

New legislation to impact Alberta's electricity future

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In this Update

- On June 11, 2018, the Alberta Legislature passed Bill 13, *An Act to Secure Alberta's Electricity Future*, which amends several existing statutes
- Bill 13 creates the legal framework for the shift from “energy-only” market to “energy + capacity” and sets tight timelines for the establishment of initial capacity market rules, which are currently under development
- The Bill makes noteworthy changes to how system rules are established and approved in Alberta, ultimately involving more oversight by the Alberta Utilities Commission
- There was an initial attempt to address the regulatory gap left by the *Stores Block* line of cases on utility asset dispositions, but the provisions were removed and thus the issue remains outstanding

On June 11, 2018, the Alberta Legislature passed Bill 13, *An Act to Secure Alberta's Electricity Future*. Bill 13 amends several existing statutes and provides the necessary legal framework for the establishment of an electrical generation capacity market – which marks a significant change to Alberta's power generation regime. In so doing, it makes noteworthy changes to how system rules are established and approved in Alberta, as further discussed in this Update. Opportunities for stakeholders to get involved in these rule-making processes are outlined below.

In addition, we note that early versions of the Bill included some long-anticipated legislative changes to address current issues with how extraordinary asset dispositions in the utility sector are managed in Alberta, an issue that arises from the Supreme Court of Canada's 2006 ruling in *Stores Block*. However, those provisions failed to make it through the legislative process, as further discussed herein.

The shift from “energy only” to “energy + capacity”

Currently, Alberta operates under an “energy-only” market where electricity generators are paid solely for the electricity they supply to the market. The only exception for some is the ancillary services market, where companies can be paid for supplying resources necessary to support the operation of the transmission system. Bill 13 will introduce a third market – a capacity market – that will have significant implications on the overall market structure for generators.

The shift to a capacity market was driven by the Alberta Government's 2015 [Climate Leadership Plan](#), which sought to accelerate the phase out of coal-fired electricity production

and replace that generation with renewable sources of power. This shift, including the Alberta Electric System Operator's (AESO) Renewable Energy Program that followed, had the potential to materially impact market dynamics in the energy-only market, which was designed to promote sufficient generation at the lowest cost – regardless of technology used. The AESO found that the new priorities established under the Climate Leadership Plan had the potential to jeopardize the market's ability to ensure reliability and reasonably priced power in the long run.

In a capacity market, generators are paid for their ability to supply energy in the future. In principle, the more reliable the supply source, the higher the capacity payment will be. Therefore, to ensure that a reliable supply of electricity remained available in the future and to facilitate the Alberta government's climate policy goals, the AESO recommended that Alberta transition to a capacity market.^[1]

The last significant change to Alberta's electricity market (deregulation) was a multi-year process that involved input and expertise from a wide range of stakeholders and international experts. In contrast, the Alberta government first introduced Bill 13 in April 2018 and is expecting that the first capacity auction will occur in November 2019, with the transition being complete by 2021.^[2] This emphasis on a quick switch is evident in Bill 13, which sets tight timelines for the establishment of new market rules and limits the rights of parties to file complaints or appeals of the initial rules, discussed below.

Capacity market rules

Participants in the capacity market will be subject to the same general obligation to conduct themselves in a manner that supports the fair, efficient and openly competitive (FEOC) operation of the market as they are under the energy-only market. However, specific rules are needed to provide clarity on how the market will operate and what behaviour will be rewarded vs. penalized. Some of those rules are created by the AESO, which rules must support the FEOC operation of the capacity market.

Bill 13 introduces several specific rule-making obligations, including changes to the typical AESO rule-making process. Of note:

- Bill 13 places an obligation on the AESO to make rules, as soon as practicable, for the establishment and operation of the capacity market. This may include rules regarding capacity auctions, capacity market participants, and the calculation of capacity payments.^[3]
- Currently, rules made by the AESO are deemed approved unless a market participant objects.^[4] However, under the new legislative regime the AESO will be required to obtain approval from the Alberta Utilities Commission (AUC) for all market rules.^[5]
- Bill 13 establishes a provisional AUC review process for new rules proposed by the AESO that are deemed "essential" to establish and operate the capacity market. The AUC must "provisionally" approve those AESO rules within six months of their filing.
 - After a rule is provisionally approved, it must undergo a full review by the AUC within 24 months of its filing. This means the rules that are provisionally approved will not be subject to a full review before they are put into place and before the first capacity auction.
 - It is unclear how changes that occur following the full review process or a separate

AESO rule application will impact parties that are already participating in the capacity market. As a result of Bill 13, the AUC can implement rule changes retroactively, which introduces risk to market participants.

