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June 29, 2009

**Delivered by Courier and Email**

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

**Re: Innisfil Hydro Distribution Systems Limited and COLLUS Power Corp. Applications to the Ontario Energy Board for 2009 Electricity Distribution Rates effective May 1, 2009 - VECC motions for review of Decisions – EB-2009-0130 (the "VECC Motions")**

As previously advised, we are counsel to Innisfil Hydro Distribution Systems Limited ("Innisfil") and to COLLUS Power Corp. ("COLLUS") in respect of the VECC Motions.

As advised in his letter to you of June 19, 2009, my colleague James Sidlofsky is out of the country from June 25th through July 10th. As a result of the Board's determination on June 23, 2009 not to make any changes to the dates contained in the Board's Decision and Procedural Order No. 2, Morgana Kellythorne and I will be acting as counsel to both Innisfil and COLLUS in respect of the VECC Motions. We ask that all future correspondence to counsel be directed to the attention of Mr. Sidlofsky, Ms. Kellythorne and myself. My contact particulars are included at the header of this letter and Ms. Kellythorne's particulars are as follows:

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Please find enclosed the Joint Responding Submissions of COLLUS and Innisfil in respect of VECC Motions and an accompanying Book of Authorities. As more completely detailed in the attached submissions, COLLUS and Innisfil request that the orders sought in the VECC Motions to review and vary the Board's respective Decisions be denied, that VECC (and any other intervenor that may claim costs in respect of these Motions) be denied its costs, and that COLLUS and Innisfil may track in a deferral account for future recovery any cost arising as a result of the VECC Motions.

As more completely detailed in the attached submissions, COLLUS and Innisfil request this relief on the following basis:

(a) VECC has failed to meet the Board's threshold test pursuant to Rule 45.01;

(b) In the alternative, the Board's Decisions are reasonable and VECC has put forth no good reason to vary the Board's Decisions; and

(c) In the alternative, the proper rate treatment of unissued third-party debt is a generic policy issue that would best be addressed in a combined proceeding and not within the scope of these Motions.

We thank you in advance for your consideration in this matter.

Yours very truly,

**BORDEN LADNER GERVAIS LLP**

*Original Signed by John A.D. Vellone*

**John A.D. Vellone**
JADV/gr

cc: Ms. Laurie Ann Cooledge, CFO/Treasurer, Innisfil Hydro Distribution Systems Limited
Mr. Tim Fryer, CFO, COLLUS Power Corp.
Mr. Bruce Bacon, BLG
Mr. James Sidlofsky, BLG
Ms. Morgana Kellythorne, BLG
Mr. Martin Davies, OEB Staff
Intervenors of Record in EB-2008-0233 and EB-2008-0226

**EB-2009-0130**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, (Schedule B);

**AND IN THE MATTER OF** a motion by VECC requesting the Board to review and vary certain aspects of Decision and Order EB-2008-0233 dated April 6, 2009 and Decision and Order EB-2008-0226 dated April 17, 2009.

**AND IN THE MATTER OF** Rules 42, 44.01 and 45.01 of the Board's Rules of Practice and Procedure.

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## RESPONDENTS' BOOK OF AUTHORITIES

**EB-2009-0130**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, (Schedule B);

**AND IN THE MATTER OF** a motion by VECC requesting the Board to review and vary certain aspects of Decision and Order EB-2008-0233 dated April 6, 2009 and Decision and Order EB-2008-0226 dated April 17, 2009.

**AND IN THE MATTER OF** Rules 42, 44.01 and 45.01 of the Board's Rules of Practice and Procedure.

# JOINT RESPONDING SUBMISSIONS OF COLLUS POWER CORP. AND INNISFIL HYDRO DISTRIBUTION SYSTEMS LIMITED (COLLECTIVELY, THE "RESPONDENTS")

**DELIVERED JUNE 29, 2009**

## INTRODUCTION

1. In August 2008, COLLUS Power Corp. ("COLLUS") filed an application with the Ontario Energy Board (the "Board") for approval of its proposed electricity distribution rates and charges effective May 1, 2009 (referred to here as the "COLLUS Application"). The Board assigned File No. EB-2008-0226 to the COLLUS Application and determined that it would be decided by way of a written hearing. The Board granted four parties intervenor status in the proceeding (the Vulnerable Energy Consumers Coalition, referred to here as "VECC"; the School Energy Coalition, or "SEC"; the Association of Major Power Consumers in Ontario, or "AMPCO"; and Energy Probe). Board staff and intervenors posted interrogatories and made submissions during the hearing process. On April 17, 2009, having considered the submissions of the parties and the evidence on the record before it, the Board issued its Decision and Order in respect of the COLLUS Application (the "COLLUS Decision"). After considering the submissions of the parties in respect of unissued third party long-term debt, the Board made the following findings:

> "As of the completion of the record in this proceeding, the proposed new 5 year loan from Infrastructure Ontario was not in place and therefore the rate on this instrument is unknown. The Board therefore finds that COLLUS should use the Board's current deemed long term debt rate of 7.62% as the

imputed rate on its new demand loan in determining its cost of debt for regulatory purposes.

The Board finds that this rate will also be applicable to COLLUS' promissory note as it is callable affiliate debt. The Board notes that all parties agreed that this was the appropriate rate to apply under the Board's policy.

In making these findings, the Board is mindful of SEC's concerns as to whether or not COLLUS could refinance its affiliate debt at a lower cost, but views this matter as a generic policy issue that is not within the scope of this Decision."

***Board's Decision with Reasons dated April 17, 2009*, VECC Motion Materials in respect of the COLLUS Motion, Tab 2, page 21.**

2. On August 15, 2008, Innisfil Hydro Distribution Systems Limited ("Innisfil") filed an application with the Board for approval of its proposed electricity distribution rates and charges effective May 1, 2009 (referred to here as the "Innisfil Application"). The Board assigned File No. EB-2008-0233 to the Innisfil Application and determined that the application would be decided by way of a written hearing. As with the COLLUS Application, the Board granted four parties intervenor status in the proceeding (VECC, SEC, AMPCO and Energy Probe). Board staff and intervenors posted interrogatories and made submissions during the hearing process. On April 6, 2009, in consideration of the submissions of the parties and the evidence on the record before it, the Board issued its Decision and Order in respect of the Innisfil Application (the "Innisfil Decision"). After considering the submissions of the parties in respect of unissued third party long-term debt, the Board made the following findings:

"The Board finds that Innisfil should use the Board's current deemed long term debt rate of 7.62% as the imputed rate on its new bank loan in determining its cost of debt for regulatory purposes rather than its proposed rate of 5.08%, since as of the completion of the record for this proceeding, Innisfil has not issued its new bank loan and as such, the rate on this instrument is unknown."

***Board's Decision with Reasons dated April 6, 2009*, VECC Motion Materials in respect of the Innisfil Motion, Tab 2, page 24.**

3. On April 24, 2009, VECC filed a Notice of Motion to review and vary the Innisfil Decision (the "Innisfil Motion") on the basis that the Board's treatment of the long term debt rate for debt that had not yet been issued "is a reviewable error in fact." On April 28, 2009, VECC filed a Notice of Motion to review and vary the COLLUS Decision on similar grounds, that the Board's treatment of the long term debt rate for debt that had not yet been issued "is a reviewable error in fact" (the "COLLUS Motion"). In the COLLUS Motion VECC further requested that the motions be heard simultaneously, and the Board granted that request in its June 3, 2009 Notice of Hearing and Procedural Order No. 1. On June 19, 2009 the Board issued its Decision and Procedural Order No. 2, pursuant to which this material is filed and the Board will hear oral argument.

4. As the Board has combined the VECC motions and assigned them File No. EB-2009-0130, and in an effort to avoid the duplication of responding material, Innisfil and COLLUS have cooperated in the preparation of this joint responding submission. Please see Appendices A and B for a sequential summary of the evidence and submissions relevant to the Board's rate treatment of unissued long term third party debt in the COLLUS Decision and Innisfil Decision respectively. For the purposes of this Joint Response: the Innisfil Application and the COLLUS Application shall be referred to collectively as the "Applications"; the Innisfil Decision and the COLLUS Decision shall be referred to collectively as the "Decisions"; and VECC's Innisfil Motion and COLLUS Motion shall be referred to collectively as the "Motions."

**SUMMARY OF SUBMISSIONS**

5. As more specifically discussed below, the Respondents respectfully submit that:

   (a) VECC has failed to meet the Board's threshold test pursuant to Rule 45.01. Specifically:

      (i) VECC has failed to introduce evidence of a reviewable error in fact;

      (ii) VECC is seeking to have the Board reconsider and interpret differently a body of evidence that was before the Board at the time it made its Decisions; and

(iii) VECC is using the Board's review process as an opportunity to reargue its case.

(b) In the alternative, the Board's Decisions are reasonable and VECC has put forth no good reason to vary the Board's Decisions. Specifically:

(i) The Decisions are grounded in the evidence that was before the Board at the time the Decisions were made;

(ii) The Board has wide power and broad discretion to determine what is included in rates. The Board's discretion is not limited to simply choosing among the submissions made by the parties during a hearing;

(iii) For unissued long-term debt, the "prudently negotiated contract rate" is unknown. At best, one must make a series of assumptions to arrive at a forecast for such a rate;

(iv) The Board has the discretion to evaluate and reject the assumptions made by the parties in arriving at forecasted, forward test year values; and

(v) In the absence of a clear policy on the point, the Board has the discretion to use its deemed long-term debt rate as the imputed rate for unissued third-party debt for regulatory purposes.

(c) In the alternative, the proper rate treatment of unissued third-party debt is a generic policy issue that would best be addressed in a combined proceeding and not within the scope of these Motions. Specifically:

(i) The proper treatment of unissued third-party debt is not explicitly addressed in the Report of the Board on *Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors* dated December 20, 2006 (the "Report");

(ii) The proper forecasting methodology that might apply in respect of unissued third-party debt is, as is evidenced by the range of submissions made during the Applications, contentious and based on assumptions that would merit further development/investigation by way of a combined proceeding;

(iii) The Board's deemed long-term debt rate is based on a rigorous, formulaic, econometric averaging of market-based bond yields. The formula itself is the result of a generic public hearing process that considered submissions from a broad array of public interest groups;

(iv) If the Board decides on some other forecasting methodology that might apply in respect of unissued third party debt, it will apply across all

similar applications considered by the Board in future rate hearings (This raises the following questions: Why should the Respondents solely carry the costs of determining this generic issue? Why should other affected distributors be effectively excluded from participating in the Board's determination on this issue?); and

(v) On June 18, 2009, the Board issued its determination on the cost of capital parameter values for 2009 rates and advised stakeholders that it is proceeding with a review of its policy regarding the cost of capital. This policy review, and not these Motions, is the most appropriate forum for hearing submissions in respect of the proper forecasting methodology for unissued third-party debt.

6. The Respondents request the following decisions/orders:

(a) that the orders sought in the Motions to review and vary the Board's respective Decisions be denied;

(b) that VECC (and any other intervenor that may claim costs in respect of these Motions) be denied its costs in respect of these Motions; and

(c) that the Respondents may track in a deferral account for future recovery any cost arising as a result of the Motions.

## THE SUBMISSIONS OF THE RESPONDENTS

### A. VECC has failed to meet the Board's threshold test pursuant to Rule 45.01.

7. VECC is relying upon Rules 42-44 of the Board's *Rules of Practice and Procedure* (the "Rules") as the legal basis for the Motions. Rule 45.01 provides that:

> In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.
>
> **Board's *Rules of Practice and Procedure*, The Respondents' Book of Authorities, Tab 2, Rules 42-45.**

8. The Board detailed its approach to the threshold question in its May 22, 2007 Decision with Reasons on Motions to Review the Natural Gas Electricity Interface Review Decision (EB-2006-0322/EB-2006-0338/EB-2006-0340) (the "NGEIR Review Decision"). Specifically (emphasis added):

"In determining the appropriate threshold test pursuant to Rule 45.01, it is useful to look at the wording of Rule 44. Rule 44.01(a) provides that:

> *Every notice of motion… shall set out the grounds for the motion that raise a question as to the correctness of the order or decision…*

Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

**With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.**

**In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. <u>It is not enough to argue that conflicting evidence should have been interpreted differently</u>.**

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review."

**Excerpt from the Board's *Decision with Reasons on Motions to Review the Natural Gas Electricity Interface Review Decision* dated May 22, 2007 (EB-2006-0322/EB-2006-0338/EB-2006-0340), The Respondents' Book of Authorities, Tab 3, at pages 17-18 .**

9. The Board confirmed this approach to the threshold question in its November 26, 2007 Hydro One / Great Lakes Power connection procedures review motion Decision (EB-2007-0797), noting at page 5 specifically that (emphasis added) "the Board would wish to be satisfied that [the Applicant's] Motion to review raises a question as to the correctness of the [Decision], **<u>and is not being used as an opportunity to reargue the case</u>**."

> **Excerpt form the Board's Hydro One / Great Lakes Power connection procedures review motion Decision dated November 26, 2007 (EB-2007-0797), The Respondents' Book of Authorities, Tab 4, at pages 5-6.**

10. In the Motions, VECC argues that the Board's treatment of the long term debt rate for debt that had not yet been issued "is a reviewable error in fact." VECC makes no suggestion that (i) there is any incompleteness of evidence; (ii) there is any change in circumstance; or (iii) there are any new facts that have arisen, as the grounds upon which VECC brought the Motions. Instead, VECC appears to be arguing that the Board's findings are somehow contrary to the evidence that was before that panel. In its letter dated April 28, 2009 in respect of the COLLUS Motion, VECC states (emphasis added) "it is VECC's submission that **while the Board had all the relevant facts in front of it, the Board did not consider any of those facts in making its Decision**." VECC reiterates its position in its letter dated June 12, 2009 in respect of the Innsifil Motion, stating that (emphasis added) "VECC submits, with respect to the evidentiary record on the motions, there is no other relevant evidence that could be adduced; **the review panel has before it precisely the same evidence that was available to the original panel**."

> ***VECC Cover Letter and Response to Letter from Counsel for Innisfil*, VECC Motion Materials in respect of the COLLUS Motion, Cover Letter, page 2.**

11. As neatly summarized by VECC's Counsel in these submissions, VECC has put no evidence before the Board on these Motions that was not available to the original panel. Further, VECC has not made reference to an identifiable error in the evidence that may have materially affected the Board's Decisions so as to cause the Decisions to be varied, cancelled or suspended. Instead, VECC's position appears to be that the Board did not consider the evidence in arriving at its Decisions.

12. The Respondents submit that VECC is seeking to have the Board reconsider and interpret differently a body of evidence that was before the Board at the time it made its Decisions. At the time of the Decisions, the Board had before it an array of evidence in respect of the treatment of the relevant long term debt rate, including:

(a) the fact that the debt was not yet in place for either COLLUS or Innisfil and therefore the term and rate on the respective third party instrument was not yet known;

(b) the Applicants' original proposal in respect of the treatment of this unissued, long-term debt;

(c) various interrogatories and responses in respect of the treatment of this unissued, long-term debt; and

(d) submissions by the Applicants, Board staff and various intervenors in respect of the treatment of this unissued, long-term debt.

**VECC Motion Materials in respect of the COLLUS Motion, Tabs 5-12.**

**VECC Motion Materials in respect of the Innisfil Motion, Tab 3 and Tabs 6-12.**

13. Based on this array of evidence, the Board had a variety of reasonable options available to it when determining the issue on the proper treatment of unissued long-term debt. For instance, the Board could have sided with the final submissions of VECC in the COLLUS Application such that the Board would apply an assumed rate on this unissued long-term debt: being the 5-year Infrastructure Ontario rate as of the date of the Board's Decision. The Board could also reasonably find that, given the evidence that the debt had not been issued and therefore the rate on this third party instrument was not yet known, the Applicant should use the Board's current deemed long-term debt rate of 7.62% as the imputed rate on the unissued debt in determining its cost of debt for regulatory purposes.

14. The Respondents submit that, in consideration of this array of evidence, the Board chose a reasonable alternative based on the evidence that was before it. The Respondents submit that VECC essentially disagrees with the Board's Decisions, and it is attempting to use these Motions as an opportunity to reargue the case. For all of these reasons, the Respondents submit that VECC has failed to meet the Board's threshold test pursuant to Rule 45.01.

## B. The Board's Decisions are reasonable and VECC has put forth no good reason to vary the Board's Decisions.

15. Counsel for VECC makes much ado about the fact that both Respondents proposed a debt rate treatment for unissued third party long-term debt that is different from the treatment ultimately adopted by the Board in its Decisions. It should be remembered that for both COLLUS and Innisfil, the Applications were their first attempt at a detailed forward test year cost-of-service based application under 2nd Generation IRM. As noted below in paragraph 24, the Board's policy on the proper rate treatment for unissued third party debt is not explicitly addressed in the Report. Ultimately, the Respondents admit deference to the Board's wisdom, experience and judgement in making its practical findings in the Decisions. Indeed, COLLUS explicitly admitted such deference in its final submission before the Board during its rate hearing.

16. Counsel for VECC argues that "neither the applicant nor any party suggested, nor was there any evidence with respect to the appropriateness of applying the Board's deemed long term debt rate as the forecast of the applicant's [unissued], third party debt, as opposed to the relying on the applicant's forecasted rate based on its intention to enter into a 5-year loan with Infrastructure Ontario." The Respondents submit that the Decisions are firmly grounded in the evidence that was before the Board at the time the Decisions were made and that the evidence was sufficient for the Board to make its Decisions. Specifically:

(a) In the COLLUS Decision, at pages 19-21, the Board accurately summarizes the evidence and the submissions of COLLUS, Board staff, SEC, VECC and Energy Probe on the proposed rate treatment for the unissued long-term debt.

(b) In the Innisfil Decision, at pages 23-24, the Board accurately summarizes the evidence and the submissions of Innisfil and Energy Probe on the proposed rate treatment for unissued long-term debt.

(c) In the COLLUS Decision, the Board considered and summarized submissions by SEC about the risks inherent in using the Board's deemed long-term debt rate for rate setting purposes. Specifically, SEC noted that the Board's deemed rate for long-term debt is "far in excess of market rates" signalled by

the Infrastructure Ontario term rates. In making its findings, the Board was mindful of SEC's concerns as to whether or not COLLUS could refinance its affiliate debt at a lower cost. It is wholly unreasonable to assume that the Board did not also consider a similar concern when it applied the same deemed rate for long-term debt to the unissued third party debt. The Board noted that SEC's concern is a "generic policy issue that is not within the scope of this Decision."

(d) In the Innisfil Decision, the Board considered the evidence of the difference between its deemed long-term debt rate and the rates signalled by the Infrastructure Ontario term rates. It is wholly unreasonable to assume that the Board did not consider the implications of applying its same deemed rate for long-term debt to the unissued third party debt.

***Board's Decision with Reasons dated April 17, 2009*, VECC Motion Materials in respect of the COLLUS Motion, Tab 2, pages 19-21.**

***Board's Decision with Reasons dated April 6, 2009*, VECC Motion Materials in respect of the Innisfil Motion, Tab 2, pages 23-24.**

**EB-2008-0226 SEC Submission Re: Long Term Debt, VECC Motion Materials in respect of the COLLUS Motion, Tab 11, para. 5.1.4 – 5.1.6.**

17. In setting just and reasonable rates the courts have allowed public utility regulators a "wide power and broad discretion" to determine what is included in these rates. See *Union Gas Ltd. and Ontario Energy Board*, [1983] O.J. No. 3191 and *BC Hydro v. Westcoast Transmission*, [1981] 2 F.C. 646.

***Union Gas Ltd. and Ontario Energy Board*, [1983] O.J. No. 3191, The Respondents' Book of Authorities, Tab 7.**

***BC Hydro v. Westcoast Transmission*, [1981] 2 F.C. 646, The Respondents' Book of Authorities, Tab 8.**

18. The Respondents submit that, in contrast to what is being proposed by VECC, the Board's discretion is not limited to simply choosing among the alternatives included in the submissions made by the parties during a hearing. Instead, the Respondents submit that the Board had "wide power and broad discretion" to set an appropriate unissued third party debt rate.

19. For unissued third party debt, the "prudently negotiated contract rate" is unknown. There is no debt, no contract, and therefore there is no actual rate on evidence and

any potential discounts or fees are unknown. At best, one must make a series of assumptions to arrive at a forecast for such a rate. One assumption frequently referred to in the submissions was to use the Infrastructure Ontario long-term debt rate.

20. The Board has the discretion to evaluate and reject the assumptions made by the parties in arriving at forecasted, forward-test year values. Consider, for instance, the Board's update to the Chapter 2 Filing Requirements dated May 27, 2009 (which was not applicable to these 2009 Applications, but will apply to those applications filed in August 2009 for 2010 rebasing) (the "Updated Filing Requirements"). Specifically:

> "The applicant is only required to provide justification of forecast parameters that differ from the Board's deemed rates."
>
> "[...] If the applicant is proposing any rate that is different from Board guidelines, a justification of forecast costs by item including key assumptions."
>
> **Board's update to the *Chapter 2 Filing Requirements* dated May 27, 2009, The Respondents' Book of Authorities, Tab 9, at pages 17-18 .**

21. In their Applications, both Respondents proposed a debt rate treatment for unissued long-term debt that was not specifically addressed by the Board in the Report (as defined below). The Respondents' proposals were based on the assumptions that: (i) the Respondents expected in the future to secure some amount of third-party debt; (ii) the Respondents anticipated the third-party counterparty to be Infrastructure Ontario; and (iii) that the Infrastructure Ontario quoted debt-rate at the time of (a) the application, (b) the expiry of a previous loan, and (c) the Decisions are all reasonable approximations of what the debt rate would be when, and if, it is actually issued. The Board had a complete basis of evidence before it in considering this proposal, and in consideration of the uncertainty inherent in each of the three assumptions noted above the Board rejected the Respondents' proposed rate treatment and instead applied the Board's deemed rates.

22. In the absence of a clear policy on the point, the Board has the discretion to use its deemed long-term debt rate as the imputed rate for unissued third-party debt for regulatory purposes.

23. For all of these reasons, as well as the reasons in included in section A above, the Respondents submit that the Board's Decisions are reasonable and VECC has put forth no good reason to vary the Board's Decisions.

## C. The Proper Rate Treatment of Unissued Third-Party Debt is a Generic Policy Issue that Would Best Be Addressed in a Combined Proceeding and not within the Scope of the Motions.

