated on January 18, 2016

Alberta Utilities Commission

(original signed by)

Willie Grieve, QC
Chair

(original signed by)

Anne Michaud
Commission Member

(original signed by)

Henry van Egteren
Commission Member