- According to the Ministry of Energy, the first set of rules for the capacity market will be filed with the AUC in January 2019.^[6] The provisional review process will therefore be complete by July 2019, allowing the provisionally approved rules to be in place prior to the initial capacity market auction scheduled to occur in November 2019. The full review will not be complete until 2021.
- It does not appear that Bill 13 contemplates a scenario where the AUC denies some or all of the AESO's provisional rules, or if the AUC requires the AESO to make certain amendments or conduct further work before granting provisional approval. These outcomes could trigger a process that extends beyond the first auction date, which could impact overall implementation timelines.
- The provisional review process sets a lower bar for AUC approval as the AUC may provisionally approve an AESO rule "if it appears" that the rule satisfies certain criteria.^[7] In contrast, under the regular review process the AUC must "be satisfied" that the criteria have been met. ^[8]
- Typically, any market participant can file a complaint with the AUC regarding AESO conduct or rules that are in effect.^[9] Bill 13 precludes the making of complaints to the AUC regarding provisionally approved rules.^[10]
- Under section 29 of the *Alberta Utilities Act*, any decision or order of the AUC is appealable to the Alberta Court of Appeal on questions of law or jurisdiction. Bill 13 attempts to shield provisional rule approvals from this review process by precluding appeals of any AUC decision in relation to a provisional AESO rule until after the two-year "regular consideration" process is complete.^[11]

In addition to market rules under development by the AESO, Alberta Energy is in the process of developing regulations regarding the capacity market. These regulations are expected to focus on:

- dispute resolution and complaints in advance of capacity auctions;
- resource adequacy;
- cost allocation; and
- fair, efficient and open competition.

Consultation and rules about making rules

Although Bill 13 removes many opportunities for stakeholders to challenge provisional rules, there will be a greater obligation on the AESO to consult when developing the rules. Pursuant to Bill 13, the AUC must make rules requiring the AESO to consult with the Market Surveillance Administrator, market participants and other interested parties in developing its rules.^[12] In light of this, the AUC has released Draft Rule 017: *Procedures and Process for Development of ISO Rules and Filing of ISO Rules with the Alberta Utilities Commission*, which is intended to address the requirements and criteria set out in Bill 13 regarding the procedures and process for the development of AESO rules.

Consultations regarding Draft Rule 017 are ongoing, and many stakeholders have expressed

concerns with the current version. The finalized Rule 017 is expected to be released on August 1, 2018.^[13] At this time, it is not clear what process the AUC will follow for the approval of AESO rules, including provisional rules.

Ongoing engagement opportunities

The AESO will continue to engage with stakeholders regarding the implementation of the capacity market. Currently, four engagement streams are planned:

- **Capacity Market Rules** (July 26 – October 31, 2018): Drafting and consultation on the AESO's rules that will set out market participant and AESO obligations for the capacity, energy and ancillary markets. The Capacity Market Rules developed by the AESO are expected to largely concord with the Comprehensive Market Design Final proposal,^[14] and the engagement process will be influenced by the new AUC Rule 017. The AESO expects to develop approximately 18 new rules, which will include 16 capacity market rules and two new energy market rules regarding energy market monitoring and mitigation and demand capacity asset outage reporting and co-ordination. All of these rules will be put forward for provisional approval by the AUC.^[15]
- **Demand Curve** (August 16 – October 2018): Working group engagement on development of the demand curve and filing language for demand curve (to include rule-like language and follow the provisional rule approval process). Engagement regarding the demand curve will occur parallel to the Capacity Market Rule engagement. ^[16]
- **Cost Allocation Tariff Design** (August 2018 – Late 2019): Advisory group and working groups to assist with tariff design to allocate the costs arising from the operation of the capacity market.
- **Market Roadmap** (October 2018 – November 2019 and beyond): Consultation on items identified for introduction into market structure beyond the 2021/2022 obligation year.^[17]

Alberta Energy has also commenced a stakeholder engagement process for the development of capacity market regulations, which will purportedly give stakeholders the opportunity to provide detailed input and feedback on proposed regulations. Alberta intends to distribute a discussion paper to stakeholders on July 23, 2018 to commence this process, which will also include a webinar on July 25, 2018.