24. The proper treatment of unissued third-party debt is not explicitly addressed in the Report of the Board on *Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors* dated December 20, 2006. In Section 2.2 of the Report, the Board determines for rate-making purposes the debt rate applicable to short-term and long-term; affiliated and third party; and new and existing debt. The Board clearly addresses the proper rate treatment of debt that has already been issued in the Report, however the Report does not address the proper rate treatment of unissued long-term debt.

> **Excerpt of the Report of the Board on *Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors* dated December 20, 2006, The Respondents' Book of Authorities, Tab 5, Section 2.2.1 .**

25. In the Report (at page 13), the Board has determined that the rate for existing new long-term debt that is held by a third party shall be the prudently negotiated contracted rate, including recognition of premiums and discounts. How does one determine the "prudently negotiated contract rate" for unissued third party debt when there is no evidence of a negotiated debt or contract rate that has been agreed to with an arms length third party?

26. One approach is to attempt to formulate a forecasting methodology to apply in respect of unissued third-party debt. However, as is evidenced by the range of

submissions made during the Applications, such a methodology could be based on various contentious assumptions. Because the loan has not yet been issued, the actual contract rate is not truly known. The rate will vary depending on (i) when the loan is actually issued; and (ii) the specifics of the loan arrangement (the counterparty, the value of the loan, the term of the loan, any premiums or discounts, early repayment rights, termination rights, etc.). When the loan has not yet been issued, the answers to these questions are necessarily evidenced based on various assumptions.

27. Another simple, practical and mechanistic approach is to apply the Board's current deemed long-term debt rate to the forecasted loan amount. This approach is beneficial because the Board's deemed long-term debt rate is based on a rigorous, formulaic, econometric averaging of market-based bond yields. It is preferable because, unlike the assumption based forecast methodology, the deemed long term debt rate formula is itself the result of a generic public hearing process that considered submissions from a broad array of public interest groups.

> **Excerpt of the Report of the Board on *Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors* dated December 20, 2006, The Respondents' Book of Authorities, Tab 5, Appendix A .**

28. Counsel for VECC argues that the Motions raise "an important point of principle, in that it will have application across all similar applicants." The Respondents agree that, to the extent that Board decisions are persuasive but not binding in subsequent hearings, that the principle decided by the Board will have a broad application for future cost of service rate hearings. On the one hand, if the Board upholds the Decisions, the Board will be deciding this principle based on its deemed long-term debt rate which itself is the result of a robust public hearing process. On the other hand, if the Board varies the Decisions, the Respondents will be faced with carrying all of the costs of determining this generic issue while other affected distributors will be effectively excluded from participating in the Board's determination on this issue. It is a fundamental principle of natural justice that the parties that may be affected by a decision should be given an opportunity to respond to the issues in that decision as

part of a fair public hearing process. While the parties involved in the Decisions received notice of the Motions and these hearings, more than 70 other licensed and rate regulated distributors in the province have not been given notice of these proceedings despite the fact that the outcome may directly affect them.

29. On June 18, 2009, the Board issued its determination on the cost of capital parameter values for 2009 rates and advised stakeholders that it is proceeding with a review of its policy regarding the cost of capital (the "Cost of Capital Review"). The Respondents submit that this Cost of Capital Review is a more appropriate forum than these Motions for hearing submissions in respect of the proper forecasting methodology for unissued third-party debt. Specifically, the Respondents note that the Board's notice of consultation provides the following framework for the Cost of Capital Review:

> "The Board is therefore proceeding with a review of its policy regarding the cost of capital. It is anticipated that any changes to the policy made as a result of this review will apply to the setting of rates for the 2010 rate year. [...] The Board will prepare a list of the issues that will form the basis of its review. [...] Interested stakeholders will be invited to file written comments identifying their views and positions on the listed issues. [...] The consultation will also include a stakeholder conference to provide a forum for discussion on the issues identified by the Board. [...] Following the stakeholder conference, provision may be made for further written comment."
>
> **Board Determination on the Cost of Capital Parameter Values for 2009 Cost of Service Applications and Notice of Consultation Process on Cost of Capital Review (Board File No.: EB-2009-0084) dated June 18, 2009, The Respondents' Book of Authorities, Tab 6 .**

30. For all of these reasons, the Respondents submit that the Board should not vary its Decisions because the proper rate treatment of unissued third-party debt is a generic policy issue that would best be addressed in a combined proceeding and not within the scope of these Motions. *Audi alteram partem* - hear the other side.

## REQUEST FOR RELIEF

31. On the basis of the foregoing submissions, the Respondents request that the orders sought in the Motions to review and vary the Board's respective Decisions be denied.

32. The Respondents also request that VECC (and any other intervenor that may claim costs in respect of these Motions) be denied its costs in respect of these Motions on the following basis:

    (a) It is the Respondents' submission that VECC has failed to satisfy the Board's threshold test pursuant to Rule 45.01 because VECC has needlessly brought the Motions in an attempt to reargue its case.

    (b) The Respondents submit that this conduct is both inappropriate and irresponsible. In doing so, VECC has engaged in conduct that has tended to lengthen unnecessarily the process related to the Applications by adding additional, unnecessary Motions. VECC has caused the Respondents to incur additional costs in preparing responding submissions and argument in respect of both the threshold issue and the merits of the Motions.

    (c) VECC has made no reasonable efforts to ensure the evidence presented in the Motion was not unduly repetitive of evidence presented during the Applications. Finally, VECC failed to contribute to a better understanding by the Board of one or more of the issues addressed by the party.

    **Excerpt of the Board's *Practice Direction on Cost Awards* revised June 9, 2009, The Respondents' Book of Authorities, Tab 10.**

33. The Respondents also request that the Respondents may track in a deferral account for future recovery any cost arising as a result of the Motions (including, if applicable, intervenor costs), on the basis that the Motions have caused an unforeseeable, extraordinary cost pressure on the Respondents from which they should be entitled to recover.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

June 29, 2009 *Original Signed by John A.D. Vellone*

John A.D. Vellone

James C. Sildofsky
Morgana Kellythorne
Counsel for the Appellant

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# APPENDIX A

## COLLUS SUMMARY OF EVIDENCE

The following is a sequential summary of the evidence and submissions made during the COLLUS Application written hearing process in respect of the proper rate treatment of unissued third party debt (See the VECC Motion Materials in respect of the COLLUS Motion, Tabs 5-12):

1. The COLLUS Application includes an overview of COLLUS' capital structure at Exhibit 6, Tab 1, Schedules 1-4, including a summary of the method and cost of financing capital requirements for the 2009 test year. Table 2 (shown below) demonstrates the calculations that were used to justify the COLLUS proposed debt rate of 5.79%. In regards to unissued third party debt, the table indicates that a demand loan of approximately $1,100,000 that was due to be issued on January 7, 2009. The wording on Schedule 1 Page 2 of 2 indicates that it was COLLUS' "intention" to replace an existing CIBC loan (due to expire on January 7, 2009) with this new debt of $1,100,000 since it was expected, at that time (August 2008) that this would need to be re-newed and a 5 year period Infrastructure Ontario 25 year rate (5.08%) used.

**TABLE 2**

**COST OF DEBT**

**Debt & Capital Cost Structure**

**Weighted Debt Cost**

| Description | Debt Holder | Affiliated with LDC? | Date of Issuance | Principal at end of 2004 | Term (Years) | Rate% | Year Applied to | Interest Cost |
|---|---|---|---|---|---|---|---|---|
| 1.Demand Loan | CIBC | No | February 7, 2002 | 2,315,654 | 7 | 5.47% | 2009 | 126,666 |
| 2. Promissory Note | Town Cwood | Yes | 1-Nov-01 | 1,710,170 | None | 6.25% | None | 106,886 |
| 3. Debenture | Usborne & H | No | June 5 1992 | 86,000 | 15 | 9.75% | 2006 | 8,385 |
| 4. Demand Loan(renew 1) | OSIFA | No | January 7, 2009 | 1,100,000 | 5 | 5.08% | 2013 | 55,880 |
| | | | | | | | | 0 |
| | | | | | | | | 0 |

| | | | |
|---|---|---|---|
| Total Long Term Debt Outstanding at end of 2004 used for 2006 EDR calc | 4,111,824 | Total Interest Cost in 2004 for 06 calc | 241,937 |
| not 297,817 from 2006 this is the 04 balance | | | |
| | | Weighted Debt Cost Rate from 2006 EDR | 5.88% |
| Total Long Term Debt Outstanding 2007 | 3,151,736 | Total Interest Cost for 2007 | 197,054 |
| | | Weighted Debt Cost Rate for 2007 | 6.25% |
| Total Long Term Debt Outstanding 2008 | 2,827,522 | Total Interest Cost for 2008 | 176,903 |
| | | Weighted Debt Cost Rate for 2008 | 6.26% |
| Total Long Term Debt Outstanding 2009 | 2,810,170 | Total Interest Cost for 2009 | 162,756 |
| (Long Term Debt Outstanding at end of 2009 expected to have $220,000 reduction of starting debt noted above for principal payments on re-newed Debt) | | | |
| | | Weighted Debt Cost Rate for 2009 | 5.79% |

2. Board staff IR #2.1 at page 21 of 71 summarized in detail the affiliate debt and inquired about the use of 6.25% instead of 6.1%. COLLUS, in response, on page 22 of 71, indicated its intention to adjust to the current deemed rate or any other newly decided rate after the Board's Decision on the application. Board staff in IR #2.2 ask for further detail on the loan interest rate of 5.08% that was used in Table 2 for the unissued third party debt forecast. In response, COLLUS indicated the forecast is based on the advertised

Infrastructure Ontario lending rates for LDCs based on the current 25 year serial rate at the time of the Decision. COLLUS also noted that banking institutions were expected to charge a 50 basis point premium, and therefore were not as competitive as the rate offered by IO.

3. In Board staff's second round IR, Board staff requested additional clarification around Exhibit 6, Tab 1, Schedule 3, Table 2. In response, COLLUS updated Table 2 above with Sch PO#4 BoardS IR #1, providing additional information about historic principal and interest payments to support the 5.79% calculation of COLLUS' Weighted Debt Rate. This update did not change the information in relation to the unissued third party loan.

4. In Board staff's Submission, at page 9 of 20, staff noted that it was unclear to Board staff why COLLUS believes the 25 year rate at the time of final application is made would be the appropriate rate rather than the five year rate applicable on January 7, 2009. Board staff invited the parties to the proceeding to provide any comments they may have on the rates proposed to be imputed on COLLUS' debt.

5. In Energy Probe's Argument, at pages 22-23, Energy Probe made various submissions about the unissued third party loan. Particularly, given that the loan had not yet been issued, Energy Probe indicated that the Board should approve a rate of 3.40% on the IO Bank Loan which the January 2009 rate for a five year term. VECC and SEC supported Energy Probe in their respective Final Submissions.

6. In COLLUS' Final Submission submitted February 25, 2009, at pages 37-38, COLLUS indicated that it is its intention to re-establish the loan in the near future, and that with respect to the loan, COLLUS will utilize the current IO 5 year serial rate that is in place when the Board's Decision is made. It was also noted that COLLUS was prepared to accept the Board's direction in its Decision on approved Rate of Return on rate base.

7. The Board issued the COLLUS Decision on April 17, 2009. The Board stated on page 21 that unissued third party debt rate should be imputed to be the deemed long term debt rate of 7.62% based on the fact the loan had not yet been issued and the rate on the instrument was not known. The Board provided on Table 4 page 22 of the decision a long-term debt rate of 7.62%.

# APPENDIX B

## INNISFIL SUMMARY OF EVIDENCE

The following is a sequential summary of the evidence and submissions made during the Innisfil Application written hearing process in respect of the proper rate treatment of unissued third party debt (See the VECC Motion Materials in respect of the Innisfil Motion, Tab 3 and Tabs 6-12):

1. On August 15, 2008 Innisfil filed the Innisfil Application including an overview of its capital structure at Exhibit 6, Tab 1, Schedules 1-4. Innisfil provides the details of its forecasted long-term debt at Exhibit 6, Tab 1, Schedule 3 – on page 2 of 3 of this Schedule, Innisfil forecasted a need for, as of yet unissued third party debt for $3,950,000 at a debt rate of 5.08% based on the 2009 capital plans (see excerpt below).

**Weighted Debt Cost**

| Description | Debt Holder | Affliated with LDC? | Date of Issuance | Principal | Term (Years) | Rate% | Year Applied to | Interest Cost |
|---|---|---|---|---|---|---|---|---|
| Note payable | Town of Innisfi | Yes | December 31, 2003 | 2,107,444 | 4 | 7.25% | 2006 | 152,790 |
| | | | | 2,107,444 | | 7.25% | 2007 | 152,790 |
| | | | December 31, 2007 | 2,107,444 | 2 | 3.35% | 2008 | 70,599 |
| | | | | 2,107,444 | | 3.35% | 2009 | 70,599 |
| Debentures | Town of Innisfi | No | April 1, 1995 | 6,640,000 | 20 | 9.75% | 2006 | 647,400 |
| | | | | 6,155,000 | | 9.75% | 2007 | 600,113 |
| | | | | 5,621,000 | | 9.75% | 2008 | 548,048 |
| | | | | 5,032,000 | | 9.75% | 2009 | 490,620 |
| Bank Loan | Infastructure C | No | May 1, 2009 | 3,950,000 | 25 | 5.08% | 2009 | 133,773 |
| | | | **Total Long Term Debt Outstanding at end of 2006** | 8,747,444 | | **Total Interest Cost for 2006** | | 800,190 |
| | | | | | | **Weighted Debt Cost Rate for 2006** | | 9.15% |
| | | | **Total Long Term Debt Outstanding at end of 2007** | 8,262,444 | | **Total Interest Cost for 2007** | | 752,902 |
| | | | | | | **Weighted Debt Cost Rate for 2007** | | 9.11% |
| | | | **Total Long Term Debt Outstanding at end of 2008** | 7,728,444 | | **Total Interest Cost for 2008** | | 618,647 |
| | | | | | | **Weighted Debt Cost Rate for 2008** | | 8.00% |
| | | | **Total Long Term Debt Outstanding at end of 2009** | 11,089,444 | | **Total Interest Cost for 2009** | | 694,993 |
| | | | | | | **Weighted Debt Cost Rate for 2009** | | 6.27% |

2. Board staff interrogatory #2.1 requested additional clarification about the new bank loan. Innisfil filed the following in response:

> *Ref: Exhibit 6/Tab 1/Schedule 3/p. 2*
>
> Innisfil includes a new bank loan to be issued on May 1, 2009 with a rate of 5.08%.
>
> Please provide a more detailed explanation of how this rate was determined including the relevant calculations.

Response #2.1

Innisfil Hydro has registered in the pre-application process with Infrastructure Ontario, (IO). IO is a Crown corporation dedicated to building and renewing public infrastructure.

IO provides the following benefits:

a) affordable borrowing rates

b) all capital expenditures are eligible for financing

c) long terms up to 40 years

d) no extra fees or need to refinance

e) hassle-free access to capital market financing if necessary

Innisfil Hydro requested a quote on a 25 year serial loan for $3,950,000 and IO supplied a rate of 5.08% as of May 16, 2008. Attached is the web based calculator schedule supplied by IO, detailing the principle and interest payments in the file Appendix A responses to OEB IR Q 2.1 Infrastructure Ontario debt 2009. Innisfil Hydro utilized this calculation within its rate application based on the reasonableness of the estimate as of the end of May 2008. As of October 31, 2008 the 25 year rate for a serial loan is 6.17% per the Infrastructure Ontario web site quotes for LDCs'.

At the time final rates are determined, Innisfil Hydro proposes the debt rate to be used for the 25 year serial loan would be set based on the debt rate quoted by Infrastructure Ontario when the OEB sets the deemed long term debt rate, the deemed short term debt rate and the rate of return of equity for 2009 cost of service/rebased applicants.

3. In response to VECC IR#25, Innisfil stated that due specified the capital changes affecting years 2008 and 2009 the anticipated 2009 unissued third party debt would decrease to $1,869,450 from $3,950,000. This is a $2,080,550 in reduced capital requirements due to changing economic conditions. The weighted debt rate for 2009 changed to 6.93% from 6.27% due to the weighting of the 1995 debentures per the following schedule:

**Weighted Debt Cost**

| Description | Debt Holder | Affliated with LDC? | Date of Issuance | Principal | Term (Years) | Rate% | Year Applied to | Interest Cost |
|---|---|---|---|---|---|---|---|---|
| Note payable | Town of Innisfi | Yes | December 31, 2003 | 2,107,444 | 4 | 7.25% | 2006 | 152,790 |
| | | | | 2,107,444 | | 7.25% | 2007 | 152,790 |
| | | | December 31, 2007 | 2,107,444 | 2 | 3.35% | 2008 | 70,599 |
| | | | | 2,107,444 | | 3.35% | 2009 | 70,599 |
| Debentures | Town of Innisfi | No | April 1, 1995 | 6,640,000 | 20 | 9.75% | 2006 | 647,400 |
| | | | | 6,155,000 | | 9.75% | 2007 | 600,113 |
| | | | | 5,621,000 | | 9.75% | 2008 | 548,048 |
| | | | | 5,032,000 | | 9.75% | 2009 | 490,620 |
| Bank Loan | Infastructure C | No | May 1, 2009 | 1,869,450 | 25 | 5.08% | 2009 | 63,312 |
| | | | **Total Long Term Debt Outstanding at end of 2006** | 8,747,444 | | **Total Interest Cost for 2006** | | 800,190 |
| | | | | | | **Weighted Debt Cost Rate for 2006** | | 9.15% |
| | | | **Total Long Term Debt Outstanding at end of 2007** | 8,262,444 | | **Total Interest Cost for 2007** | | 752,902 |
| | | | | | | **Weighted Debt Cost Rate for 2007** | | 9.11% |
| | | | **Total Long Term Debt Outstanding at end of 2008** | 7,728,444 | | **Total Interest Cost for 2008** | | 618,647 |
| | | | | | | **Weighted Debt Cost Rate for 2008** | | 8.00% |
| | | | **Total Long Term Debt Outstanding at end of 2009** | 9,008,894 | | **Total Interest Cost for 2009** | | 624,531 |
| | | | | | | **Weighted Debt Cost Rate for 2009** | | 6.93% |

4. Board staff invited parties to the proceeding to provide any comments they may have on the rates proposed to be imputed on Innisfil's debt at page 10 of staff's submissions dated January 29, 2009.

5. Energy Probe's submission page 29, brings up two further points on Innisfil's unissued third party debt. First, Energy Probe agrees in principle with using the most recent IO rate available at the time the Board sets the deemed long term debt rate, noting that the IO rates have gone from 6.17% to 5.47% for the 25 year loan as of January 30, 2009. Second, Energy Probe submits that the Board should approve a loan rate of 5.08% or lower for terms of less than 25 years.

6. In Innisfil's Reply Submission submitted February 20, 2009 at page 36, Innisfil agreed with Energy Probe about entering into shorter-term loan periods and the associated rates.

7. The Board issued the Innisfil Decision on April 6, 2009. The Board stated on page 24 that the long-term debt rate should be deemed rate of 7.62% based on the fact the loan had not yet been issued and the rate on the instrument was not known. The Board provided on Table 4 page 24 of the decision a long-term debt rate of 7.81%.

8. On April 24, 2009 VECC filed a Notice of Motion to review and vary the Board's decision on the debt rate of 7.62% instead of the 5.08% submitted within the rate application.

written submission or written evidence to provide it in the other language if the Board considers it necessary for the fair disposition of the matter.

## 40. Media Coverage

40.01 Radio and television recording of an oral or electronic hearing which is open to the public may be permitted on conditions the Board considers appropriate, and as directed by the Board.

40.02 The Board may refuse to permit the recording of all or any part of an oral or electronic hearing if, in the opinion of the Board, such coverage would inhibit specific witnesses or disrupt the proceeding in any way.

# PART VI - COSTS

## 41. Cost Eligibility and Awards

41.01 Any person may apply to the Board for eligibility to receive cost awards in Board proceedings in accordance with the *Practice Directions*.

41.02 Any person in a proceeding whom the Board has determined to be eligible for cost awards under **Rule 41.01** may apply for costs in the proceeding in accordance with the *Practice Directions*.

# PART VII - REVIEW

## 42. Request

42.01 Subject to **Rule 42.02**, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.

42.02 A person who was not a party to the proceeding must first obtain the leave of the Board by way of a motion before it may bring a motion under **Rule 42.01**.

42.03 The notice of motion for a motion under **Rule 42.01** shall include the information required under **Rule 44**, and shall be filed and served within 20 calendar days of the date of the order or decision.

42.04 Subject to **Rule 42.05**, a motion brought under **Rule 42.01** may also include a request to stay the order or decision pending the determination of the motion.

42.05 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.

42.06 In respect of a request to stay made in accordance with **Rule 42.04**, the Board may order that the implementation of the order or decision be delayed, on conditions as it considers appropriate.

## 43. Board Powers

43.01 The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.

43.02 The Board may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in its orders or decisions.

## 44. Motion to Review

44.01 Every notice of a motion made under **Rule 42.01**, in addition to the requirements under **Rule 8.02**, shall:

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and

(b) if required, and subject to **Rule 42**, request a stay of the implementation of the order or decision or any part pending the determination of the motion.

## 45. Determinations

45.01 In respect of a motion brought under **Rule 42.01**, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Ontario Energy Board

Commission de l'Énergie de l'Ontario


**EB-2006-0322**
**EB-2006-0338**
**EB-2006-0340**

# MOTIONS TO REVIEW THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION

**DECISION WITH REASONS**

May 22, 2007

## Section C: Threshold Test

Section 45.01 of the Board's Rules provides that:

> In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Parties were asked by the panel to provide submissions on the appropriate test for the Board to apply in making a determination under Rule 45.01.

Board Staff argued that the issue raised by a moving party had to raise a question as to the correctness of the decision and had to be sufficiently serious in nature that it is capable of affecting the outcome. Board Staff argued that to qualify, the error must be clearly extricable from the record, and cannot turn on an interpretation of conflicting evidence. They also argued that it's not sufficient for the applicants to say they disagree with the Board's decision and that, in their view, the Board got it wrong and that the applicants have an argument that should be reheard.

Enbridge submitted that the threshold test is not met when a party simply seeks to reargue the case that the already been determined by the Board. Enbridge argued that something new is required before the Board will exercise its discretion and allow a review motion to proceed.

Union agreed with Board Staff counsel's analysis of the scope and grounds for review.

IGUA argued that to succeed on the threshold issue, the moving parties must identify arguable errors in the decision which, if ultimately found to be errors at the hearing on the merits will affect the result of the decision. IGUA argued that the phrase "arguable errors" meant that the onus is on the moving parties to demonstrate that there is some reasonable prospect of success on the errors that are alleged.

CCC and VECC argued that the moving parties are required to demonstrate, first, that the issues are serious and go to the correctness of the NGEIR decision, and , second, that they have an arguable case on one or more of these issues. They argued that the moving parties are not required to demonstrate, at the threshold stage, that they will be successful in persuading the Board of the correctness of their position on all the issues.

MHP argued that the threshold question relates to whether there are identifiable errors of fact or law on the face of the decision, which give rise to a substantial doubt as to the correctness of the decision, and that the issue is not whether a different panel might arrive at a different decision, but whether the hearing panel itself committed serious errors that cast doubt on the correctness of the decision. MHP submitted that a review panel should be loathe to interfere with the hearing panel's findings of fact and the conclusions drawn there from except in the clearest possible circumstances.

Kitchener argued that jurisdictional or other threshold questions should be addressed on the assumption that the record in NGEIR establishes the facts asserted.

School Energy Coalition argued that an application for reconsideration should only be denied a hearing on the merits in circumstances where the appeal is an abuse of the Board's process, is vexatious or otherwise lacking objectively reasonable grounds.

**Findings**

It appears to the Board that all the grounds for review raised by the various applicants allege errors of fact or law in the decision, and that there are no issues relating to new evidence or changes in circumstances. The parties' submissions addressed the matter of alleged error.

In determining the appropriate threshold test pursuant to Rule 45.01, it is useful to look at the wording of Rule 44. Rule 44.01(a) provides that:

> Every notice of motion… shall set out the grounds for the motion that raise a question as to the correctness of the order or decision…

Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

2007 WL 5095121 (Ont. Energy Bd.), 2007 CarswellOnt 9174

2007 CarswellOnt 9174

Hydro One Networks Inc., Re

In the Matter of the Ontario Energy Board Act, 1998, S.O. 1998, c.15 (Schedule B)

In the Matter of an application by Hydro One Networks Inc. for the review and approval of connection procedures

In the Matter of an application by Great Lakes Power Limited for the review and approval of connection procedures

In the Matter of Rules 42, 44.01 and 45.01 of the Board's Rules of Practice and Procedure

**Ontario Energy Board**

K. Quesnelle Member, P. Nowina V-Chair, P. Sommerville Member

Judgment: November 26, 2007
Docket: EB-2007-0797



Counsel: None given

Subject: Public; Civil Practice and Procedure

Public law --- Public utilities -- Operation of utility -- Equipment -- Construction and alteration of supply lines.

Public law --- Public utilities -- Regulatory boards -- Practice and procedure -- Miscellaneous.

Statutes considered:

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B

s. 1 -- referred to

s. 56 -- referred to

transmission plans referred to in that section, and to the implications for cost responsibility. To place the matter into context, at issue was Hydro One's interpretation of the Code to the effect that a capital contribution is not required for the construction or reinforcement of connection facilities which Hydro One characterizes as being for "Local Area Supply" or "LAS", except for advancement costs. An LAS connection facility is defined by Hydro One as a radial line (or line connection facility) that serves more than a single customer. It follows that any plan regarding a connection facility that is required to meet the needs of more than one customer would, under Hydro One's approach, be a transmission plan within the meaning of section 6.3.6 of the Code, and a capital contribution would therefore not be required.

16 The key findings in the Connection Procedures Decision in relation to the Code Issue can be summarized as follows:

> i. taken as a whole, section 6.3 of the Code provides that a capital contribution will be required in almost all cases where a transmitter is enhancing its equipment to accommodate the needs of a line connection;
>
> ii. section 6.3.6 of the Code provides a qualified exception that allows a customer to avoid a capital contribution where an enhancement has been "otherwise planned" by a transmitter to address system needs; and
>
> iii. whether a plan meets the criteria giving rise to the exception in section 6.3.6 of the Code is a matter of evidence to be considered by the Board on a case-by-case basis. The key feature of a plan giving rise to the exception is the extent to which it addresses system reliability and integrity concerns which arise from the transmitter's assessment of projected load growth and not the requirements of a specific customer or customers within a local area. It cannot be a "plan" that is created primarily at the request of a connecting customer. Where planning involves joint studies between Hydro One and one or more distributors to meet different timing and supply needs such as load growth, such plans are viewed as customer-driven where a capital contribution would be required.

17 The Connection Procedures Decision also discussed two further matters that have been raised by parties to this proceeding. The first is the regulatory treatment of capital contributions paid by distributors to transmitters. The second is adjustments to cost responsibility that can and should be made where a transmitter's plans call for the installation of unique system elements as part of the proposed reinforcement of connection facilities.

**The Threshold Question**

***1. Scope of the Power to Review***

18 Under Rule 45.01 of the Rules, the Board may determine as a threshold question whether the matter should be reviewed before conducting any review on the merits.

19 The Notice and PO provided guidance in relation to this threshold question, based in part on the Board's May 22, 2007 Decision with Reasons on the NGEIR Motions (proceeding EB-2006-0322/EB-2006-0338/EB-2006-0340) (the "NGEIR Motions Decision"). Specifically, the Notice and PO indicated that the Board would wish to be satisfied that Hydro One's Motion to review raises a question as to the correctness of the Connection Procedures Decision, and is not being used as an opportunity to reargue the case.

20 The moving party must also satisfy the Board of the following:

- To the extent that an error in the Connection Procedures Decision is alleged:

> • that the error is identifiable, material and relevant to the outcome of the Connection Procedures Decision and that, if the error is corrected, the reviewing panel could change the outcome of the Connection Procedures Decision (in other words, there is enough substance to the issues raised that a review based on those issues could result in the reviewing panel deciding that the Connection Procedures Decision should be varied, cancelled or suspended); and
>
> • that the findings of the Connection Procedures panel are contrary to the evidence that was before that panel, the panel failed to address a material issue, the panel made inconsistent findings, or another error of a similar nature was made by the panel.

• To the extent that the incompleteness of evidence is raised as a ground for review:

> • that the facts now sought to be brought to the attention of the Board could not have been discovered by reasonable diligence at the time; and
>
> • that those facts are material and relevant to the outcome of the Connection Procedures Decision and that, if considered by the reviewing panel, could change the outcome of the Connection Procedures Decision (in other words, the facts are such that a review based on a consideration of those facts could result in the reviewing panel deciding that the Connection Procedures Decision should be varied, cancelled or suspended).

21 With one exception, the parties did not expressly take issue with the threshold test as articulated above. In its written summary of submissions and at the oral hearing, the EDA argued that the Board cannot limit its substantive jurisdiction through its procedural rules, and that the issue of whether there is a "question as to the correctness of the order or decision" goes beyond whether there was a simple error. If the implications of a decision were not matters before the Board at the relevant time, and have only emerged subsequently, it is in the EDA's view appropriate for the Board to reconsider the conclusions that were reached in the decision.

22 During the oral hearing, the OPA submitted that while reviews initiated by motion are subject to the constraints identified in Rule 44 of the Rules, the Board has a broader power to review under Rule 43.01. That broader power can be exercised even if the Board finds that the moving party has not made a case for review under Rule 44.

23 During the oral hearing, Board staff agreed that the Board has wide latitude in relation to reviews, under both Rule 43 and Rule 44. However, in the case of an applicant-driven motion to review, it is not sufficient to simply reargue the case, or to argue that a different outcome might have been preferred. The moving party must show that the decision at issue is incorrect in an identifiable, relevant and material way.

24 This panel acknowledges that the scope of the Board's power to review is broad, but remains of the view that a motion to review must raise a question as to the correctness of the decision at issue. The Board has previously indicated, in the NGEIR Motions Decision and in the Notice and PO, that the grounds for review set out in **Rule 44.01** are not exhaustive. It may be that the emergence of previously unknown or unforeseen implications of a decision could be considered a ground for review. However, in the circumstances of this case this panel does not need to decide that issue given the findings below.

***2. The Section 71 Issue***

*a. Introduction*

25 Hydro One's Notice of Motion raised the following grounds for review in relation to the Section 71 Issue:

**Ontario Energy Board**

# Report of the Board

## on Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors

December 20, 2006

### 2.1.2 Equity Component

***Policy and Rationale***

The Board has determined that distribution rates shall reflect 40% **common equity. There will be no adjustment for a preferred share component of equity in rates, although distributors can, if they choose to do so, use preferred shares within their financing structure**.

***Issues and Options Raised in Consultations***

One distributor suggested that preferred shares be treated as debt, so that the deemed capital structure would be 40% common equity, up to 4% preferred shares, and the remainder as long- and short-term debt. It was argued that common and preferred shares are different.

The Board is of the view that while common and preferred shares differ, preferred shares and debt also differ. The Board is not persuaded that preferred shares should be treated as debt in the deemed capital structure for ratemaking purposes. The fact that there is no requirement for the actual debt and equity structure of a distributor to match the deemed amount in rates means that distributors can use preferred shares at their discretion.

## 2.2 Debt Rates

### 2.2.1 Long-term debt

Long-term debt is a major component of a distributor's capital structure. As noted previously, for ratemaking purposes the term of the debt should be assumed to be compatible with the life of the asset. With electricity distributors, the asset life can

extend beyond 30 years. Typically, debt is incurred at the time when assets are put in service and the cost of that debt is at the prevailing market rate. This means that a distributor may be holding long-term debt at rates that differ according to when the debt was incurred. This is often called "embedded debt."

In Ontario, distributors have two main sources of debt financing: affiliates (including owners); and third parties, such as commercial banks.

***Policy and Rationale***

For rate-making purposes, the Board considers it appropriate that further distinctions be made between affiliated debt and third party debt, and between new and existing debt.

**The Board has determined that for embedded debt the rate approved in prior Board decisions shall be maintained for the life of each active instrument, unless a new rate is negotiated, in which case it will be treated as new debt.**

**The Board has determined that the rate for new debt that is held by a third party will be the prudently negotiated contracted rate. This would include recognition of premiums and discounts.**

**For new affiliated debt, the Board has determined that the allowed rate will be the lower of the contracted rate and the deemed long-term debt rate. This deemed long-term debt rate will be calculated as the Long Canada Bond Forecast plus an average spread with "A/BBB" rate corporate bond yields**. The Long Canada Bond Forecast is comprised of the 10-year Government of Canada bond yield forecast (*Consensus Forecast*) plus the actual spread between 10-year and 30-year bond yields observed in Bank of Canada data. The average spread with "A/BBB" rate corporate bond yields is calculated from the observed spread between Government of Canada Bonds and "A/BBB" corporate bond yield data of the same term from Scotia Capital Inc., both available from the Bank of Canada.

**For all variable-rate debt and for all affiliate debt that is callable on demand the Board will use the current deemed long-term debt rate**. When setting distribution rates at rebasing these debt rates will be adjusted regardless of whether the applicant makes a request for the change.

The deemed long-term rate will be calculated using data available three full months in advance of the effective date of the distribution rate change. The method that the Board will use to update this rate is detailed in Appendix A.

The approach to setting the rate for embedded debt at its prior approved rate is based on the fact that those rates have already been reviewed in previous cases and been determined to be appropriate.

The approach to setting the rate for new debt differs as between third party and affiliate lenders, so as to recognize that in affiliate transactions there is an opportunity for terms to be negotiated at less than “arm’s length”, which could result in less favourable terms and conditions. When a distributor is financed by a third party, however, it is expected that the distributor will obtain commercial terms and conditions, including market rates.

Distribution rates will be adjusted for embedded debt only when the distributor is rebased and only up to the maximum allowed by the approved capital structure and at the weighted average cost of the embedded debt. During the incentive period, deemed debt rates will remain unchanged.

***Issues and Options Raised in Consultations***

Dr. Lazar and Dr. Prisman proposed that the deemed long-term debt rate be determined as the riskless rate plus the average spread between a sample of “A/BBB” rated corporate bonds of 5, 10 and 20 year maturities and the corresponding Government of Canada bonds. The riskless rate would be approximated by averaging estimates of the

5-, 10- and 15-year zero-coupon Government of Canada bond yields from publicly available data (e.g. from the Bank of Canada).

A concern was expressed that the 5- 10- and 15-year zero-coupon bond yields do not adequately match the life of the distribution assets. Stakeholders suggested that the bond yields should include longer terms up to 30 years. The Lazar/Prisman proposal and the method that the Board has adopted do include 30-year bond yields in the calculation of the deemed long-term debt rate.

The Board is of the view that while the Lazar/Prisman method has merit, the approach is materially more complicated and is also unfamiliar to stakeholders. In addition, the current method produces a similar result to that which arises from the Lazar/Prisman method. Maintaining the current method provides continuity and consistency for distributors, and the Board concludes that there is no compelling reason to change the method for setting the deemed long-term debt rate.

### 2.2.2 Short-term debt

"Short-term debt" normally denotes demand notes or debt that has a term of one year or less. On November 28, 2006, the Board issued a letter communicating its approved method for calculating interest rates for regulatory accounts. This provides a method to compute a short-term rate which is acceptable for short term debt.

***Policy and Rationale***

**The Board has determined that the deemed short-term debt rate will be calculated as the average of the 3-month bankers' acceptance rate plus a fixed spread of 25 basis points.** This is consistent with the Board's method for accounting interest rates (i.e. short-term carrying cost treatment) for variance and deferral accounts. The Board will use the 3-month bankers' acceptance rate as published on the Bank of Canada's

website, for all business days of the same month as used for determining the deemed long-term debt rate and the ROE.

For the purposes of distribution rate-setting, the deemed short-term debt rate will be updated whenever a cost of service rate application is filed. The deemed short-term debt rate will be applied to the deemed short-term debt component of a distributor's rate base. Further, consistent with updating of the ROE and deemed long-term rate, the deemed short-term debt rate will be updated using data available three full months in advance of the effective date of the rates.

***Issues and Options Raised in Consultations***

The topic of short-term debt rates was subject to little comment due to the Board's separate process on interest rates to be applied to deferral and variance accounts. Any issues raised have been addressed as part of the Board's consideration of that issue.

## 2.3 Return on Equity

### 2.3.1 Return on Common Equity

The return on common equity compensates investors for the opportunity cost of providing share capital to a distribution business. The cost of that capital will vary with the perceived risk of the investment. In general, the rate of return to the investor should be appropriate to the risk of the distribution company compared to that in the market.

# Appendix A: Method to Update the Deemed Long-term Debt Rate

The Board will use the Long Canada Bond Forecast plus an average spread with "A/BBB" rated corporate bond yields to determine the updated deemed debt rate.

The following approach is consistent with the ROE method. As per the approach adopted in the 2006 EDRH, the ROE and the long-term debt rates are based on the same risk-free rate forecast. Therefore, they differ only through the risk premiums that reflect their distinct natures and for which lenders/investors seek commensurate returns. This approach simplifies the calculations and aims to make it easier to understand the numbers. Specifically, the Long Canada Bond Forecast ($LCBF_t$) used will be the same as that used for updating the ROE. The average spread between "A/BBB" rated corporate bond yields and 30-year (long) Government of Canada Bond yields will be calculated as the average spread over the weeks of the month corresponding to the Consensus Forecasts.

The deemed Long-Term Debt Rate ($LTDR_t$) will be calculated as follows:

$$LTDR_t = LCBF_t + \frac{\sum_w (CorpBonds_{w,t} - {}_{30}CB_{w,t})}{n}$$

Where:

- $CorpBonds_{w,t}$ is the average long-term corporate bond yield from Scotia Capital Inc. for week $w$ of period $t$ [Series V121761];
- ${}_{30}CB_{w,t}$ is the 30-year (long) Government of Canada bond yield for week $w$ of period $t$ [Series V121791]; and
- $n$ is the number of weeks in the month for which data are reported.

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Ontario

**BY E-MAIL AND WEB POSTING**

June 18, 2009

**To:** All Participants in Consultation Process EB-2009-0084
All Licensed Electricity Distributors
All Registered Intervenors in 2009 Cost of Service Proceedings
All Other Interested Stakeholders

**Re: Board Determination on the Cost of Capital Parameter Values for 2009 Cost of Service Applications and Notice of Consultation Process on Cost of Capital Review Board File No.: EB-2009-0084**

On February 24, 2009, the Ontario Energy Board (the "Board") issued a letter which set out its determination on the values for the Return on Equity ("ROE") and the deemed Long-Term and Short-Term debt rates for use in the 2009 rate year cost of service applications. These cost of capital parameter values were calculated based on the methodologies and formulae set out in the Board's December 20, 2006 "Report of the Board on Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors" (the "Methodology").

On March 16, 2009, the Board initiated a consultative process to help it to determine whether current economic and financial market conditions warrant an adjustment to any of the parameter values of the Methodology (i.e., the ROE, Long-Term debt rate, and Short-Term debt rate).

Interested stakeholders were invited to provide written comments on issues as identified by the Board. Comments were received from 18 interested stakeholders. Stakeholders' written comments are available on the Board's website.

## Board Determination

There was general agreement amongst stakeholders that economic conditions have had an impact on the variables used in the Methodology. Government of Canada long bond yields have declined while the cost of equity has risen.

However, not all stakeholders agreed that adjustments should be made to the parameter values. Stakeholders representing ratepayer groups acknowledged that the Long-Term debt rate was higher than might be otherwise be expected, but generally argued that the values announced in February are reasonable. The remaining stakeholders, representing rate-regulated companies or the financial

community, generally commented that adjustment should be made to both the ROE and the Short-Term debt rate. These stakeholders put forward a range of proposed parameter values, and varied in their views about how best to make any 2009-specific adjustments.

Although some parties expressed concern with the results from the application of the Methodology, others did not.

The Board is not persuaded that there is a sufficient basis to vary, in a timely manner, the 2009 parameter values for 2009 rates. Nevertheless, the Board is satisfied that further examination of its policy regarding the cost of capital is warranted to ensure that, on a going forward basis, changing economic and financial conditions are accommodated if required.

## Review of Policy Regarding Cost of Capital

The Board is therefore proceeding with a review of its policy regarding the cost of capital. It is anticipated that any changes to the policy made as a result of this review will apply to the setting of rates for the 2010 rate year.

*List of Issues*

The Board will prepare a list of the issues that will form the basis of its review. The list, which will be issued in due course, will be prepared taking into account the stakeholder comments received in response to the Board's March 16th letter and other information that the Board considers relevant. Interested stakeholders will be invited to file written comments identifying their views and positions on the listed issues.

*Stakeholder Conference September 21 to 25, 2009*

The consultation will also include a stakeholder conference to provide a forum for discussion on the issues identified by the Board. Participants will be provided with an opportunity to make presentations during the stakeholder conference.

The stakeholder conference will be held from September 21 to September 25, 2009 in the Board's West Hearing Room, 25th floor, 2300 Yonge Street, Toronto. The stakeholder conference will be attended by members of the Board who will subsequently report back to the full Board. The conference will be transcribed and will be webcast to allow remote participation.

Following the stakeholder conference, provision may be made for further written comment. Further details on this consultation process, including registration for and participation at the stakeholder conference, will follow shortly.

## Cost Awards

As noted in the Board's March 16th letter, cost awards will be available to eligible persons under section 30 of the *Ontario Energy Board Act, 1998* for their participation in this consultation. The costs awarded will be recovered from all rate-regulated licensed electricity distributors based on their respective distribution revenues.

Details regarding the process for filing requests for cost eligibility will be included in the separate communication setting out further details on this consultation process. Participants that were determined to be eligible for an award of costs as identified in the Board's April 14, 2009 Decision on Cost Eligibility need not file a further cost eligibility request.

An eligible participant that plans to retain an expert is asked to so advise the Board by letter by **July 6, 2009** in accordance with the filing instructions set out below. Cost awards will be available to eligible participants as follows:

| **Activity Eligible for Cost Awards** | **Total Eligible Hours per Eligible Participant** |
|---|---|
| For eligible participant: | |
| • Written comments addressing the issues identified by the Board; and | Up to 15 hours |
| • Preparation for, attendance at, and reporting on the stakeholder conference held September 21 to September 25, 2009 (up to 12 hours per day). | Up to 60 hours |
| • Further written comment (to be determined). | Up to 10 hours |
| For expert retained by eligible participant: | |
| • Expert advice to eligible participant; and | Up to 40 hours |
| • Participation at stakeholder conference (up to 12 hours per day). | Up to 60 hours |

*Instructions on Filing Material with the Board*

All filings in relation to this consultation must quote file number **EB-2009-0084** and include your name, address, telephone number and, where available, an e-mail address and fax number. Three paper copies and one electronic copy of each filing must be provided. Paper copies are to be addressed to the Board Secretary at the Board's mailing address set out above. The electronic copy must be in searchable/unrestricted PDF format, be submitted through the Board's web portal at www.errr.oeb.gov.on.ca and conform to the document naming conventions and document submission standards outlined in the RESS e-Filing Guides (available on the Board's website at www.oeb.gov.on.ca on the e-Filing Services web page). A user ID is required for filings through the web portal. If you do not have a user ID, please visit the Board's web site on the e-Filings Services web page and fill out a user ID password request. If the web portal is not available, the electronic copy may be submitted by e-mail to BoardSec@oeb.gov.on.ca. Participants that do not have internet access may file their electronic copy on diskette or CD.

Filings must be received by **4:45 pm** on the required date.

If you have any questions regarding this consultation, please contact Lisa Brickenden at 416-440-8113, or e-mail EDR@oeb.gov.on.ca. The Board's toll-free number is 1-888-632-6273, and the Market Operations Hotline is 416-440-7604.

Yours truly,

*original signed by*

Kirsten Walli
Board Secretary

*Re*

# Union Gas Ltd. and Ontario Energy Board et al.

[1983] O.J. No. 3191

43 O.R. (2d) 489

**1 D.L.R. (4th) 698**

22 A.C.W.S. (2d) 301

Ontario
High Court of Justice
Divisional Court
Steele, Anderson

**and Saunders JJ.**

November 1, 1983.