Stores Block: a bridge too far

In addition to facilitating the electricity market shift, we note that early versions of the Bill included provisions meant to address what many perceive to be a regulatory gap left by the *Stores Block* line of cases. Those proposed provisions did not survive the committee process and were removed through an amendment put forward by the Minister of Energy.

By way of background, in 2006, the Supreme Court of Canada issued its decision in *Stores Block: ATCO Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board)*.^[18] *Stores Block* examined whether Alberta's utility regulator (then the Alberta Energy and Utilities Board (AEUB), now AUC) had the power to direct surplus value realized on a utility asset sale. The Court decided that the regulator had no power to distribute any gains to utility customers, and that the gains resulting from the disposition of utility assets accrued only to the utility owner's shareholders.^[19] The fact that the asset was used for utility purposes was immaterial – the utility asset owner would have sole claim to the gains.^[20]

Stores Block was applied in various regulatory decisions to the converse situation of losses, where utility owners were forced to bear the burden of unexpected losses caused by asset stranding or destruction.^[21] This approach was confirmed by the Alberta Court of Appeal in *FortisAlberta Inc v Alberta (Utilities Commission)*.^[22] Applying the logic of *Stores Block*, where gains would accrue solely to the utility owner and not customers, then losses that occur as a result of stranded assets or where assets are no longer required for utility purposes, should accrue solely to the utility owner as well.^[23] The Court in *FortisAlberta* opined that the principle established in *Stores Block* is good law in Alberta.^[24] In doing so, the Court suggested that *Stores Block* and its subsequent case law could only be overturned by a legislative act.

Specifically in regards to the Climate Leadership Plan, this issue has arisen in relation to technological updates necessary to promote and accommodate increased renewable generation. For example, as a result of the AUC's approach to allocating stranded asset costs following *Stores Block*, EPCOR declined to pursue a "smart" meter infrastructure program because the existing meters were not fully depreciated and the consequent "stranding" of the assets would result in a loss to utility shareholders.^[25] Utility companies have recently stated that this approach represents a barrier to the future development of renewable generation, as distribution companies may be reluctant to invest in the assets and technology that may be necessary to help achieve the government's renewable energy goals if doing so results in stranded assets and financial loss. They suggested that legislative revisions or other government policy clarity would be required before such investments are made to further the objectives of the Climate Leadership Plan.^[26]

Bill 13 at first reading proposed to amend the *Alberta Utilities Commission Act* by adding s. 17.1, which empowered the AUC to allocate amongst both the utility owner and the utility customers, the costs and benefits arising out of:

1. a sale, lease or mortgage of a property owned by a utility;
2. a removal or withdrawal of property from service to the public by the owner of a utility;
3. a removal of property from rate base.^[27]

These provisions are a clear response to address the *Stores Block/FortisAlberta* decisions that have loomed over Alberta's utility sector since 2006. However, the proposed amendments were criticized by certain stakeholders for failing to provide clarity on when the costs of stranded assets would be borne by a utility's shareholders vs. ratepayers.

These provisions were ultimately struck at the committee stage. On May 30, 2018, the Minister of Energy moved to amend Bill 13 to strike the provisions in Bill 13 addressing the *Stores Block* gap.^[28] In moving for the strike, the Minister cited a need for further discussion, and a desire for additional collaboration with industry, consumer groups and the relevant government agencies to "develop the best possible policy for Albertans."^[29] The amendment was passed and the provisions were struck.

Therefore, while legislative change to correct the *Stores Block* gap appears forthcoming, we will have to wait to see what approach the government will take to address it. The Minister's reference to further consultation suggests a potential opportunity for market participants to provide input before the next proposal is put before the Legislature.