B. H. Kellock, Q.C., and B. MacL. Rogers, for appellant.

D. H. Rogers, Q.C., for respondent, Ontario Energy Board.

P. C. P. Thompson, Q.C., for respondent, Industrial Gas Users Association.

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The judgment of the court was delivered by

**1 ANDERSON J.**:-- This is a motion by Union Gas Limited (Union) for leave to appeal from the order of the Ontario Energy Board (the O.E.B.) issued May 13, 1983, and, if leave be granted, by way of appeal from the said order. The central question for decision is whether the O.E.B., in the course of its rate- making function, having disallowed the appellant an operating cost of which the quantum was not in dispute and the propriety was not in question, committed an error of law or jurisdiction such that this court should intervene on appeal. The provisions of the Ontario Energy Board Act, R.S.O. 1980, c. 332 (the Act), in so far as they are material are in the following terms:

> 32(1) An appeal lies to the Divisional Court from any order of the Board upon a question of law or jurisdiction, but no such appeal lies unless leave to appeal is obtained from the court within one month of the making of the order sought to be appealed from or within such further time as the court under the special circumstances of the case allows.
>
> (2) The Board is entitled to be heard by counsel or otherwise upon the argument of any such appeal.

(3) The Divisional Court shall certify its opinion to the Board and the Board shall make an order in accordance with such opinion, but in no case shall such order be retroactive in its effect.

Facts

**2** Union conducts an integrated gas utility business which combines the operations of producing, purchasing, transmitting and storing gas ("gas" as defined by s. 1(1), para. 6 of the Act). Union stores and transmits gas for others, sells gas to other utilities for resale and distributes gas to ultimate consumers in its franchise area in south-western Ontario.

**3** By application dated July 15, 1982, Union applied to the O.E.B. pursuant to s. 19 of the Act for, inter alia, an order approving or fixing just and reasonable rates and other charges for the sale of gas, and for the storage and transmission of gas for others; such rates to be effective on April 1, 1983, the commencement of Union's 1984 fiscal year.

**4** Union's application (given the docket No. E.B.R.O. 388) was supported by pre-filed evidence and by oral testimony and oral and written argument during the hearing. The hearing commenced December 13, 1982, and concluded February 18, 1983. The O.E.B.'s reasons for decision are dated April 22, 1983; the final order was issued May 13, 1983; and the rates thereby established became effective commencing April 22, 1983.

**5** In its decision and by its order, the O.E.B. excluded from the amount to be recovered by the rates fixed the sum of $8,693,000, representing a portion of the cost to Union of its gas supplies from Union's major supplier, TransCanada PipeLines Limited ("T.C.P.L."), during the test year (April 1, 1983 to March 31, 1984). The treatment of this item by the O.E.B. is the focal point of this application.

**6** Union seeks leave to appeal and, if granted, appeals from the O.E.B. order upon the grounds that the O.E.B. erred in law or exceeded its jurisdiction in purporting to fix just and reasonable rates which do not permit Union the opportunity of recovering through such rates $8,693,000 of Union's cost of gas supplies.

**7** The respondent, the O.E.B., exercises jurisdiction over, inter alia, the sale and distribution of gas to consumers, and the construction of facilities to distribute the gas. No distributor such as Union is permitted to sell gas except in accordance with an order of the O.E.B.

**8** A distributor desiring to sell gas is required to apply to the O.E.B. for a determination of just and reasonable rates. The O.E.B. is required to determine a rate base and a reasonable return, based upon the evidence adduced in a public hearing.

**9** In a rate application, the O.E.B. generally proceeds, as in the case at bar, by determining:

(a) the rate base;

(b) the appropriate rate of return on that rate base;

(c) the applicant's cost of service;

(d) the revenue deficiency (or revenue surplus), and

(e) the appropriate rate increases (or decreases) for each customer class required to meet the deficiency (or surplus).

**10** Accordingly, in each rate application the applicant utility structures the evidence filed in support of the application so as to permit the O.E.B. to determine the appropriate rate base and the appropriate cost rates for each element of the capital structure used to finance the rate base, the utility's cost of service and, finally, the amount of the revenue deficiency (if any) that existing rates would produce if they were not altered. These amounts are estimated and determined by the O.E.B. for the period covered by the application, a future "test year" during which the rates to be fixed will be in force.

**11** Traditionally, the O.E.B., and most other utility regulators, have set rates based upon an historic "test year" utilizing actual results for a past period.

**12** Recently, and in E.B.R.O. 388, some regulated utilities have chosen to seek rates based on a future test year. This requires forecasts or predictions of future conditions.

**13** The future test year approach has been accepted by the O.E.B. as appropriate in specific cases. While the approach has certain advantages in times of rising costs, it does require the application of extensive judgment in all areas and increases the uncertainties involved.

**14** The rate base is simply the depreciated cost to the utility of Union's property (plant and equipment) "used or useful" in serving the public, e.g., pipelines, compressors, trucks and typewriters, together with allowances for such items as working capital.

**15** As Union has investments in unregulated activities (e.g., the development of oil and gas in western Canada), the O.E.B. must determine an appropriate capital structure for the utility operation alone that includes long-term debt, preference shares, common equity capital and short-term borrowings.

**16** The O.E.B. then determines the appropriate cost rates for the test year for each component of the capital structure, i.e., long-term and short-term debt, preference shares and common equity.

**17** The utility's revenue requirement, which is made up of two components, its total operating costs and an appropriate return on rate base, represents the utility's cost of service for the test year. Operating costs include the cost of gas supplies, pay-roll costs, depreciation and taxes.

**18** The revenue deficiency (if any) is calculated by comparing the total cost of service to the total estimated revenues. For this purpose, the rates in effect prior to the application are applied to the estimated volume of gas sales in the test year. The shortfall (if any) is termed the "revenue deficiency".

**19** The last step in the process is the determination by the O.E.B. of the specific alterations to be made in the utility's rate structure so as to provide the utility with the opportunity over the test year to collect sufficient revenues from all classes of customers sufficient to cover the revenue deficiency. The O.E.B. then determines the appropriate rates for each class of customer.

**20** Union receives more than 96% of its gas supply from T.C.P.L. in accordance with Union's contractual commitments and T.C.P.L.'s tariffs. The remaining amount is supplied by independent producers and Union's own gas wells in south-western Ontario, and by Petrosar in Sarnia, Ontario. T.C.P.L. delivers its gas from western Canada through its own pipelines to Union and other utilities in accordance with rate schedules approved by the National Energy Board ("N.E.B.").

**21** Gas is purchased by Union from T.C.P.L. under three classes of service permitted by the N.E.B.: CD (Contract Demand), ACQ (Annual Contract Quantity) and AOI (Authorized Overrun Interruptible). CD and ACQ services are supplied pursuant to long-term contracts between Union and T.C.P.L. Approximately one-half of the contracted-for gas is purchased under six CD contracts. The other half is purchased under three ACQ contracts. AOI service is only available from time to time upon short notice and, therefore, cannot be relied upon for long- term gas supply.

**22** Under CD service, the delivery of a specific quantity of gas, on a daily basis, is guaranteed by T.C.P.L. For this, Union must pay both demand and commodity charges. The demand charges must be paid on a monthly basis, whether or not the quantity of gas contracted for is actually taken. The demand charges represent the minimum monthly bill. In essence, the demand charges are a reservation fee to ensure a constant and secure supply of gas and are intended to recoup T.C.P.L.'s fixed costs for the CD service contracted for, recognizing that T.C.P.L. must have continually available the facilities that are necessary to deliver CD service gas on a daily basis. In addition, commodity charges are payable for the quantity of gas actually taken by Union in any particular month under the CD service contracts. Therefore, unlike the demand charges, commodity charges will vary directly with actual volumes delivered. Since the quantities guaranteed for delivery are fixed by contract, demand charges will remain constant for the period of the contract, except for changes in T.C.P.L.'s tariffs.

**23** ACQ service is the lowest price supply service available to Union from T.C.P.L. While the price of ACQ service is lower than CD service, ACQ is offered on an interruptible basis. Union is required to pay the full cost of the annual quantities of gas contracted for, whether or not Union can accept delivery of such quantities. The quantity Union is committed to take annually (and T.C.P.L. to supply) can be reduced by no more than 10% in any year, and then only if 18 months' prior notice is given by Union to T.C.P.L. Because of the interruptible nature of ACQ service, a great deal of storage capacity is required.

**24** AOI service is available only when T.C.P.L. has a surplus of both gas and delivery capacity, and is offered in specific quantities and on short notice.

**25** Union has been able in the past to take full levels of both ACQ and CD service. By taking CD service at "100% load factor", or the full contracted quantity, the demand charge component of the price for this gas has been spread over the maximum volume (or units) of gas. This reduces the unit cost of CD service gas and keeps it close to that of ACQ service gas. All of the demand charges are said to be fully "absorbed" when CD service gas is purchased at 100% load factor. "Unabsorbed demand charges" occur whenever a utility is unable to take the full volumes that have been contracted for.

**26** As a gas utility, Union must meet customers' requirements while keeping gas costs as low as possible. Union must therefore enter into long-term contracts (20 years or more) that commit Union to purchasing specific quantities of gas over many years. When an unexpected and temporary economic downturn causes the demand for gas to fall, Union can maximize its use of storage capacity or cut back the quantity of CD service taken.

**27** Union must, looking into the future, make a determination of its gas supply strategy by assessing many different factors. These include maximum and optimum storage levels, anticipated future increases in the price of gas, anticipated gas sales in the future and effect of CD service cutbacks on the price of gas for contract customers with price escalation provisions in their contracts with Union. These and other factors must be predicted for some time in the future and all but the volume of gas kept in storage are out of Union's control.

**28** Whatever strategy is finally determined, an economic downturn causes the unit cost of gas to Union to increase. When the quantity of gas contracted for exceeds the quantities that can be sold, increased carrying costs of gas in storage or demand charges for the CD service that are no longer spread over the full quantities contracted for, or both, will be incurred.

**29** Union's gas sales volumes fell substantially in fiscal year 1983 (April 1, 1982 to March 31, 1983) from those forecast in O.E.B. rate case E.B.R.O. 382 (which fixed rates for that year). The pre-filed evidence in E.B.R.O. 388 reflected an estimated reduction in sales from the E.B.R.O. 382 forecast. This estimate was revised twice before the final estimate was filed. The final sales volume estimates filed in E.B.R.O. 388 likewise indicated substantially reduced sales. Sales in fiscal year 1985 were also forecast to decrease. The provisions of Union's long-term contracts with T.C.P.L. combined with reduction in sales produced a substantial gas supply surplus. The decision was made by Union in 1982 to maximize the use of storage and thereby to reduce CD service. This almost totally used Union's storage capacity but was of benefit to Union by minimizing the unit cost of gas. A cut-back in the CD service was forecast for the E.B.R.O. 388 test year (1984). The reductions in sales meant that in the test year 1984 the cost of gas would be $8,693,000 more than if the CD service was continued at 100% load factor. This amount, described as unabsorbed demand charges, is a direct cost of gas to Union in the test year 1984.

**30** As to the return to common shareholders, the board had the evidence of three expert witnesses. The lowest estimate was given by the witness Parcell, in whose opinion a range of 15% to 16% represented the cost of equity capital for Union Gas' utility operations. The O.E.B. found a rate of 15.6% to be appropriate. The O.E.B. then determined the appropriate revenue deficiency for the purpose of fixing the rates.

Issues and law

**31** The rate-making jurisdiction of the O.E.B. is found in s. 19 of the Act which, in so far as material to these proceedings, is in the following terms:

> 19(1) Subject to the regulations, the Board may make orders approving or fixing just and reasonable rates and other charges for the sale of gas by transmitters, distributors and storage companies, and for the transmission, distribution and storage of gas.
>
> (2) In approving or fixing rates and other charges under subsection (1), the Board shall determine a rate base for the transmitter, distributor or storage company, and shall determine whether the return on the rate base produced or to be produced by such rates and other charges is reasonable.
>
> (3) The rate base to be determined by the Board under subsection (2) shall be the total of,

(a) a reasonable allowance for the cost of the property that is used or useful in serving the public, less an amount considered adequate by the Board for depreciation, amortization and depletion;

(b) a reasonable allowance for working capital; and

(c) such other amounts as, in the opinion of the Board, ought to be included.

(4) In determining the reasonable allowance for the cost of the property under clause (3)(a), the Board shall ascertain the actual cost of the property to the present owner, but,

(a) where the actual cost to the present owner of any of the property cannot be ascertained, the Board shall determine a reasonable allowance to be included in the rate base for the cost of that property; and

(b) where in the opinion of the Board the actual cost to the present owner of any of the property is more than a reasonable allowance for inclusion in the rate base for the cost of that property, the Board shall determine a reasonable allowance to be included in the rate base for the cost of that property.

(5) In considering whether the actual cost mentioned in subsection (4) exceeds a reasonable allowance for inclusion in the rate base and in determining the appropriate deductions to be made in respect of any such excess, the Board may consider all matters it considers relevant, including the public benefit resulting from the acquisition of the property, whether the acquisition at the price paid was prudent in the circumstances existing at the time and, where the property was acquired as an operating system or part thereof, the allowance made for its cost in the rate base of the former owner or, if no such rate base had been determined that included an allowance for the cost thereof, the allowance that would have been made therefor in a rate base for the former owner determined in accordance with this section.

(6) Findings of fact on which determinations are made by the Board under subsections (2), (3), (4) and (5) shall be based on the evidence adduced at the hearing.

**32** The phrases "just and reasonable" or "fair and reasonable", "rate base" and "used or useful" have been employed to describe the principles and methodology to be used by public utility boards and commissions in fixing public utility rates in the United States and Canada for many years. See, for example, Northwestern Utilities, Ltd. v. City of Edmonton et al., [1929] S.C.R. 186, [1929] 2 D.L.R. 4, per Lamont J. at pp. 192-3 S.C.R., p. 8 D.L.R.:

> The duty of the Board was to fix fair and reasonable rates; rates which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested. By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise (which will be net to the company) as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise.

**33** In support of its motion for leave and if appeal be granted, in support of its appeal, the appellant makes the following submissions:

(1) In order to be just and reasonable, the rates fixed must:

(a) cover the utility's operating cost, and

(b) provide appropriate compensation to the owners of the utility over and above the cost of providing the service.

(2) That the Act does not provide the O.E.B. with authority or jurisdiction to act as manager of the appellant's utility operation, to determine its operating costs arbitrarily, or to exercise an unlimited discretion.

(3) That the result of the O.E.B. decision is to deprive Union of its property without adequate compensation, in contravention of the language and intent of the Act.

(4) That once the appellant's gas purchase decisions have been found to be reasonable, it follows, a fortiori, that the purchase price of such gas must be found to be a reasonable operating expense and must be included in the calculation of the rates to be fixed and recoverable by the appellant.

**34** The position of the respondent O.E.B. with which the other respondent associated itself, is that no issue of law or jurisdiction is involved. The respondent submits that:

(a) the O.E.B. is given wide powers and broad discretion to fix rates which in its opinion are "just and reasonable";

(b) that the determination of the cost of service is not strictly an issue of law or jurisdiction and is a matter in which the court should not substitute its opinion for that of the board;

(c) that in determining rates which are just and reasonable the O.E.B. should balance the interest of the customers (ratepayers) and those of the owners (shareholders);

(d) that the O.E.B. should consider the conflicting interests of present and future customers.

**35** In the oral argument two principal areas of difference emerged.

**36** The respondents contended that the decisions taken by the appellant to continue in fiscal year 1983 to fulfil its CD contracts and to use its storage facilities to the greatest extent possible had the effect of avoiding, for that period, unabsorbed demand charges which would otherwise have been a charge to the shareholders. It was further contended that, if the unabsorbed demand charges which resulted in the test year were allowed in full, they would operate to the detriment of customers of the utility during that year. They submitted that the disposition by the board of the over-supply problem and the disallowance of the unabsorbed demand charges represented a sharing of the latter between the shareholders and the customers of the utility, and that it was within the due and proper discretion of the O.E.B. to effect such a sharing in those circumstances.

**37** On these points, counsel for the appellant first submitted that Union's decision to follow the course which it did follow with respect to the over-supply problem was a legitimate management technique as to which no adverse finding was made by the O.E.B. He further submitted that the O.E.B. had no discretion or jurisdiction to effect such a sharing as to an operating cost. He submitted that, in the instant case, such sharing had the effect of reducing the return on equity from 15.6%, which on the evidence the O.E.B. had found to be appropriate, to 13.75%, which, he submitted, found no support on the evidence.

**38** The arguments of counsel for the respondents may be related to concerns expressed by the O.E.B. in its reasons for decision:

> The treatment to be accorded the volume of gas in storage was one of the main issues in this hearing. As outlined later in the gas sales forecast section of these Reasons for Decision, the Company found itself in an acute gas over- supply position. However, Union proposed that only a part of the excess gas be included in inventory and consequently in rate base and that the remainder, valued at $52 million, be segregated in the capital structure as a "special assignment". As well, Union also forecasted a test year cut- back in the Contract Demand ("CD") gas supply contract of 372 106m3 which would result in unabsorbed demand charges of $8.693 million and which the Company proposed be included in its cost of gas for the test year. As the unabsorbed demand charges also result from the gas over-supply situation, the Board will include discussion

of these proposals together with the excess gas in storage, in this section. The special assignment however, is discussed under its own heading in these Reasons for Decision.

IGUA submitted that the total value of the over-supply ought to be excluded from rate base, but the cost of financing it ought to be included in the utility's cost of service for the test year and distributed on a demand rather than a commodity basis. Mr. Thompson submitted that the rate base for the test year as put forward by Union reflects this abnormally and unacceptably high level of gas in storage and a reduction ought to be made to reflect normal conditions.

Mr. Thompson estimated that the value of the excess gas in storage was approximately $100 million and he argued that Union's ratebase ought to be reduced by that amount and the cost of service should be increased by $12 million to provide for the cost of carrying that $100 million worth of excess gas.

Mr. Kawalec in his argument took issue with Union's entire proposal to charge its customers the excess carrying costs. He submitted that:

"The Board [should] not bail out Union on every excess supply problem. One Petrosar is enough. This problem should rightfully reach the shareholders, and they can hold management accountable for this excess gas supply."

Board Counsel submitted that Union, in attempting to alleviate the drastic over-supply problem in the 1983 fiscal year and the test year took the following steps:

1. deferred 122 106m3 of Annual Contract Quantity ("ACQ") purchases from the 1983 fiscal year to the test year, and then the same amount from the test year to the 1985 fiscal year;
2. curtailed 219 106m3 of ACQ purchases in the test year;
3. curtailed the purchases of ACQ gas by a further 10% in the test year;
4. reduced volumes for its short-term storage customers in the test year by 230 106m3 and increased its long-term storage volumes by 88 106m3; and
5. agreed with Consumers' that 77 106m3 of ACQ deliveries would be delayed from the 1983 fiscal year to the test year.

Board Counsel submitted that Union was transferring 198 106m3 of gas from the 1983 fiscal year to the test year. The major reason for this he submitted, was that if a CD curtailment had taken place during the 1983 fiscal year, Union's shareholders would have absorbed the total cost but if the curtailment were to take place during the test year as Union proposed, the cost would be transferred to customers in the test year.

Mr. Rogers also argued that the deferral of the 122 106m3 of ACQ gas from 1983 to 1984 and then subsequently to 1985, effectively denied the 1984 customers a benefit by removing a potential deferral and using that deferral for excess 1983 volumes. Thus, he argued, the customers in the test year are really being asked to pay for gas costs that should properly be assigned to the 1983 fiscal year. He submitted that:

"Union has endeavoured to manage its gas supply picture so as to maximize the shareholder benefit first and then to the extent it's still possible pass some benefit to the customer. This clearly is not considered appropriate."

Mr. Kellock argued that no portion of legitimate gas costs should be disallowed without evidence of "fault, bad faith, negligence or abuse of discretion." He pointed out that Union was "not

in possession of a crystal ball" and could not have altered its gas supply arrangements so as to produce a lower level of costs than that claimed. He contended that cut-backs in CD deliveries must be made over the next two years and the claimed cut-back of 372 106m3 for the test year is unavoidable. Such cut-backs are common to all three major gas utilities in Ontario, he said.

In regard to Mr. Rogers' argument about the lowering of the proposed test year cut-back to account for the fact that there should have been a cut-back in 1983, Mr. Kellock pointed out that as the ACQ deferral from 1983 is actually passed through to 1985 it does not have any effect on the test year. He said that the Consumers' arrangements in regard to storage delivery were made for Consumers' benefit and had no impact on the need for a CD cut-back in 1983. He also argued that the Consumers' short-term storage arrangements in 1983 had no impact on the level of the CD cut-back in 1984 since a like amount has been subsequently deferred through to the 1985 fiscal year. As well, he pointed out that an unscheduled cut-back in 1983 would have an adverse impact on Union's customers which have price escalations in their supply contracts.

The Board in examining the evidence is concerned about the carry-over of excess gas from the 1983 fiscal year to the test year. Mr. Kellock argued that: "because of the success of Union's negotiations with TCPL, it became evident that no cut-backs were needed for fiscal year 1983." This he pointed out, saved a further erosion in sale volumes which would have resulted from a price increase caused by the pass-through of unabsorbed demand charges to the contracts with price escalation.

There is no doubt that these points are valid reasons why a cut-back should not have taken place in the 1983 fiscal year. Union has testified that in the circumstances, storing the excess gas and paying the extra carrying cost was preferable to a cut-back.

The Board's concern is that by so doing Union has forced the cost of cut-backs on its 1984 customers. By putting the excess gas during fiscal 1983 into storage, Union has effectively reduced the storage space for any excess gas in 1984 and as the rates for 1983 were set a year ago, and did not take into account that excess, part of the cost of the excess gas should be borne by Union's shareholders. If the opposite had been the case and Union had sold more gas than was forecast when the rates were set, that extra revenue would have belonged to the shareholders and for that reason Union must bear some of the costs associated with the downturn in gas sales.

In so far as the argument was made that the CD contracts are essential, primarily for security of supply and that security of supply is a cost responsibility of customers, the Board is of the opinion that although security of supply is vital to Union's customers, it is also vital to its shareholders. Risk of an economic downturn is a risk that rests on Union's shareholders and they are compensated for it in the return on common equity.

Mr. Black's evidence was that in Union's last rate case there was available 376.1 106m3 of extra storage space and as well, a total of 330 106m3 of Authorized Overrun Interruptible ("AOI") gas which could be cancelled without notice. This amounted to a total "downside coverage" of 706.1 106m3 for the fiscal years 1983 and 1984. The ultimate result however was that Union, although it covered a large part of its sales downturn, did not do so without considerable cost. As stated earlier, Union's shareholders must bear part of the cost of the over-supply because of the sales downturn in 1983 for which the 1984 customers are not responsible.

The Board will therefore allow in rate base the value of the gas in inventory as proposed by Union save and except the value of the special assignment and will also disallow all forecasted unabsorbed demand charges.

**39** It was basic to the submissions on behalf of both respondents that the rate-making process is an involved and technical one as to which the O.E.B. has special expertise. The hearing was lengthy and the reasons of the O.E.B. detailed and voluminous. The relevant textbooks and authorities are replete with admonitions that a court should be reluctant to interfere with the dispositions of such tribunals, and should do so only in circumstances which clearly require it. See, for example, Re Western Ontario Credit Corp. Ltd. and Ontario Securities Com'n (1975), 9 O.R. (2d) 93, 59 D.L.R. (3d) 501, where, at p. 103 O.R., p. 511 D.L.R., Hughes J. has this to say:

> ... where a regulatory tribunal, acting within its jurisdiction, makes an order in the public interest with the experience and understanding of what that interest consists of in a specialized field accumulated over many years, the Court will be especially loath to interfere.

It is with such admonitions as that in mind that I approach the disposition of this case.

**40** By way of general observation, it may also be said that in the field of law with which this case is concerned there are substantial similarities between the situation here and in the United States, and authorities of courts in the United States are frequently referred to and considered in cases of this kind. In the case at bar, reference was made by counsel for all parties to both textbooks and cases originating in the United States.

**41** As general background in considering the rate-making function performed by the O.E.B. it is useful to consider a quotation from Principles of Public Utility Regulation by A.J.G. Priest. At p. 4, the learned author quotes a speaker on this subject in the following terms:

> "In the United States, private enterprise operates a larger share of these vital industries than in almost any other country because of our balanced system of regulation by public authority. This system is designed to protect consumers against exploitation where competition is inherently unavailable or inadequate, and to ensure that these industries will serve the public interest. At the same time it provides these companies necessary assurance of an opportunity to earn a reasonable return on their investment and to attract capital for expansion."

Put another way, it is the function of the O.E.B. to balance the interest of the appellant in earning the highest possible return on the operation of its enterprise (a monopoly) with the conflicting interest of its customers to be served as cheaply as possible.

**42** That in balancing these conflicting interests and determining rates that are just and reasonable the O.E.B. has a wide discretion, is not in issue or in doubt. Findings of fact upon which its determinations under s-ss. (2), (3), (4) and (5) of s. 19 of the Act are made are required by s-s. (6) to be based on the evidence adduced at the hearing. In the exercise of that discretion and subject to that requirement, for the purpose of determining a rate base, the O.E.B. can fix a reasonable allowance for the cost of the property that is "used or useful" in providing service, a reasonable allowance for working capital and such other amounts as, in its opinion, are fit to be included. In the instant case, for example, it adjusted, determined, and allowed amounts for gas in storage and working capital. It declined to allow a change in accounting policy as applied to capitalization of overhead expenses. It approved a capital structure including long-term debt, short-term debt, preference shares and equity. In this context, it allowed a "special assignment" of $52 million for gas in storage. Likewise, in determining cost of service, the O.E.B. has a wide discretion as to what will be included and in what amount. It can apportion common costs as between utility and non-utility operations.

**43** Looking at the obligation of the O.E.B. to have regard for the interests of the appellant, the O.E.B. is under an obligation to approve rates which will produce a fair return. In British Columbia Electric R. Co. Ltd. v. Public Utilities Com'n of British Columbia et al., [1960] S.C.R. 837, 25 D.L.R. (2d) 689, 33 W.W.R. 97, Locke J. says, at p. 848 S.C.R., p. 698 D.L.R.:

> The obligation to approve rates which will produce the fair return to which the utility has been found entitled is, in my opinion, absolute ... The Commission is directed by s. 16(1) (a) to consider all matters which it deems proper as affecting the rate but that consideration is to be given in the light of the fact that the obligation to approve rates which will give a fair and reasonable return is absolute.

**44** The question of what is a fair return is addressed in North- western Utilities, Ltd. v. City of Edmonton et al., [1929] S.C.R. 186, [1929] 2 D.L.R. 4, where, at p. 193 S.C.R., p. 8 D.L.R., is found the following language in the judgment of Lamont J.:

> By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise (which will be net to the company) as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise.

(Emphasis added.) The provision of the fair return is essential to preservation of the financial integrity of the appellant which is of mutual concern both to the appellant and to its customers.

**45** The relatively narrow question presented by the appellant for determination by this court concerns the disallowance of the $8,693,000 of unabsorbed demand charges which were forecast for the test year and whether such disallowance was a question of law or jurisdiction such as to give rise to a right of appeal under s. 32 of the Act.

**46** I am not satisfied that the item of $8,693,000 can be dealt with thus in isolation. It was not so dealt with by the O.E.B.

**47** It is apparent from the reasons for decision, and in particular the portions quoted above, that the O.E.B. dealt with this item as part of its consideration of the whole question of over-supply of gas. This included its treatment of gas in storage as well as the disputed item. It is only fair to conclude that its disposition of the problem of gas in storage, necessary in determination of the rate base, and as to which no sound objection could be taken, was related to and conditioned by its concomitant disposition of the disputed item.

**48** The O.E.B. has a wide discretion as has already been observed to allow, disallow or adjust the components of both rate base and expense. It may not, in the exercise of its discretion, be arbitrary or capricious in either area. It therefore ought not, as a general rule, to disallow an item of expense which will be properly incurred by the utility.

**49** I am not persuaded that it did so in this case. Considered as one factor in dealing with the whole problem of over-supply of gas, it cannot be said that the disallowance was arbitrary or capricious. In my view, it did not involve any reversible error of law or jurisdiction.

**50** At the same time, the appeal does raise a question of law or jurisdiction as to which leave ought properly to be granted.

**51** I would grant leave but dismiss the appeal. I would give the respondent I.G.U.A. its costs and make no other order as to costs.

Leave to appeal granted; appeal dismissed.

# British Columbia Hydro and Power Authority (appellant)
# v.
# Westcoast Transmission Company Limited, British Columbia Petroleum Corporation, Inland Natural Gas Co. Ltd., Peace River Transmission Company Limited, Canadian Petroleum Association, Amoco Canada Petroleum Company Ltd., Dome Petroleum Limited, Mobil Oil Canada, Ltd., Pan-Alberta Gas Ltd., PanCanadian Petroleum Limited, Shell Canada Resources Limited, Canada Cement Lafarge Ltd., Cominco Ltd., Consumers Glass Company, Limited, Domglas Ltd., Council of Forest Industries of British Columbia, Dow Chemical of Canada, Limited, Hiram Walker & Sons Ltd., Independent Petroleum Association of Canada, Union of British Columbia Indian Chiefs, Foothills Pipe Lines (South Yukon) Ltd., Foothills Pipe Lines (Yukon) Ltd., TransCanada PipeLines Limited, Alberta Petroleum Marketing Commission, Attorney General of British Columbia, Greater Kamloops Chamber of Commerce, and Fort Nelson Gas Limited (respondents)

**[1981] 2 F.C. 646**

Action Nos. A-66-80 (A-625-79), A-67-80 (A-285-78) and A-68-80

(A-665-78)

Federal Court of Canada
COURT OF APPEAL

**THURLOW C.J., PRATTE AND URIE JJ.**

VANCOUVER, OCTOBER 7, 8, 9, 10, 14, 15, 16 AND 17, 1980;
OTTAWA, JANUARY 19, 1981.

*Judicial review -- Applications to review and set aside three decisions of the National Energy Board -- Also, appeals under s. 18 of the National Energy Board Act attacking said decisions -- Decisions made on application by Westcoast Transmission Co. Ltd. for an order giving effect to tolls for gas sold by Westcoast -- First decision requiring Westcoast to adopt normalization method of accounting for taxes and to provide for "catch-up" of deferred taxes in its cost of service -- Second decision upholding normalization but rescinding requirement in respect of "catch-up" -- Third decision dealing with inter alia rate of return and rate base -- Final decision and order of Board to the effect that tolls proposed*

*by Westcoast are just and reasonable -- Whether Board erred in law and whether its order should be set aside with respect to items such as normalization, rate of return, rate base, depreciation, looping and interested party status -- National Energy Board Act, R.S.C. 1970, c. N-6, as amended, ss. 2, 11, 17(1), 18, 50, 51, 52, 53, 54, 61 -- Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, ss. 28, 29 -- Sale of Goods Act, R.S.B.C. 1979, c. 370, s. 23(6).*

These are appeals under section 18 of the National Energy Board Act (the Act) and applications for judicial review against decisions of the National Energy Board dated May 1978, November 1978 and September 1979. The three decisions were all made on an application by Westcoast Transmission Co. Ltd. for an order under sections 50 and 53 of the Act giving effect to tolls which Westcoast proposed to charge for gas produced in British Columbia and sold to its B.C. and export customers, and disallowing any tolls and tariffs then in effect which were inconsistent with the new tolls and tariffs. These joint proceedings were heard along with appeals and applications for judicial review attacking all or some of the said decisions and commenced by Cominco Ltd. et al., by British Columbia Petroleum Corporation (BCPC) and by Westcoast. The May 1978 decision (Phase I decision) required Westcoast to change to the normalized method of accounting for corporate income taxes when the new rates came into effect and to provide for "catch-up" of deferred income taxes in its cost of service. The November 1978 decision (review decision) made pursuant to section 17(1) of the Act upheld the Phase I decision regarding normalization but rescinded the requirement respecting "catch-up" of deferred taxes. In its September 1979 final decision the Board dealt with inter alia rate base and rate of return and held that the tolls proposed by Westcoast were just and reasonable and based its order thereon. The parties argue with respect to the items set out below that the Board erred in law and consequently, that its final order should be set aside.

(1) Normalization: Appellants submit that the normalization method is inappropriate and that its use would work injustice to present day utility customers. They further submit that the Board's finding that crossover will occur in 1983 or 1984, or earlier, is an erroneous finding of fact and that they should have been afforded an opportunity to offer evidence regarding the denial of Westcoast's looping application that the review panel took into account.

(2) Rate of return: Appellants argue that the rate of return was based on a consideration of risk that included the risk involved in the unregulated operations of Westcoast subsidiaries and that the ratio adopted as a fair return on common equity and the equity ratio were too high.

(3) Rate base: British Columbia Hydro argues that by its decision respecting rate base, the Board left it to Westcoast to increase the rate base by whatever it expends for construction, thus denying the users any right to review these expenditures and that it included in rate base amounts not used nor useful to provide service to utility customers. BCPC argues that the Board's decision to permit Westcoast to include as an element of working capital its investment in line pack gas is contrary to section 52 of the Act, as it permits Westcoast to earn a return where no proper investment has been made.

(4) Depreciation: BCPC argues that the Board's decision to allow Westcoast to accelerate depreciation now, discriminates against current customers and fails to take into account the matching principle of costs and revenues, while considering the level of depreciation at some future time, an irrelevant consideration.

(5) Looping: BCPC argues that the inclusion of the cost of service chargeable to BCPC of certain costs pertaining to the looping of a section of the main transmission line results in unjust unreasonable tolls.

(6) Interested party status: It was submitted on behalf of Cominco Ltd. et al. that the Board erred in law in not including them in its final order, among the parties who were accorded "interested party status" in matters related to Westcoast's tolls subsequent to the hearing.

Held, the appeals and applications for judicial review are dismissed.

(1) Normalization: The question whether the normalization method is appropriate and whether it should be followed by Westcoast and whether its use amounts to injustice are not questions of law or of jurisdiction. It is wrong for the Court to attempt to treat the accounting principles involved in that method as if they were principles of law and to attempt to deal with them as such. While the paragraph of the review decision dealing with the occurrence of crossover is inaccurate and wrong, it does not follow that the Board's decision is based on a finding that "crossover", in the defined sense, will occur sometime in 1983 or 1984. It is based on the finding that it will occur: this is clear from the title of the chapter: "The Likelihood of Crossover and the Need for Consistency" and from the final paragraph of that chapter. With respect to the looping application, until the final decision was given and the formal order made, it was at all times open to the appellants to raise the matter before the Board, if it was considered to be of any significance.

(2) Rate of return: It was clearly within the jurisdiction of the Board to express an opinion of what would be a reasonable rate in respect of operations which are to be carried on in the future. It is not the function of this Court to reweigh the evidence and substitute its own opinion for that of the Board. Nor is there any reason to think that the Board was unaware of any applicable legal principle or that it misapplied any applicable legal principle.

(3) Rate base: With respect to B.C. Hydro's objections: Nothing in the National Energy Board Act requires the Board to fix a rate base in any particular way or to approve the amount of every item to be added to the rate base before it is so added. The fact that the method in this case includes provision for the addition to the rate base of additional capital expenditures even if not subject to prior scrutiny and approval of the Board, does not amount to an error of law. The test of the present use or usefulness of the items may be used. But there is no rule of law that such a test must be used or followed or that it is the only principle that can be applied. Pursuant to clause 16 of the contract under which BCPC supplies gas to Westcoast, the latter is required to pay for all the gas by the 25th of the month following the calendar month during which it was delivered to Westcoast. Furthermore, under clause 9 of the contract, the gas which Westcoast agrees to purchase is ascertained and appropriated to the contract when it is received into the Westcoast system and under section 23(6) of the Sale of Goods Act title to the gas passes to Westcoast. Westcoast thus has an investment in its line pack gas which may be properly included in its rate base.

(4) Depreciation: It was plainly open to the Board to require that the depreciation to be charged be related to the use that could be expected to be made of the pipeline during the remainder of its expected life. In reaching that conclusion, the interests of present and future customers are plainly relevant. The "matching principle" is not offended by depreciation charges being based on the anticipated use today in relation to anticipated use in some foreseeable future period.

(5) Looping: Plainly, the B.C. gas shares the benefit from the availability of the increased transmission capacity resulting from the looping and from not being obliged to share the former transmission capacity with the Alberta gas. Thus it is not contrary for the Board to treat the costs of the whole section as referable to the whole of the gas transmitted through it.

(6) Interested party status: There is nothing in the final order which prevents the parties in question from applying to the Board for recognition as interested parties for the purposes of Schedule A to the final order. In any event, their right to apply to the Board for relief is quite a different right from a right to require the Board to confer on them "interested party" status under its order.

**CASES JUDICIALLY CONSIDERED**

Referred to:
Northwestern Utilities Ltd. v. The City of Edmonton [1979] 1 S.C.R. 684
; Trans Mountain Pipe Line Co. Ltd. v. National
Energy Board [1979] 2 F.C. 118; Canadian Pacific Railway Co.
v. The Board of Trade of the City of Regina (1912) 45 S.C.R. 321
; Consumers' Association of Canada v. The Hydro-Electric
Power Commission of Ontario [No. 1] [1974] 1 F.C. 453.

Distinguished:
Canadian Pacific Railway Company v. Toronto Transportation
Commission [1930] A.C. 686; Re Consumers' Gas Co. and Public
Utilities Board (1971) 18 D.L.R. (3d) 749.

**COUNSEL:**

Gordon F. Henderson, Q.C., Y.A. George Hynna and David Duff for appellant British Columbia Hydro and Power Authority.
Gordon F. Henderson, Q.C., and Y.A. George Hynna for appellants Cominco Ltd. et al.
K.C. Mackenzie for respondent Attorney General of British Columbia.
P.G. Griffin for National Energy Board.
John McAlpine, Q.C. for respondent Westcoast Transmission Company Limited.
John W. Lutes for respondents Foothills Pipe Lines (South Yukon) Ltd. et al.
J.J.L. Hunter and D.G. Sanderson for respondent British Columbia Petroleum Corporation.

**SOLICITORS:**

Gowling & Henderson, Ottawa, for appellants British Columbia Hydro and Power Authority and Cominco Ltd. et al.
Guild, Yule, Schmitt, Lane, Sullivan & Finch, Vancouver, for respondent Attorney General of British Columbia.
P.G. Griffin, Ottawa, for National Energy Board.
McAlpine, Roberts & Poulus, Vancouver, for respondent Westcoast Transmission Company Limited.
Shrum, Liddle & Hebenton, Vancouver, for respondents Foothills Pipe Lines (South Yukon) Ltd. et al.
David & Company, Vancouver, for respondent British Columbia Petroleum Corporation.

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The following are the reasons for judgment rendered in English by

**1** **THURLOW C.J.**: These are appeals under section 18 of the National Energy Board Act, R.S.C. 1970, c. N-6, as amended and applications under section 28 of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10 against decisions of the National Energy Board dated May 1978, November 1978 and September 1979. By orders of this Court, dated February 25, 1980, the appeal and the section 28 application with respect to each decision were joined and it was directed that the joint proceedings be heard together and along with appeals and section 28 applications which attacked all or some of the same three decisions and which had been commenced by Cominco Ltd., Consumers Glass Company, Limited, Domglas Ltd. and Hiram Walker & Sons Ltd., by British Columbia Petroleum Corporation and by Westcoast Transmission Company Limited, for all of which proceedings a single case was to be prepared.

**2** At the hearing, for the sake of convenience, the Court heard argument first with respect to all the proceedings except those brought by Westcoast Transmission Company Limited and deferred the argument of those brought by that company until the argument of the others had been completed.

**3** The three decisions of the National Energy Board were all made on an application made by Westcoast Transmission Company Limited for an order or orders under sections 50 and 53 of National Energy Board Act giving effect to the tolls which Westcoast proposed in the application to charge for gas produced in British Columbia and sold by Westcoast to its B.C. and export customers and disallowing any tolls and tariffs then in effect which were inconsistent with the proposed new tolls and tariffs.

**4** Westcoast owns and operates a pipeline system for the collection, processing and transportation of natural gas which originates at various points in British Columbia, Alberta, the Northwest Territories and the Yukon. The pipeline system passes through British Columbia to the south and southwest to serve the Vancouver market area and connects at the international boundary at Huntingdon, British Columbia to Northwest Pipeline Corporation to allow for the export of natural gas to the U.S. The gas, after entering Westcoast's pipeline system, is moved to a plant where it is processed. It is then transmitted to and sold to customers. Westcoast also has substantial investments in subsidiaries which are not pipeline companies and whose operations are not subject to regulation under Part IV of the National Energy Board Act.

**5** The appellant, British Columbia Hydro and Power Authority (hereinafter referred to as B.C. Hydro), is one of the principal customers of Westcoast's pipeline operation. It purchases large quantities of natural gas which it distributes to residential, commercial and industrial customers in British Columbia, including the appellants, Cominco Ltd., Consumers Glass Company, Limited, Domglas Ltd., and Hiram Walker & Sons Ltd.

**6** The appellant, British Columbia Petroleum Corporation (hereinafter referred to as BCPC), is a British Columbia Crown corporation which purchases natural gas produced in British Columbia from the producers and sells it to Westcoast at a price which is computed by a formula and which is adversely affected by some of the elements included by the Board in the computation of the cost of service and rate base which the Board directed Westcoast to use.

**7** The Westcoast application used a cost of service, rate base -- rate of return approach to the derivation of the proposed rates and tolls. Under this approach, the forecasted total revenue from rates and tolls is intended to equal the forecasted cost of service, including a return on the rate base.

**8** In its decision of May 1978, the Board, after a hearing, dealt with the issues of the income tax and depreciation components of Westcoast's cost of service. The decision fixed the rates of depreciation to be used when the new tolls came into effect, required Westcoast to change over to the normalized method of accounting for corporate income taxes at the point in time when the new rates came into effect and to include normalized taxes in the cost of service for rate design purposes and further required Westcoast to provide for "catch-up" of deferred income taxes in its cost of service.

**9** The Board's decision of November 1978 was made on a review, under subsection 17(1) of the National Energy Board Act, of the May 1978 decision, basically on the same material as that on which the May 1978 decision was made. In its decision, the Board, after some thirty-four pages of reasons, concluded that it would be appropriate, in seeking to achieve just and reasonable tolls to be charged by Westcoast, to permit Westcoast to change to the normalized method of income tax accounting and to recover normalized income taxes on a current basis in its cost of service and in that respect did not vary the earlier decision. It did, however, vary the decision by rescinding the requirement that Westcoast provide for "catching up" and recover past deferred taxes in its cost of service.

**10** In its third decision, that of September 1979, the Board, following a further hearing, in lengthy reasons dealt with the remaining issues arising on Westcoast's application, including those relating to the rate base and rate of return, and embodied its conclusions in a formal order number TG-5-79 to come into effect on November 1, 1979. The decision states that the order is to be made under section 50 of the National Energy Board Act but the order itself purports to be made pursuant to sections 11 and 50 of the Act. In the second last paragraph of the reasons, it is stated that:

> It is the Board's view that tolls determined in the manner described in these Reasons for Decision and regulated in the manner provided by the Board's method of regulation prescribed in Order No. TG-5-79, will result in tolls being charged by Westcoast which are just and reasonable.

**11** The Board's authority with respect to the tolls of pipeline companies engaged in the interprovincial or international transmission of natural gas is provided for in Part IV of the National Energy Board Act, sections 50 to 54 of which are as follows:

> 50. The Board may make orders with respect to all matters relating to traffic, tolls or tariffs.
>
> 51.(1) A company shall not charge any tolls except tolls specified in a tariff that has been filed with the Board and is in effect.
>
> (2) Where the gas transmitted by a company through its pipeline is the property of the company, the company shall file with the Board, upon the making thereof, true copies of all the contracts it may make for the sale of gas and amendments from time to time made thereto, and the true copies so filed shall be deemed, for the purposes of this Part, to constitute a tariff pursuant to subsection (1).
>
> 51.1 Where a company files a tariff with the Board and the company proposes to charge a toll referred to in paragraph (b) of the definition "toll" in section 2, the Board may establish the day on which the tariff is to come into effect and the company shall not commence to charge such toll before that day.
>
> 52. All tolls shall be just and reasonable, and shall always,under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.
>
> 53. The Board may disallow any tariff or any portion thereof that it considers to be contrary to any of the provisions of this Act or to any order of the Board, and may require a company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tariffs in lieu of the tariff or portion thereof so disallowed.
>
> 54. The Board may suspend any tariff or any portion thereof before or after the tariff goes into effect.

**12** The word "toll" is defined in section 2, as follows:

2. ...

"toll" includes

(a) any toll, rate, charge or allowance charged or made for the shipment, transportation, transmission, care, handling or delivery of hydrocarbons, or for storage or demurrage or the like, and
(b) any toll, rate, charge or allowance charged or made for the provision of a pipeline when the pipeline is available and ready to provide for the transmission of oil or gas.

**13** Neither the word "rate" nor the word "tariff' is defined. In my view, "rate", as used in the statute, refers to a toll or levy that is measured by a rate applied to some variable such as quantity or distance and "tariff" refers to a list of tolls or rates.