That these provisions were proposed and then struck citing the need for further consultation is an indication that the process of changing Alberta's electricity regime deserves careful consideration to ensure the consequent regimes are workable and beneficial for Alberta.

Coming into force

The majority of Bill 13, including the provisions discussed herein, will be fully in force on August 1, 2018.^[30] A handful of clauses came into force on Royal Assent on June 11, 2018,^[31] while the rest of the clauses come into force on Proclamation.^[32] Most clauses have been Proclaimed in force as of August 1, 2018, with the exception of clauses 2(24), 2(25) and 37(a)(ii) related to the *Electric Utilities Act*. There is not yet a Proclamation date for these remaining clauses.

[1] Alberta Electric System Operator, [Alberta's Wholesale Electricity Market Transition Recommendation](#) [PDF] (October 3, 2016).

[2] Government of Alberta, [Electricity Capacity Market](#).

[3] Bill 13, *An Act to Secure Alberta's Electricity Future*, 4th Sess, 29th Leg, 2010 cl 2(29) [Bill 13].

[4] *Electric Utilities Act*, SA 2003 c E-5.1, s 20.3.

[5] Bill 13, cl 2(13).

[6] Alberta, Ministry of Energy, [An Act to Secure Alberta's Electricity Future Technical Information Session](#) [PDF] (Presentation, April 2018).

[7] Bill 13, cl 2(14).

[8] Bill 13, cl 2(14).

[9] *Electric Utilities Act*, SA 2003 c E-5.1, s 25.

[10] Bill 13, cl 2(14).

[11] Bill 13, cl 2(14).

[12] Bill 13, cl 2(18).

[13] Alberta Utilities Commission, [Consultation Meeting](#) [PDF] (Presentation, June 2018).

[14] Alberta Electric System Operator, [Comprehensive Market Design Final Proposal](#) [PDF] (29 June 2018).

[15] Alberta Electric System Operator, [Market Transition Industry Stakeholder Session](#) [PDF] (Presentation, July 2018)

[16] Alberta Electric System Operator, [Market Transition Industry Stakeholder Session](#) [PDF] (Presentation, July 2018).

[17] Alberta Electric System Operator, [Market Transition Industry Stakeholder Session](#) [PDF] (Presentation, July 2018).

[18] 2006 SCC 4 [*Stores Block*]; For a succinct overview of the *Stores Block/Fortis Alberta* issue, see Nigel Banks, "[Overturning Stores Block and Implementing the Capacity Market](#)" [PDF] (25 April 2018).

[19] *Stores Block*, para 78.

[20] *Stores Block*, para 87.

[21] See *FortisAlberta Inc v Alberta (Utilities Commission)*, 2015 ABCA 295 [*FortisAlberta*] at paras 59-62.

[22] *Ibid.*

[23] *FortisAlberta*, para 62.

[24] *FortisAlberta*, paras 160-161.

[25] AUC Decision 3100-D01-2015, *EPCOR Distribution & Transmission Inc – 2013 PBR Capital Tracker True-up and 2014-2015 PBR Capital Tracker Forecast* (25 January 2015), para 705.

[26] AUC Final Report, *Alberta Electric Distribution System-Connected Generation Inquiry* (December 29, 2017), paras 294-297.

[27] Bill 13, cl 1(2) (first reading 19 April 2018).

[28] Bill 13 A1, *Amendments to Bill 13 An Act to Secure Alberta's Electricity Future Act*, 29th Leg, 4th Sess, Alberta, 2018, cl A (as passed by the Legislative Assembly of Alberta May 30, 2018).

[29] Alberta, Legislative Assembly, *Hansard*, 29th Leg, 4th Sess, (May 30, 2018) at 1322.

[30] OC 2018-208 (June 14, 2018).

[31] Bill 13, cls 1(1), (3), (10), (11) and (12), 2(1), (2)(a)(viii), (3), (6), (18), (26), (30), (31), (32), (33), (36), (37)(a)(i) and (39) and 3(1) and (2).

[32] See Bill 13, cl 5(1).