**14** Section 61 further provides that:

> 61. Where the gas transmitted by a company through its pipeline is the property of the company, the differential between the cost to the company of the gas at the point where it enters its pipeline and the amount for which the gas is sold by the company shall, for the purposes of this Part, be deemed to be a toll charged by the company to the purchaser for the transmission thereof.

**15** It will be observed that the system imposed by this legislation is one in which, initially, tolls for the transportation of gas may be set by the pipeline company itself subject to the requirement of section 51 that its tariff or tariffs of tolls be filed with the Board. But by section 50 the Board is given power, in unrestricted terms, to make orders with respect to all matters relating to traffic, tolls to or tariffs and under section 53 it may disallow any tariff or portion thereof for any reason referred to in the section and may require a company to substitute a tariff satisfactory to the Board or prescribe other tariffs in lieu of the tariff or portion thereof disallowed. The reconciliation of the unrestricted power given by section 50 with the restricted and more specific powers given by section 53 could be a problem but no question has been raised in these proceedings as to the authority of the Board to entertain Westcoast's application and to regulate or fix just and reasonable tolls to be charged by that company. What was argued by all parties attacking the decisions was that in various respects, to be mentioned later in these reasons, the Board in reaching its conclusions erred in law or failed to observe a principle of natural justice or otherwise abdicated or lost its jurisdiction with the result that its conclusion that the tolls to be charged pursuant to its order TG-5-79 will be just and reasonable is erroneous in law and the order based thereon should be set aside.

**16** In considering these objections it must, in my view, be borne in mind that the regulatory system established by Part IV of the National Energy Board Act differs markedly from that considered by the Supreme Court in Northwestern Utilities Limited v. The City of Edmonton[1], where, as appears from the judgment of Estey J., there were specific statutory directions to the Public Utilities Board contained in The Gas Utilities Act. Estey J. says at pages 689-690:

> The Board is by the latter statute directed to "fix just and reasonable ... rates, ... tolls or charges ..." which shall be imposed by the Company and other gas utilities and in connection therewith shall establish such depreciation and other accounting procedures as well as "standards, classifications [and] regulations ..." for the service of the community by the gas utilities (s. 27, The Gas Utilities Act). In the establishment of these rates and charges, the Board is directed by s. 28 of the statute to "determine a rate base" and to "fix a fair return thereon". The Board then estimates the total operating expenses incurred in operating the utility for the period in question. The total of these two quantities is the 'total revenue requirement' of the utility during a defined period. A rate or tariff of rates is then struck which in a defined prospective period will produce the total revenue requirement.

**17** There are no like provisions in Part IV of the National Energy Board Act. Under it, tolls are to be just and reasonable and may be charged only as specified in a tariff that has been filed with the Board and is in effect. The Board is given authority in the broadest of terms to make orders with respect to all matters relating to them. Plainly, the Board

has authority to make orders designed to ensure that the tolls to be charged by a pipeline company will be just and reasonable. But its power in that respect is not trammelled or fettered by statutory rules or directions as to how that function is to be carried out or how the purpose is to be achieved. In particular, there are no statutory directions that, in considering whether tolls that a pipeline company proposes to charge are just and reasonable, the Board must adopt any particular accounting approach or device or that it must do so by determining cost of service and a rate base and fixing a fair return thereon.

**18** In Trans Mountain Pipe Line Co. Ltd. v. National Energy Board[2], Pratte J., with whom the other members of the Court agreed, described the function of the Board and of this Court on an appeal from the Board's decision as follows:

> Under sections 50 and following of the Act, the Board's duty was to determine the tolls which, in the circumstances, it considered to be "just and reasonable".
>
> Whether or not tolls are just and reasonable is clearly a question of opinion which, under the Act, must be answered by the Board and not by the Court. The meaning of the words "just and reasonable" in section 52 is obviously a question of law, but that question is very easily resolved since those words are not used in any special technical sense and cannot be said to be obscure and need interpretation. What makes difficulty is the method to be used by the Board and the factors to be considered by it in assessing the justness and reasonableness of tolls. The statute is silent on these questions. In my view, they must be left to the discretion of the Board which possesses in that field an expertise that judges do not normally have. If, as it has clearly done in this case, the Board addresses its mind to the right question, namely, the justness and reasonableness of the tolls, and does not base its decision on clearly irrelevant considerations, it does not commit an error of law merely because it assesses the justness and reasonableness of the tolls in a manner different from that which the Court would have adopted.

**19** This view of the respective functions of the Board and the Court is, I think, supported by the judgments of the Supreme Court of Canada in The Canadian Pacific Railway Company v. The Board of Trade of the City of Regina[3], Canadian National Railways Company v. The Bell Telephone Company of Canada[4], Union Gas Company of Canada Limited v. Sydenham Gas and Petroleum Company Limited[5], Memorial Gardens Association (Canada) Limited v. Colwood Cemetery Company[6], and in the three Northwestern Utilities Limited v. The City of Edmonton[7] appeals, including that of 1979. In it Estey J., speaking for the Court said at page 703:

> In any case the administrative mechanics to be adopted in the discharge of the function mandated by The Gas Utilities Act are exclusively within the power of the Board. We need not here deal with the question of arbitrariness in the discharge of administrative functions for there is no evidence on the record before this Court raising any such issue. This Court is concerned only with the issue as to whether the Board in the performance of its duties under the statute has exceeded the power and authority given to it by the Legislature.

and at pages 707-708:

> The Appellate Division of the Supreme Court of Alberta, after coming to the same result, vacated the Board's order and referred the matter to the Board for further consideration and determination pursuant to s. 64 of The Public Utilities Board Act. In doing so, it is evident from the reasons for judgment of the said Court that the Court properly viewed its appellate jurisdiction under s. 64 of The Public Utilities Board Act as a limited one. It is not for a court to usurp the statutory responsibilities entrusted to the Board, except in so far as judicial review is expressly allowed under the Act. It is, of course, otherwise where the administrative tribunal oversteps its statutory authority or fails to perform its function as directed by the statute. Questions as to how and when operating expenses are to be measured and recovered through prescribed rates are, subject to the limits imposed by the Act itself, for the Board to decide, and the procedures for such decisions if made within the confines of the statute are administrative matters which are better left to the Board to determine. (vide City of Edmonton v. Northwestern Utilities Limited [[1961] S.C.R. 392], per Locke J. at p. 406).

**20** In Consumers' Association of Canada v. The Hydro-Electric Power Commission of Ontario [No. 1][8], Jackett C.J., on an application for leave to appeal under section 18 of the National Energy Board Act, outlined the scope of the review which the Court may make under that provision as follows [at pages 457-458]:

> Section 83(b) calls for a determination by the Board as to whether the price to be charged is "just and reasonable" in relation to the public interest. Generally speaking, as it seems to me, where Parliament leaves it to a tribunal to decide "fair and reasonable" or "just and reasonable" rates or prices or public convenience and necessity, the tribunal has a discretion to decide in what manner it will obtain information and the Courts have no right to review the Board's opinion based on the facts established before it. See Northwestern Utilities Ltd. v. The City of Edmonton ([1929] S.C.R. 186), Union Gas Company of Canada, Limited v. Sydenham Gas and Petroleum Company, Limited ([1957] S.C.R. 185) and Memorial Gardens Association (Canada) Limited v. Colwood Cemetery Company ([1958] S.C.R. 353). Furthermore, where a tribunal adopts a rule of practice to guide it in the exercise of its statutory functions, the question whether it properly appreciates its own rule cannot be a question of law. Nor "can the question whether in a given case the Board has properly appreciated the facts for the purpose of applying the rule be such a question. This is so because ... there is no statutory rule and there is no rule of law that prescribes the considerations by which the Board is to be governed in exercising its administrative discretion...". See Bell Telephone Co. v. Canadian National Railways ((1939) 50 C.R.T.C. 10) per Duff C.J.C. (giving the judgment of the Supreme Court of Canada) at page 21. As it seems to me, before this application can be granted, the Court must be able to see a specific question of law or jurisdiction the answer to which may lead to the setting aside of the decision or order attacked. That may be a question as to whether the decision or order was made by the Board in disregard of a statutory provision or other rule of law. It may be that the decision or order was based on a finding of fact that cannot be sustained having regard to the Board's statutory mandate. It may fall in some other area that does not occur to me. In any event, as already indicated, I fail to recognize any such specific question of law in the paragraph of the applicants' supporting submissions set out above.

**21** Counsel for the appellant relied on the judgment in the 1979 Northwestern Utilities case but it appears to me that the point decided in that case was a very narrow one turning on the interpretation of a statutory provision for which there is nothing comparable in the National Energy Board Act. It seems to me to be a case in which the question of law was one of the kind which Jackett C.J. referred to as "a question as to whether the decision or order was made by the Board in disregard of a statutory provision" and I see nothing in the judgment which lends support for any of the submissions put forward on behalf of appellant.

**22** I turn now to the objections raised by the appellants.

NORMALIZATION OF INCOME TAXES

**23** Up to the time of the application to the Board, Westcoast in computing its cost of service had dealt with the incidence of income taxes on what was referred to as a "flow-through" basis. Under it, there is included, in the cost of service, the income taxes actually paid or incurred. Because in the early part of the life of a capital asset, capital cost allowances in respect of the asset calculated on a declining balance basis, that may be claimed as deductions in computing income for tax purposes are likely to be greater than depreciation calculated on a straight-line basis and based on the expected life of the asset, income taxes payable in such years are lower by the amount of tax that would otherwise be payable in respect of the difference. In later years, the situation is reversed and it becomes necessary to pay higher income taxes because the capital cost allowances that may be claimed are less than normal depreciation. When this occurs, the customers of later years of a regulated utility will be obliged to pay higher rates to produce for the utility revenues sufficient to pay the higher income taxes.

**24** The point in time at which capital cost allowances that may be claimed in respect of the capital assets used in the operation equal normal depreciation on the assets is referred to as "crossover" or as the crossover point. As I understand it, the point is the same whether a flow-through accounting system of dealing with income taxes or a normalization system is followed. But the point when crossover might otherwise occur for a company may be delayed or deferred by reason of the acquisition by the company from time to time of new capital assets on which the higher capital cost allowances that may be claimed in respect of them will more than offset the decrease in capital cost allowances that may be claimed in respect of older capital assets.

**25** Under the accounting device known as "normal-ization" or "normalized taxes", the company in the early years of the life of a capital asset, besides providing for taxes actually payable, transfers to a reserve the difference between such taxes and the taxes that it would have had to pay, had capital cost allowances been claimed as a deduction in computing income for tax purposes only to the extent of normal depreciation. The reserve is then available to help pay the increased income taxes to be paid in years following crossover.

**26** In the foregoing, I may have imprecisely and inaccurately described and unduly simplified the concepts, but the description will, I hope, be sufficient for the immediate purpose of explaining the objections taken by the appellants to the direction the Board to Westcoast to change from the flow-through system to normalization at the time when the new rates come into effect.

**27** It will be recalled that the Phase I decision also directed Westcoast to provide for "catch-up" of "deferred" taxes by including in its cost of service amounts in respect of the difference between actual taxes for previous years and what would have been necessary to provide the reserve for "deferred taxes" but that that direction was rescinded by the review decision. The review decision, however, upheld the Phase I decision directing Westcoast to change to the normalized system with respect to the future and that direction was carried into effect in the final decision and in the order TG-5-79.

**28** The appellants' first submission was that nor-malization of taxes is an accountant's device, that it is an artificial concept which is unrelated to the service to be provided and is wrong in principle, that it includes as an expense what is not an expense, that is to say, what counsel referred to as "phantom"[9] taxes, that such amounts are not necessarily incurred to give service to the utility customers of the period in which the tolls are paid and that such taxes may never have to be paid because crossover may never be reached. This submission was supported by counsel for BCPC as well as by counsel for Cominco Ltd. et al. On behalf of Cominco Ltd. et al., it was further objected that as the reserve created by the normalization system is a sum available for use by Westcoast, the utility customers are being obliged, by the use of the normalization method, to provide capital either to finance the non-utility operations of Westcoast or to finance the acquisition of further utility assets, the depreciation of which will thereafter be an element of Westcoast's cost of service and an extra charge on the users of the utility service.

**29** In my opinion, whether or not the normalization method of accounting for income taxes or some variation of it was appropriate for use by Westcoast in arriving at just and reasonable tolls to be charged for its service, whether or not such a method should be followed by Westcoast and whether or not the use of such a method would work injustice to present day utility customers were all questions of fact which it was within the jurisdiction of the Board to decide. They are not questions of law or of jurisdiction and it would, in my view, be wrong for the Court to attempt to treat the accounting principles involved in the normalization method as if they were principles of law and to attempt to deal with them as such. I would, accordingly, reject these submissions of the appellants in their entirety.

**30** Two further objections put forward on behalf of the same appellants were based on the following passage from the review decision:

> 2. The Likelihood of Crossover and the Need for Consistency
>
> In the 1977 Interprovincial decision, the Board considered as a factor in its decision on whether to permit the recovery of normalized income taxes in Interprovincial's cost of service, the likelihood of crossover. The Board concluded in that case that so the likelihood of crossover was not sufficiently uncertain to suggest the use of the flow-through method (Interprovincial Pipe Line Limited, Phase II, December 1977, page 4-37).
>
> The Board has noted the difference between the Interprovincial case and that of Westcoast. In the Interprovincial case, the Company has been accounting for income taxes on the normalized basis since its inception, and the issue facing the Board was whether the Company should continue on the normalized basis. On the other hand, Westcoast has used the flow-through method of tax accounting since 1957 and now seeks to change to the normalized method.
>
> Westcoast provided its projection of capital additions to its utility plant for the years 1978 to 1988. For the years 1978 and 1979, the Company shows substantial capital additions in the

> amount of $309,439,000. In 1980, capital additions are forecast at $66,291,000. Thereafter, Westcoast forecasts capital investments in utility plant from 1981 to 1988 of some $20 million to $40 million per year, primarily in gathering and compressor facilities. The Company considers this forecast to be "fairly accurate" for the period ending in 1988. There are no capital additions forecast in the period after 1988.
>
> On the flow-through basis of income tax accounting, the Company forecasts that it will pay income taxes of some $25 million in 1983 and $49 million in 1984, with continuing increases in each year in the period to 1995. It thus appears that, on the flow-through basis, the Company would reach crossover -- that is, the point when capital cost allowances available for tax purposes no longer exceed booked depreciation -- sometime in 1983 or 1984. If Westcoast were to change over now to the normalized method of tax accounting, it would reach crossover at some time earlier than 1983.
>
> Several Intervenors questioned the capital development plans of Westcoast as being unduly conservative and short-term in nature. Reference was made to the evidence of Westcoast's policy witness, who indicated his expectation that the Company would continue to grow and be dynamic, and would have gas to deliver through its existing system for more than 26 years.
>
> The Board has noted that included in Westcoast's capital expansion forecast for 1978 and 1979 is its proposal for the construction of mainline looping, having a capital cost of some $80,578,000. Since the forecast was prepared, the Company's application for a certificate under Part III of the NEB Act for the mainline looping was denied by the Board (Westcoast Transmission Company Limited, June 1978), with the result that the capital forecast for 1978 and 1979 would be reduced to some $228,861,000. The effect of this reduction in the forecast capital expenditures would be to advance the date of crossover regardless of whether the Company is on the flow-through or normalized method of tax accounting.
>
> The Board appreciates that any forecast of future capital expansion is subject to doubt, and that a forecast going beyond ten years is probably highly speculative. The Board accepts Westcoast's estimate of gathering plant additions for the next ten years as not being unreasonable, although it is aware that the level of expenditure will depend upon the size and location of any new natural gas discoveries, and economic conditions at the time. As a result, the Board concludes that the occurrence of crossover is not sufficiently uncertain to warrant the continued use of the flow-through method of tax accounting for Westcoast.

**31** The first of the two objections focused on the fourth paragraph of this excerpt. It had not been given in evidence nor had it been contended by Westcoast or by anyone else that the crossover point in the sense I have endeavoured to describe, and as defined in the paragraph itself, would occur before 1989-90. The submission was that because of what is stated in the paragraph, the Board's decision is not supported by the evidence and that it is based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

**32** I do not agree with the submission. While the author of the paragraph refers to "crossover" and defines it accurately, I think it is apparent from the confusion in what he says that he is using "crossover" in some different sense from that which he defines. The crossover point, at least as it was explained by counsel and as I have understood it, does not depend on whether the income tax accounting is on a flow-through or a normalized basis. Perhaps the author was thinking of crossover as the time when substantial amounts of income tax would be payable by Westcoast but it is unnecessary to speculate on what he meant. It may be accepted that what is said in the paragraph is inaccurate and wrong in its reference to crossover. But it does not follow that it is erroneous in its findings, whatever they may be, with respect to "crossover" in some other sense. Nor does it follow that the decision of the Board is based on a finding that "crossover", in the defined sense, will occur sometime in 1983 or 1984.

**33** The decision is expressed in the following terms at page 2-35:

> DECISION

> On the basis of the above considerations, it is the Board's view that it would be appropriate, in seeking to achieve just and reasonable tolls to be charged by Westcoast, to permit the Company to change to the normalized method of income tax accounting and to recover normalized income taxes on a current basis in its cost of service. In this respect, the Board would not vary the Phase I Decision.

**34** In the preceding pages, the Board had discussed many aspects of the proposed change including the recommendation of the accounting profession, Westcoast's need for the additional money, the likelihood of crossover and the need for consistency, intergenerational equity and the additional burden likely to fall on future customers by continuing the flow-through method and by reason of the anticipated termination in 1990 of Westcoast's export licence, the ability of the customers to pay the increases resulting from the change to normalization, and the timeliness of the change and the risk of future collectibility of income tax having regard to eight or more points of consideration discussed in the decision. The impugned paragraph, as I view it, is merely a part of the discussion leading to the Board's conclusion that crossover, in the accepted sense, will occur, and while the paragraph is inaccurate and confusing, and erroneous as well if the word crossover is indeed used in the defined sense, though I think it is not, the finding with respect to crossover on which the decision, as I interpret it, is based is not that crossover will occur in 1983 or 1984 or earlier but that it will occur. That, as it seems to me, is apparent both from the title of the chapter, i.e., "The Likelihood of Crossover and the Need for Consistency" and from the final paragraph of the chapter which, for convenience, I repeat:

> The Board appreciates that any forecast of future capital expansion is subject to doubt, and that a forecast going beyond ten years is probably highly speculative. The Board accepts Westcoast's estimate of gathering plant additions for the next ten years as not being unreasonable, although it is aware that the level of expenditure will depend upon the size and location of any new natural gas discoveries, and economic conditions at the time. As a result, the Board concludes that the occurrence of crossover is not sufficiently uncertain to warrant the continued use of the flow-through method of tax accounting for Westcoast.

**35** In my opinion, therefore, the appellants' objection on this ground should not be sustained. But I do not think I should part with the matter without observing, (1) that the Phase I decision, which in this respect the review decision confirmed, was not based on what is in the impugned paragraph with respect to crossover and, (2) that none of the appellants sought a review of it under section 17 of the National Energy Board Act even though there was an opportunity for some ten months to do so from the time the review decision was issued until the September 1979 decision.

**36** The second objection based on the excerpt I have cited from the review decision was that the review panel breached the principles of natural justice by considering the fact, which had occurred and had been made known to the parties after the Phase I decision, that an application by Westcoast for approval of an expenditure of some $80,000,000 on looping of its main line had been denied by the Board. It was said that since the review panel had turned down requests by the appellants, or some of them, for leave to adduce additional evidence to supplement the record of the Phase I hearing and had decided to review the Phase I decision solely on the basis of the record of that hearing, natural justice required that before taking into account the additional fact of the denial of Westcoast's looping application, the parties should have been afforded an opportunity to offer evidence and make representations to counter the effect of accelerating the probable time of crossover which might be implied from the denial of the application.

**37** In considering this submission, it is necessary to bear in mind that the Board had decided in the Phase I decision that the change to normalization should be made, that that decision had been reached long before the application for approval of the $80,000,000 looping expenditure, which had been included in Westcoast's projected capital expenditures, was denied, and that the appellants had been made aware of the denial some two weeks before the oral public hearing of their applications for review of the Phase I decision. No application was made either before or at that hearing for leave to adduce evidence respecting the effect of the denial of the looping application. In its memorandum dealing with the application for review, the Board said:

> Certain of the applicants in the July 26 hearing requested that the Board consider conducting a rehearing, with additional evidence on certain aspects of the issues dealt with in Phase I of the Westcoast Rate Hearing. It does not appear to the Board that this additional evidence relates to matters arising subsequent to the original Phase I hearing held in February and March 1978.

> The Board has thus concluded that the applications for a rehearing with additional evidence should be dismissed.
>
> As a result, the Board will conduct the review, pursuant to subsection 17(1) of the National Energy Board Act based on the record of the original Phase I hearing and the submissions made at the hearing of July 26, 1978. For these reasons, the Board does not consider it advisable to conduct any further public hearings on the review of the Phase I Decision.

**38** This may have led the appellants to think that the tendency or effect of the denial of the looping application to accelerate crossover would not be considered by the review panel even though it was known to the Board and to the parties and even though its relevance to the question of crossover is obvious. Had there been no subsequent proceedings before the Board and no further opportunity to raise the matter with the Board or the review panel, the objection might have been serious enough to warrant setting aside the decision and referring the matter back for reconsideration and redetermination after giving the appellants an opportunity to be heard as to the effect of the denial of the looping application on the likelihood or acceleration of crossover.

**39** But that was not the end of the matter. In my opinion, neither the Phase I decision nor the review decision was final in the sense that it could not be reconsidered and altered by the Board, if necessary. They were, in my view, no more than expressions of opinion on particular issues on which a conclusion would be required for the purpose of dealing with Westcoast's application as a whole. It is noteworthy that the Rules and Procedures established by order PO-2-RH-2-77 of February 6, 1978, which provided for the hearing of the application in three phases, directed only that the hearing and argument on Phase I issues should be conducted before the hearings and arguments on subsequent phases. They did not direct that the particular issues to be heard in Phase I should be finally decided before proceeding with the hearing of Phase II issues. Had that been directed, it might have been arguable that the decision determined those issues and the rights of the parties in respect to them and that they could not be reopened before the Board except on a review under subsection 17(1). It is also noticeable that there was no formal order made on the matters dealt with in the Phase I decision. Moreover, while there was no formal order directing a public hearing of the applications for review of the Phase I decision, no formal order was made following that hearing or following the review itself. In particular, the result of the review decision was not embodied in an order purporting to determine the issues considered and the rights of the parties in respect thereto. Since what was before the Board for determination was not a series or group of issues, but an application for an order fixing or determining just and reasonable tolls, it seems to me that until the final decision on that application was given and order TG-5-79 was made it was at all times open to the appellants to call to the attention of the Board, if it was considered to be of any significance, that the review panel had gone beyond its own definition of the record on which the review was to be made and had taken into account a fact not included in that record without affording the appellants an opportunity to be heard with respect to that fact, and to ask for an opportunity to be heard with respect to it. As no such request appears to have been made in the ten-month period between December 1978 when the review decision was published and September 1979, when the final decision was made and order TG-5-79 was issued, a period in which the parties had ample opportunity to raise the matter, there is, in my view, no reason to believe that the appellants were denied an opportunity to be heard on the subject prior to the final decision.

**40** In my view, to set aside the result of the very lengthy proceedings before the Board on a ground that the appellants, with ample opportunity to do so, did not treat as being of sufficient importance to raise before the Board, would be to bring about a result that would be little short of grotesque. True, B.C. Hydro forthwith brought an application under section 28 of the Federal Court Act for a review of the Board's review decision but that application was not prosecuted with dispatch and in any case it did not prevent B.C. Hydro or any other of the appellants from raising the objection before the Board.

**41** In my opinion, therefore, the appellants were not denied natural justice and their objection should not be sustained.

RATE OF RETURN

**42** The appellants' second attack was on the rate of return, as determined by the Board, to be earned on Westcoast's investment in the pipeline operation. The Board's finding, as to the appropriate rate of return, is found in the following portion of the final decision:

> RATE OF RETURN BEFORE TAXES ON RATE BASE

Based on the applied-for capital structure and the Board's findings on the cost of debt, preferred shares and common equity and the appropriate rate for applying normalized income taxes, the Board finds that the allowable Rate of Return before Taxes on Rate Base is 16.94 percent. One-twelfth of this amount, namely 1.4117 percent is the rate to be applied to the allowable rate base (net of Deferred Income Taxes) each month in order to determine the dollar value of the Return before Taxes on Rate Base to be included in the allowable cost of service.

The derivation of the allowable Rate of Return before Taxes on Rate Base is as follows:

| | Amount | Ratio | Cost | Cost Component |
|---|---|---|---|---|
| | $000 | % | % | % |
| Long Term Debt | 474,088 | 55.38 | 8.63 | 4.78 |
| Preferred Shares | 40,000 | 4.67 | 8.77 | .41 |
| Common Equity | 342,011 | 39.95 | 14.25 | 5.69 |
| | 856,099 | 100.00 | | |
| Rate of Return after Taxes on Rate Base | | | 10.88 | |
| Normalized Income Taxes (99.32% of the cost of preferred shares & common equity) | | | 6.06 | |
| Rate of Return before Taxes on Rate Base | | | 16.94 | |

**43** The appellants' attack was threefold: First, it was said that the rate of return was based on a consideration of risk that included the risk involved in the unregulated operations of Westcoast subsidiaries. Second, it was argued that the 14.25 figure adopted as a fair return on common equity was too high having regard to a figure of 14 which had been set for TransCanada PipeLines Limited and that on a market approach it should not have been higher than 12.4 to 12.9. Third, it was submitted that the 39.95 equity ratio was too high for the appellant, that is to say, as I understood the submission, that because a higher debt capital ratio and a correspondingly lower equity capital ratio would produce a possible benefit to Westcoast in lower income taxes which benefit could be passed on to Westcoast's customers in lower tolls, the rate of return should be based on what the Board would consider an appropriate ratio for Westcoast, regardless of the existing situation.

**44** In my opinion, none of these submissions should be sustained. It is apparent from the decision that the Board gave careful consideration to the risk both of the regulated activity and of Westcoast's operations as a whole and concluded that it was not significantly different from that of two other named pipeline companies both of whose operations presumably had, to the knowledge of the Board, some features in common and some not precisely the same as those of Westcoast's operation. The Board also discussed and considered several approaches to the question of an appropriate rate of return as well as the varying contentions of Westcoast and of the intervenors as to what would be appropriate and then considered as well the ratio of equity to debt capital as proposed by Westcoast and found it to be on the high side but nevertheless acceptable.

**45** Thereafter, the Board concluded as follows:

> Having carefully weighed all of the evidence the Board concludes that a 14.25 percent rate of return on common equity, in relation to the applied for capital structure, is fair and reasonable for the test period.

**46** In my view, what the Board is here expressing is not a finding of an existing fact but an opinion of what would be a reasonable rate in respect of operations which are to be carried on in the future[10]. In my opinion, it was clearly within the jurisdiction of the Board to formulate such an opinion and it is not the function of this Court to reweigh the evidence and substitute its own opinion for that of the Board. Nor is there, in my view, any reason to think that the Board erred in law, that it was unaware of any applicable legal principle or that it misapplied or failed to apply any appropriate legal principle in reaching its opinion.

**47** Three subsidiary points submitted were (1), that in adopting Westcoast's ratio of common equity capital to debt capital, the Board erred in not or excluding both debt and equity of subsidiary companies rather than their debt alone, (2), that after concluding that the equity ratio was at the upper limit of what would be appropriate and after fixing a 14.25% rate of return on such capital, the Board abdicated its jurisdiction by encouraging Westcoast to change its capitalization by increasing the debt portion and thus increase the return on the equity portion and, (3), that the Board erred in fixing a "before taxes" rate of return rather than an "after taxes" rate of return.

**48** In my view, there is no substance in these points. With respect to the first, the capital structure as applied for by Westcoast and as approved by the Board treats Westcoast's own investment in subsidies as having been financed by Westcoast's own debt, preferred shares and common equity in the same proportions as its investment in its utility operation. The common equity figure of 342,011 shown in the passage I have cited earlier from the decision, as I understand it, includes Westcoast's issued capital and retained earnings plus Westcoast's share of the retained earnings of the subsidiaries. The figure thus represents the equity of Westcoast and it is that together with the preferred share capital and Westcoast's debt which makes up the total capital of Westcoast that is regarded as invested proportionately in the utility and the subsidiary companies. I can see no error in law in the Board having adopted this method of calculation and apportionment of Westcoast's capital investments between the utility operation and the subsidiaries and so far from thinking the method erroneous, I think that to include the debts of subsidiaries would not be in accordance with the principle of the apportionment and would lead to an incorrect result.

**49** On the second point, there is, in my opinion, no abdication of the jurisdiction of the Board involved in its finding with respect to the common equity ratio or in its encouragement of Westcoast to change it by steps that would result in advantage to Westcoast. Nor is there error of law involved in the Board having fixed a "before taxes" rate of return rather than an "after taxes" rate of return.

RATE BASE

**50** The Board's decision on rate base was attacked by B.C. Hydro and by BCPC. On behalf of B.C. Hydro, it was submitted, first, that the Board abdicated its jurisdiction to fix the rate base by including in its decision and order a provision that the rate base at December 31, 1978, as determined by the Board, would be increased by "subsequent capital expenditures on construction approved by the Board under Part III of the National Energy Board Act which have been recorded in the plant account set out in Schedule 'D' to the National Energy Board Gas Pipe Line Uniform Accounting Regulations". It was said that this left it to Westcoast to increase the rate base by whatever it expends for construction and that the users were not given any right to review the expenditures that might be added to the rate base under this provision.

**51** No authority was cited for the view that this amounted to an error of law on the part of the Board or to an abdication of its jurisdiction and I am of the opinion that it cannot be so regarded.

**52** Nothing in the National Energy Board Act requires the Board to fix a rate base or fix a rate base by any particular method. What the statute provides is that tolls are to be just and reasonable and that the Board may make orders with respect to all matters relating to the tolls. It also provides that the Board may disallow any tariff or portion thereof that it considers to be contrary to the Act or to an order of the Board and to require the substitution of other tariffs in lieu thereof. That power would obviously be exercisable whenever the Board considered a tariff to be contrary to the Act in that the tolls listed in it were not just and reasonable.

**53** In the present situation, the rate base to be included, in the method which the Board considered to be appropriate for the regulation of Westcoast's tolls, is no doubt "a matter relating to tolls" in respect of which the Board may make orders under section 50 but, as I read it, the statute does not require the Board to fix a rate base in any particular way or to approve the amount of every item to be added to the rate base before it is so added. In the system for establishing

Westcoast's tolls, adopted by the Board, the manner in which the rate base is to be calculated from month to month, as I see it, was a matter for the Board to decide[11]. The fact that the method includes provision for the addition to the rate base of additional capital expenditures even if not subject to prior scrutiny and approval of the Board, does not in my opinion, amount to error of law or abdication of jurisdiction on the part of the Board. Moreover, it does not follow that the adoption of such a method results in tolls that are not just and reasonable.

**54** Other objections on behalf of B.C. Hydro were that the order permitted the inclusion in rate base of amounts in respect of the cost of (1), plant that is not useful to serve customers in that it is not yet in use or had become obsolete, (2), items acquired for use in the construction of pipeline but not yet put to use for that purpose, and (3), retired and abandoned plant. The basis of these objections, as I understood it, was that the amounts should not be included because they are not used or useful to provide service to utility customers and that it is unjust to them and unreasonable to include such items in the rate base upon which tolls that such customers must pay are to be fixed.

**55** The question of what items should be included in a rate base is one for the judgment of the Board. In reaching that judgment, the Board is without doubt entitled to use as a guide, if it sees fit, the test of the present use or usefulness of the items sought to be included in providing utility service. But there is no rule of law that such a test must be used or followed or that it is the only principle that can be applied. Nor does it follow that the use of other principles in determining a rate base will result in tolls that are not just and reasonable. There is accordingly, in my opinion, no basis for regarding these objections as raising questions of law or jurisdiction on which the Court should or might properly intervene[12].

**56** The attack on rate base mounted by BCPC was directed at the decision of the Board to permit Westcoast to include as an element of working capital Westcoast's investment in line pack gas, that is to say, gas that is in the Westcoast system. It was said that the decision is based on a misinterpretation of the contract under which BCPC supplies gas to Westcoast and is contrary to section 52 of the National Energy Board Act because it permits Westcoast to earn a return where no proper investment has been made, and therefore, the tolls cannot be just and reasonable.

**57** The contract provided as follows in clauses 9, 10, 11 and 16:

> 9. Sale of Gas: The Corporation agrees to sell to Westcoast and Westcoast agrees to purchase from the Corporation, those volumes of natural gas required by Westcoast to meet the maximum contractual obligations as presently defined and undertaken in the sales agreements identified in Schedule B hereto. For this purpose the gas available pursuant to the Contracts is committed to Westcoast. To the extent that the volumes of natural gas required by Westcoast to meet the maximum contractual obligations in its said sales agreements with its British Columbia customers and as presently licensed for export to its United States customer cannot be supplied by gas available pursuant to the Contracts, the Corporation will acquire gas to supplement such volumes and will commit the same to Westcoast but nothing contained herein shall obligate the Corporation to supply gas to make up any shortfall occurring in the supply from the Beaver River and Pointed Mountain fields as a result of the conditions presently claimed to constitute a force majeure in those fields.
>
> 10. Gathering, Processing and By-Products: Westcoast will gather and process the volumes of natural gas purchased by the Corporation to enable it to meet its commitments to Westcoast pursuant to paragraph 9 hereof. The Corporation will sell all by-products extracted from such gas to Westcoast at no cost and Westcoast will credit its cost of service with all revenues received or receivable from the sale of by-products; provided that the Corporation may terminate its sale to Westcoast of any such by-product on or after the date on which Westcoast's existing agreements for sale of such by-product terminate without prejudice to the Corporation's right to call upon Westcoast to continue to gather and process such gas.
>
> 11. Price for Gas: The price of natural gas purchased from the Corporation by Westcoast pursuant hereto shall be an amount of money equal to the gross revenue received by Westcoast on the resale thereof less the total cost of service of its utility system operation (determined in accordance with paragraph 12 hereof) for the month such resale takes place.
>
> ...

> 16. Payment for Gas: Westcoast will pay the Corporation for all gas purchased by it from the Corporation at the rates herein set out within twenty-five (25) days after the end of the calendar month during which such gas was delivered to Westcoast.

**58** On November 1, 1973, when the contract came into effect, Westcoast, as I understand it, had an investment in line pack gas amounting to some $320,000. Westcoast owned that gas. It represented Westcoast's inventory of gas at that time. That gas would have been delivered to customers on and after November 1, 1973, while new gas supplied by BCPC under the contract came into the system to replace it. Under clause 16, Westcoast became liable to pay for the new gas by the 25th of the following month.

**59** The accounting system employed by Westcoast to deal with line pack gas, as explained by the witness, Williams, and as I understand it, is to add to its cost of service for each month the value of the line pack that it had on hand at the beginning of that month and which would have passed out of the pipeline system to customers in the first days of that month, and to deduct from the total cost of service the value of line pack on hand at the end of that month. In the period since November 1, 1973, as the price of gas and the volume of line pack increased, the value of the line pack increased. At the end of 1978, it amounted to some $4,462,000.

**60** In its decision, the Board found:

> The Board recognizes that the Applicant had an investment in line pack at the inception of the BCPC Agreement and has purchased line pack to meet its contractual obligations under clause 9 of that Agreement. It also notes that there is an allowance for working capital in the agreement and that no transportation agreement exists between the Applicant and the BCPC for the carriage of gas.
>
> Having considered the evidence and argument, the Board accepts the inclusion in working capital of an allowance for Line Pack Gas. The current method used by Westcoast is also acceptable to the Board. The Applicant should continue the practice of crediting or debiting cost of service with any gains or losses in the value of Line Pack Gas caused by the monthly revaluation process.

**61** Having regard to what is in clause 9 of the agreement, the first sentence of this excerpt would, I think, be more easily understood if it read:

> The Board recognizes that the applicant had an investment in line pack at the inception of the BCPC agreement and has purchased line pack under clause 9 of that agreement to meet its contractual obligations.

So read, in my opinion, the Board's finding is consistent with what is being done pursuant to the contract, and, in my view, what is being done by Westcoast is consistent both with Westcoast's ownership of the line pack on hand on November 1, 1973 and of that line pack gas which has since replaced it and with what is required by the terms of the contract, in particular, clause 16. Under that clause, what is to be paid for on the 25th of each month is the gas delivered to Westcoast in the previous month and that plainly includes the line pack gas on hand at the end of that month. As I see it, the line pack gas on hand at the end of the month is paid for by the deduction of its value from the cost of service. The disappearance of that gas in the following month is part of the cost of service in that month and the value of the gas so disappearing is properly added to the cost of service in that month.

**62** Counsel for BCPC argued that Westcoast was not obliged by the contract to purchase line pack, that all it was ever required to pay for was gas sold to customers, that the risk of loss of gas while in the Westcoast system was borne by BCPC, that under the Sale of Goods Act the gas sold to Westcoast is not ascertained until the gas is delivered to Westcoast's customers, that the contract does not provide for sale of line pack gas by BC to Westcoast and that title to the gas while in the Westcoast system is in BCPC.

**63** I do not think any of these arguments, even if correct, can prevail against the effect of the contractual requirement of clause 16 that Westcoast pay for all the gas by the 25th of the month following the calendar month during which it was delivered to Westcoast. Even if the contract does not specifically provide for the purchase by Westcoast of line pack gas, obviously it was necessary for Westcoast to have gas in its pipeline in order to operate the system and in the

nature of the operation it was necessary to take delivery of gas some days before it could be sold to Westcoast customers. Further, whether or not, under the contract the risk of loss of gas while in the pipeline rests on BCPC, which, as I see it, is true only in a sense, it seems to me to be clear that the gas which Westcoast agrees to purchase under clause 9 of the contract is ascertained and appropriated to the contract when it is received into the Westcoast system and that under subsection 23(6) of the Sale of Goods Act[13] title to the gas passes to Westcoast at that time.

**64** In his submission that title to line pack gas does not pass to Westcoast when the gas is received into its system, counsel for BCPC stressed the fact that clause 10 provides that BCPC will sell to Westcoast all by-products extracted from the gas gathered by Westcoast. The clause appears to me to be intended to establish a basis for accounting for receipts from the sale by Westcoast of the by-products. It specifically provides that Westcoast's receipts from the sale of by-products are to be credited to the cost of service and thus to BCPC. It does not purport to deal with or fix the time of sale or of the passing of title to the by-products. But even if its effect is to fix the time of their extraction as the time of sale and transfer of title to them, it does not appear to me to follow that the title to the gas from which the by-products are recovered does not pass to Westcoast under the contract at the time of the reception of the gas into the Westcoast system.

**65** The view that title to the gas passes to Westcoast at the time of its reception into the pipeline system, appears to me to gain support from the fact that under the contract gas entering the Westcoast system is neither processed nor transported for a fee or toll to be paid by BCPC, and from the fact that Westcoast does not act as a carrier for BCPC. Moreover, it is not inconsistent with the fact that the gas need not be paid for until the 25th of the month following its delivery to Westcoast.

**66** Accordingly, and particularly in view of what is required by clause 16, I can see no error of law or otherwise in the Board's conclusion that Westcoast has an investment in its line pack gas and that it is proper to include that investment in Westcoast's rate base. The method of computing it is, I think, an administrative matter for the Board to determine and there was, in my view, no error of law involved in its having approved the method followed by Westcoast. Once that position is reached, it seems to me that the second branch of BCPC's submission, based as it is on the contention that no proper investment in line pack gas had been made by Westcoast and that therefore the rates and tolls could not be just and reasonable, must also fail.

DEPRECIATION

**67** The principal issue with respect to the Board's decision on the subject of depreciation was put forward by BCPC in its memorandum of argument as:

> Whether the Board erred in its Final Decision insofar as it allowed Westcoast to accelerate depreciation now so that it could charge less depreciation at a future date, in that:
>
> (i) such a decision unjustly discriminates against current customers; and
> (ii) the decision was based upon an irrelevant consideration, and failed to take into account a relevant consideration.

**68** The irrelevant consideration referred to was the level of depreciation at some future time; the relevant consideration was the matching principle of costs and revenues.

**69** The Westcoast pipeline system is used to serve both export and B.C. customers. At the time of the hearing, design capacity was used to the extent of approximately 60%, to serve the export customer, and 40% to serve B.C. customers. Westcoast's licence to continue exporting gas was not, however, indefinite and the Board considered that it was not reasonable to assume that the existing licence would be renewed. The Board found:

> With the expiration of Licence GL-41 on 31 October 1989, it is reasonable to assume that, at that time, there will be a substantial reduction in the pipeline throughput, but continuing growth in the domestic market will gradually use up more and more of the excess capacity. In these circumstances, the Board believes that it would be appropriate to correlate depreciation costs with pipeline utilization over the remaining service life of the asset. If more depreciation is charged currently when Westcoast's pipeline capacity is fully used, then less depreciation will be required to be charged after the expiration of Licence No. GL-41, when the capacity used is expected to be substantially less.

> The Board has approved straight-line depreciation rates for transmission plant based on an estimated service life for each class of transmission plant and on the Applicant's forecast of a high level of pipeline use during the remaining life of Licence No. GL-41, followed by a drop in use and then continued increase as domestic markets grow. Based on all of the evidence adduced the Board finds that the rates of depreciation for Westcoast's main transmission plant to be used when new tolls came into effect should be 3.33 percent for Mains (NEB Account Numbers 461 to 465) and 5.0 percent for Compressors (NEB Account Numbers 466 and 467).

**70** While the Board in this passage refers to the fact that if more depreciation is charged currently when Westcoast's pipeline capacity is fully used, less depreciation will be required later, and counsel for BCPC focused on this part of the passage, I do not think it indicates that the Board was permitting unjust discrimination against present day customers to the advantage of future customers. What the Board appears to me to be saying is that in view of the expiry date of the export licence, it believes that it would be appropriate to correlate depreciation with pipeline use over its remaining life and that as it was to be expected that use would decline sharply with the termination of the export licence more depreciation should be charged in the period of full use prior to the expiration of the export licence so that following its expiry, the remaining customers would not be required to bear depreciation charges disproportionate to the use then being made of the pipeline. In my view, this was eminently a matter for the Board.

**71** I see in its finding no unjust discrimination against present day customers in favour of future customers and I think it was plainly open to the Board to take into account in fixing depreciation rates the use that could be expected to be made of the pipeline during the remainder of its expected life and to require that the depreciation to be charged be related to the use that could be expected to be made of it during different periods in the remainder of its life. In reaching the conclusion that depreciation should be correlated to expected use, the interests of present and future customers are plainly relevant and it does not appear to me to be unjust to the present day customer to require him to contribute to depreciation based on the extent of the use being made of the pipeline capacity.

**72** Counsel relied on what was referred to as the "matching principle" under which, as I understand it, the tolls to be charged to present day customers must not exceed the present day costs of providing the service, but I do not think that the principle, even if it could be considered to be a principle of law, is offended by depreciation charges being based on the anticipated use to be made of the asset to serve the present day customers in relation to anticipated use of the assets in some foreseeable future period.

**73** It was also submitted on behalf of Cominco Ltd. et al. that the Board erred in law in ordering or permitting Westcoast to increase the rates of depreciation in respect of the so-called Beaver River/Pointed Mountain Line. It was said that prior to the Phase I decision, Westcoast depreciated the various plant components of this portion of its system at rates of 3.0% per annum and that in permitting an increase to 6.0% or 7.0% the Board erred in law as that would indicate that the remaining life of the assets was 14 to 16 years while the evidence was that the expected life was much longer and well in excess of 20 years.

**74** I find no merit in this position. There was evidence that the gas reserves available for transmission in this part of the system at the end of the year 1976 amounted to 222.8 Bcf giving an estimated 5.7 years supply at the production rate achieved in 1976. Other evidence suggested the reserves were 369 Bcf at that time. There was also evidence of a contract made in 1978 under which Westcoast might acquire some 316 Bcf of additional gas which might serve to increase the projected period of 5.7 years in which the system might be expected to continue to be useful. There is, in my view, no reason to believe that the Board was not aware of this evidence and of its implications for the future use of the system. It was for the Board to assess those implications and their extent and importance as well as the reliability of the inferences to be drawn from such evidence and it was for the Board to decide what effect should be given to it in its estimate of what would be appropriate depreciation rates for the assets in question. In my opinion, no error of law or jurisdiction was involved in its estimate.

LOOPING

**75** This item refers to the allocation made by the Board of cost of service charges between BCPC, which supplies all the B.C. gas to Westcoast, and the Alberta, Yukon and Northwest Territories producers. All of the gas supplied by the Alberta, Yukon and Northwest Territories producers is considered to be exported to the U.S. along with a considerable portion of that produced in B.C.

**76** The issue raised by BCPC is concerned with the costs pertaining to the looping of a section of the main transmission system for the purpose of increasing the carrying capacity of the line in order to carry gas which Westcoast had arranged to purchase from Alberta producers. The evidence indicates that the line without the loop was capable of carrying all the B.C. gas to be carried. In practice, however, B.C. gas as well as other gas, is carried by the loop.

**77** The issue is stated as follows in BCPC's memorandum of argument:

> The Board in its Final Decision erred in law insofar as it permitted Westcoast to include in the cost of service chargeable to B.C.P.C. a portion of:
>
> (a) the depreciation in respect of,
> (b) the return on capital invested in, and
> (c) the operating and maintenance expense of
>
> the Fort St. John loop because such a toll:
>
> (a) cannot be just and reasonable and is, therefore, contrary to Section 52 of the National Energy Board Act, and
> (b) constitutes unjust discrimination, contrary to Section 55 of the National Energy Board Act.

**78** In considering this objection, it is necessary to bear in mind that it is not the function of the Court to substitute views of its own for those of the Board but to consider whether what the Board has done is justified on the evidence and not contrary to law. As I view it, what the Board had to consider was a proper basis for allocation of costs between B.C. and other gas in a section of the main transmission line. There may be a number of bases for doing this, any one of which might be more or less appropriate. But for reasons which were discussed in the decision, the Board, as I understand it, adopted a method proposed by Westcoast in which it rolled in all the costs of each of the sections of the line, and allocated them on a basis which takes into account inter alia the extent of use of the section of the system in the transmission of B.C. and other gas. With respect to the particular issue, it is well to remember that the looping in question is in a main transmission section of the system, not in a gathering section.

**79** I can see no reason to think that it is contrary to law or that it results in injustice or unjust discrimination for the Board to treat the costs of the whole section as referable to the whole of the gas transmitted through it. Plainly, the B.C. gas shares the benefit from the availability of the increased transmission capacity resulting from the looping and from not being obliged to share the former transmission capacity with the Alberta gas. It appears to me that having regard to the Westcoast utility undertaking as a whole and to the function and authority of the Board, there can be no priority right for BCPC to the use of the older portion of the section for the transmission of its gas over Alberta gas. If it were so, there would be discrimination.

**80** In my opinion, therefore, this objection as is fails.

INTERESTED PARTY STATUS

**81** Cominco Ltd. et al. were parties who, pursuant to Board order RH-2-77, intervened in the proceedings before the Board on Westcoast's application. The order provided inter alia for the publication of notice of the hearing of the application and that "any person" intending to oppose the application should file with the Secretary of the Board copies of a written statement containing his reply or submission. These parties were recognized as intervenors and participated in the proceedings. However, in the final order TG-5-79, they were not included among the parties who were accorded "interested party status" in matters related to tolls subsequent to the hearing called by order RH-2-77. On their behalf, it was submitted that the Board erred in law and misconceived or exceeded its jurisdiction in denying them status as interested parties in matters related to Westcoast's tolls subsequent to the hearing.

**82** The part of order TG-5-79 in question is paragraph 1 which declares that:

> 1. Pursuant to sections 11 and 50 of the National Energy Board Act, the Board's method of regulating the tolls to be charged and received by Westcoast and the tariff to be filed by Westcoast in accordance with this Order, shall be as set forth in Schedule A attached to and forming part of this Order.

**83** Schedule A outlines a method for regulating the tolls of Westcoast on a monthly basis and confers on "interested parties" certain rights to receive and obtain information and to file with the Board representations with respect to Westcoast's budget. Paragraph 2 provides:

> Interested Parties
>
> 2. The Attorney General of British Columbia, the British Columbia Petroleum Corporation ("BCPC"), groups representing out-of-province producers, and the customers of Westcoast will be granted interested party status in all matters related to tolls subsequent to the hearing called by the Board's Order No. RH-2-77.

**84** It is to be observed that while this definition does not include Cominco Ltd. et al. among those to whom interested party status is granted, such status has not necessarily been denied to them. As it seems to me, there is nothing in the order which prevents them from applying to the Board for recognition as interested parties for the purposes of Schedule A to order TG-5-79.

**85** Next, the only proceeding before the Court which Cominco Ltd. et al. have brought against the final decision, which incorporates order TG-5-79, is an application under section 28 of the Federal Court Act. As there is provision in section 18 of the National Energy Board Act for an appeal from such an order on a question of law or jurisdiction, in my opinion, section 29[14] of the Federal Court Act applies to prevent a review of the order under section 28 on grounds of error of law or jurisdiction as put forward on behalf of these parties.

**86** That, in my view, is sufficient to dispose of the objection but, in any event, I am of the opinion that it is not sustainable. Counsel referred to some observations of Lord Macmillan in Canadian Pacific Railway Company v. Toronto Transportation Commission[15], on the meaning of persons "interested or affected by such order" in section 39 of the Railway Act and to the judgment of the Appellate Division of the Supreme Court of Alberta in Re Consumers' Gas Co. and Public Utility Board[16], on the meaning of "interested party" in section 30 of the Alberta Gas Trunk Line Company Act, but in my view, these cases have no application to the present situation and afford no support for counsel's submission. Here there is no statutory wording to be interpreted and we are not referred to, nor have I found, any applicable rule of procedure which would confer on Cominco Ltd. et al. or on anyone, the right to status as interested parties under the Board's order. These parties have, no doubt, an interest, albeit a more indirect one than that of the parties to whom interested party status was expressly accorded, and they may have a right from time to time to complain and to apply to the Board for relief against what they may regard as unjust or unreasonable tolls charged by Westcoast but that, in my view, is quite a different right from a right to require the Board to confer on them "interested party" status under its order.

**87** The objection accordingly fails.

**88** For the foregoing reasons, in my opinion appeals and the applications under section 28 of the Federal Court Act brought by the appellant British Columbia Hydro and Power Authority and those brought by British Columbia Petroleum Corporation, on files A-71-80 (A-70-80), A-72-80 (A-623-79) and A-73-80 (A-292-78) and by Cominco Ltd., Consumers Glass Company, Limited, Domglas Ltd. and Hiram Walker & Sons Ltd. on files A-75-80 and A-626-79 fail and should dismissed.

* * *

**89** PRATTE J. concurred.

* * *

**90** URIE J. concurred.

qp/s/mwk/lls

1 [1979] 1 S.C.R 684.

2 [1979] 2 F.C. 118 at p. 121.

3 (1912) 45 S.C.R. 321.

4 [1939] S.C.R. 308.

5 [1957] S.C.R. 185.

6 [1958] S.C.R. 353.

7 [1929] S.C.R. 186. [1961] S.C.R. 392. [1979] 1 S.C.R. 684.

8 [1974] 1 F.C. 453.

9 Compare Public Systems v. Federal Energy Regulatory Commission 606 F.2d. 973 (1979) at p. 976.

10 Union Gas Company of Canada Limited v. Sydenham Gas and Petroleum Company Limited and Memorial Gardens Association (Canada) Limited v. Colwood Cemetery Company (supra).

11 Compare City of Edmonton v. Northwestern Utilities Limited [1961] S.C.R. 392, per Locke J. at page 406:

With great respect, however, the proposed order would be made in an attempt to ensure that the utility should from year to year be enabled to realize, as nearly as may be, the fair return mentioned in that subsection and to comply with the Board's duty to permit this to be done. How this should be accomplished, when the prospective outlay for gas purchases was impossible to determine in advance with reasonable certainty, was an administrative matter for the Board to determine, in my opinion. This, it would appear, it proposed to do in a practical manner which would, in its judgment, be fair alike to the utility and the consumer.

12 See Northwestern Utilities, Limited v. The City of Edmonton [1929] S.C.R. 186, where Lamont J. said at page 196:

The items which should be included in the rate base cannot, in my opinion, be considered a question of jurisdiction or of law.

13 R.S.B.C. 1979, c. 370:

23. ...

(6) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. The assent may be express or implied, and may be given either before or after the appropriation is made.

14 29. Notwithstanding sections 18 and 28, where provision is expressly made by an Act of the Parliament of Canada for an appeal as such to the Court, to the Supreme Court, to the Governor in Council or to the Treasury Board from a decision or order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except to the extent and in the manner provided for in that Act.

15 [1930] A.C. 686 at p. 697.

16 (1971) 18 D.L.R. (3d) 749 at p. 760.

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Ontario

May 27, 2009

To: Licensed Electricity Distributors
Licensed Electricity Transmitters

**Re: Update to Chapter 2 of the Filing Requirements for Transmission and Distribution Applications**

Attached is an update of Chapter 2 of the Board's "Filing Requirements for Transmission and Distribution Applications" (the "Filing Requirements"). This chapter outlines the information that the Board expects electricity transmitters and distributors to file for cost of service rate applications, based on a forward test year. The remainder of the Filing Requirements will be updated at a later date. The Board is advancing the updates to this Chapter so that it is available to those distributors filing applications in August 2009 for 2010 rebasing.

Following two years of cost of service reviews, a need to update this chapter of the Filing Requirements had been identified by both external and internal stakeholders in order to make this chapter clearer and more focused. It is the Board's expectation that the updated Filing Requirements will decrease the likelihood of receipt of incomplete applications and reduce the number of interrogatories. To that end, the Board has included certain additional information requirements that it found helpful in its reviews of cost of service applications in 2008 and 2009.

The Board has also updated its definition of the typical residential customer for purposes of communicating bill impacts. Beginning in 2010, the Board's focus for a typical residential customer will be at the 800 kWh consumption level rather than the previous 1,000 kWh level as this number more closely approximates the monthly consumption of a typical residential customer.

Finally, since the Filing Requirements were issued in November 2006, the Board has reviewed certain policy matters and introduced new guidelines in areas such as smart meters and cost allocation. These have been included in the update as well.

This update does not incorporate any adjustments to reflect potential changes arising from the Statement of the Chair of April 3, 2009 on ”Regulatory Framework for Approval of Investment in Infrastructure by Electricity Transmitters and Distributors”. This initiative is ongoing. There may also be the need for updates related to other ongoing matters such as the implementation of the *Green Energy Act 2009*, the Low-income Energy Assistance Program and others. Any such updates will be made as required.

These Filing Requirements benefitted from the input of a number of stakeholders. The Board wishes to thank all those that assisted in this update.

Yours truly,

*Original Signed By*

Kirsten Walli
Board Secretary

Encl.

Ontario Energy Board

Commission de l'énergie de l'Ontario

# Ontario Energy Board

## Chapter 2 of the Filing Requirements for Transmission and Distribution Applications

**May 27, 2009**

differences from the handbook, and indicate whether these have been previously reviewed and approved by the Board (if so, file relevant references).
- Where the applicant is proposing new or changed depreciation/amortization rates, supporting documentation, preferably a depreciation study, must be provided.
- The applicant must provide a copy of depreciation/amortization policy, if available. If not, the applicant should state that such a policy does not exist, or explain why it is not available.

Appendix 2-N should be completed.

### 2.5.8 Taxes (PILs, Capital Tax and Property Taxes)

The applicant must provide the information outlined below:

- Detailed PILs calculation (or actual provincial and federal taxes if applicable), including derivation of adjustments (e.g., Tax credits, CCA adjustments) for the Historical, Bridge and Test Years;
- Supporting schedules and calculations identifying reconciling items;
- Most recent federal and provincial tax returns;
- Ontario Capital Tax (Actual costs versus forecast costs with detailed breakdown);
- Amount of property taxes and explanation of changes to most recent actual; and,
- Calculation of tax credits (e.g., apprenticeship tax credits, education tax credits).

A model based on the Board's tax methodology will be made available on the Board's web site. This can be used at the applicant's option.

## 2.6 Exhibit 5. Cost of Capital and Capital Structure

The applicant may apply for a utility-specific cost of capital and/or capital structure. If the applicant wishes to take such an approach, it must provide appropriate justification for its proposal.

Alternatively, the *Report of the Board on Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors* (the Cost of Capital Report) of December 20, 2006 and the subsequent updates providing the Board's deemed capital structure and cost of capital rates can be used. The applicant is only required to provide justification of forecast parameters that differ from the Board's deemed rates.

### 2.6.1 Capital Structure

The elements of the deemed capital structure are shown below and must be presented with the required schedules for: current Board approved, Historical Actuals, Bridge and Test Years:

- Long-Term Debt;
- Short-Term Debt;
- Preference Shares; and
- Common Equity.

Appendix 2-O must be completed for the required years.

An explanation of changes in actual capital structure is required including:

- Non-scheduled retirement of debt or preference shares and buy back of common shares; and
- Long-Term Debt, preference shares and common share offerings.

### 2.6.2 Cost of Capital

The applicant must provide the following information for each year:

- Calculation of cost for each capital component;
- Profit or loss on redemption of debt and/or preference shares, if applicable;
- Copies of any current promissory notes or other debt arrangements with affiliates; and
- If the applicant is proposing any rate that is different from the Board guidelines, a justification of forecast costs by item including key assumptions.

### 2.6.3 Calculation of Return on Equity and Cost of Debt

These requirements are outlined in the Cost of Capital Report.

## 2.7 Exhibit 6. Calculation of Revenue Deficiency or Surplus

The applicant must include the following information in this exhibit, net of energy costs and revenues:

- Determination of Net Utility Income;
- Statement of Rate Base;
- Actual Utility Return on Rate Base;
- Indicated Rate of Return;
- Requested Rate of Return;
- Deficiency or Sufficiency in Revenue; and
- Gross Deficiency or Sufficiency in Revenues.

The filing requirements have been designed in a manner to isolate the delivery-related sufficiency/deficiency separate and apart from the energy-related sufficiency/deficiency. In keeping with this separation, the applicant must provide revenue sufficiency or deficiency calculations net of electricity price differentials captured in the RSVAs and also net of any cost associated with LV charges or smart meter expenditures/revenues


# ONTARIO ENERGY BOARD

## Practice Direction

## On

## Cost Awards

**ONTARIO ENERGY BOARD**

**PRACTICE DIRECTION ON COST AWARDS**

## 1. DEFINITIONS

1.01 In this direction, words have the same meaning as in the Ontario Energy Board's Rules of Practice and Procedure, unless otherwise defined in this section.

"Act" means the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B;

"applicant" means:

(a) when used in connection with processes commenced by an application, a person who makes an application;
(b) when used in connection with processes commenced by reference, Order in Council, or on the Board's own initiative, the person(s) named by the Board to be the applicant; and
(c) when used in connection with a notice and comment process under section 45 or 70.2 of the Act or any other consultation process initiated by the Board, the person(s) ordered by the Board to pay costs in accordance with section 30 of the Act;

"application" means the commencement by a party of a process before the Board;

"distributor" means a person who owns or operates a distribution system;

"generator" means a person who owns or operates a generation facility;

"IESO" means the Independent Electricity System Operator;

"intervenor" means a person who has been granted intervenor status by the Board or, for the purposes of a notice and comment process under section 45 or 70.1 of the Act or any other consultation process initiated by the Board, means a person who is participating in that process;

"marketer" means a person who markets natural gas;

"party" means the applicant, any person granted intervenor status by the Board, and any person participating in a Board process;

"process" means a process to decide a matter brought before the Board whether commenced by application, reference, Order in Council or on the Board's own initiative (including, but not limited to, a notice and comment process under section 45 or 70.2 of the Act and any other consultation process initiated by the Board);

"retailer" means a person who retails electricity;

"Secretary" means the Board Secretary and any Assistant Board Secretary;

"Tariff" means the Cost Award Tariff contained in Appendix A to this Practice Direction on Cost Awards;

"transmitter" means a person who owns or operates a transmission system; and

"wholesaler" means a person who purchases electricity or ancillary services in the IESO-administered markets or directly from a generator or who sells electricity or ancillary services through the IESO-administered markets or directly to another person, other than a consumer.

## 2. COST POWERS

2.01 The Board may order any one or all of the following:

(a) by whom and to whom any costs are to be paid;
(b) the amount of any costs to be paid or by whom any costs are to be assessed and allowed;
(c) when any costs are to be paid;
(d) costs against a party where the intervention is, in the opinion of the Board, frivolous or vexatious; and
(e) the costs of the Board to be paid by a party or parties.

## 3. COST ELIGIBILITY

3.01 The Board may determine whether a party is eligible or ineligible for a cost award.

3.02 The burden of establishing eligibility for a cost award is on the party applying for a cost award.

3.03 A party in a Board process is eligible to apply for a cost award where the party:

(a) primarily represents the direct interests of consumers (e.g. ratepayers) in relation to regulated services;
(b) primarily represents a public interest relevant to the Board's mandate; or
(c) is a person with an interest in land that is affected by the process.

3.04 In making a determination whether a party is eligible or ineligible, the Board may also consider any other factor the Board considers to be relevant to the public interest.

3.05 Despite section 3.03, the following parties are not eligible for a cost award:

(a) applicants before the Board;
(b) transmitters, wholesalers, generators, distributors, and retailers of electricity, either individually or in a group;
(c) transmitters, distributors, and marketers of natural gas, and gas storage companies, either individually or in a group;

(d) the IESO; and
(e) the Ontario Power Authority.

3.06 Notwithstanding section 3.05, a party which falls into one of the categories listed in section 3.05 may be eligible for a cost award if it is a customer of the applicant.

3.07 Also notwithstanding section 3.05, the Board may, in special circumstances, find that a party which falls into one of the categories listed in section 3.05 is eligible for a cost award in a particular process.

3.08 The Board may, in appropriate circumstances, award an honorarium recognizing individual efforts in preparing and presenting an intervention or submission. The amount of the honorarium will be specified by the Board panel presiding.

## 4. COST ELIGIBILITY PROCESS

4.01 A party that will be requesting costs must submit its reasons as to why the party believes that it is eligible for an award of costs, addressing the Board's cost eligibility criteria (see section 3), at the time of filing of its notice of intervention or, in the case of a notice and comment process under section 45 or 70.2 of the Act or any other consultation process initiated by the Board, at a date specified by the Board. For information on filing and serving a request for intervention, refer to the Board's Rules of Practice and Procedure.

4.02 An applicant in a process will have 14 calendar days from the filing of the notice of intervention and request for cost eligibility to submit its objections to the Board, after which time the Board will rule on the intervention and request for eligibility.

4.03 The Board may at any time seek further information and clarification from any party that has filed a request for cost eligibility and may provide direction to such parties as to any matter that the Board may consider in determining the amount of a cost award, and, in particular, combining interventions and avoiding duplication of evidence.

4.04 A direction mentioned in section 4.03 may be taken into account in determining the amount of a cost award under section 5.01.

## 5. PRINCIPLES IN AWARDING COSTS

5.01 In determining the amount of a cost award to a party, the Board may consider, amongst other things, whether the party:

(a) participated responsibly in the process;
(b) asked questions on cross examination which were unduly repetitive of questions already asked by other parties;
(c) made reasonable efforts to ensure that its evidence was not unduly repetitive of evidence presented by other parties;
(d) made reasonable efforts to co-operate with other parties in order to reduce the duplication of evidence and questions on cross-examination;
(e) made reasonable efforts to combine its intervention with that of similarly interested

parties;

(f) contributed to a better understanding by the Board of one or more of the issues addressed by the party;

(g) complied with directions of the Board including directions related to the pre-filing of written evidence;

(h) addressed issues in its written or oral evidence or in its questions on cross-examination or in its argument which were not relevant to the issues determined by the Board in the process;

(i) engaged in any other conduct that tended to lengthen unnecessarily the duration of the process; or

(j) engaged in any other conduct which the Board found was inappropriate or irresponsible.

## 6. REIMBURSEMENT FOR COSTS CLAIMED

6.01 Reference should be made to the Board's Tariff for approved costs.

6.02 Cost claims shall be made on Board-approved forms (Appendix "B").

6.03 The burden of establishing that the costs claimed were incurred directly and necessarily for the party's participation in the process is on the party claiming costs.

6.04 An individual party that has incurred a wage or salary loss as a result of participating in a hearing may recover all or part of such wage or salary loss, subject to review by the Board.

6.05 A party will not be compensated for time spent by its employees or officers in preparing for or attending at Board processes. When determining whether a person is an officer or employee of the party, the Board will look at the true nature of the relationship between the person and the party and the role the person performs for the party. The Board may deem the person to be an officer or employee of the party regardless of the person's title, position, or contractual status with the party. Furthermore, an employee or officer of a company or organization that is affiliated with or related to the party that is eligible for an award of costs will be deemed to be an employee or officer of the party.

6.06 Counsel fees will be accepted in accordance with the Board's Tariff.

6.07 Paralegal fees will be accepted in accordance with the Board's Tariff. To qualify for consideration as a paralegal service, a paralegal must have undertaken services normally or traditionally performed by legal counsel, thereby reducing the counsel's time spent on client affairs.

6.08 Where appropriate, hourly rates for Articling Students may be allowed in accordance with the Board's Tariff.

6.09 In-house counsel and supporting employees, including in-house paralegal and articling students respectively, will not be reimbursed for their services.

6.10 Consultant and case management fees will be accepted according to the Board's Tariff. A copy of the consultant's curriculum vitae must be attached to the Statement of Costs forms (Appendix "B").

6.11 No differentiation will be made between the rates for preparation and attendance. Travel time spent working should be claimed as preparation time with the appropriate time documented. There will be no compensation for other hours spent in travel, although reasonable disbursements for travel costs will be allowed in accordance with the Board's Tariff.

6.12 The Board may award costs to a party on the basis of a fixed amount per day for participation in workshops, working groups, advisory groups, technical conferences, issues conferences, settlement conferences or pre-hearing conferences.

## 7. DISBURSEMENTS

7.01 Reasonable disbursements, such as postage, photocopying, transcript costs, travel and accommodation, directly related to the party's participation in the process, will be allowed in accordance with the Board's Tariff.

7.02 A party may be compensated for the reasonable disbursements of an employee or officer of the party which are necessarily and directly incurred as a result of participation in a Board process.

7.03 Receipts, where appropriate, must be submitted with the cost claim.

## 8. GROUP INTERVENTIONS

8.01 In a case where a number of eligible parties have joined together for the purpose of a combined intervention, the Board will normally allow reasonable expenses necessary for the establishment and conduct of such a group intervention.

8.02 The reasonable costs of meeting room rentals and associated costs required for the formation and coordination of a group, and which are specific to the intervention, will normally be allowed. The travel costs and personal expenses of group members attending such meetings will, however, normally be excluded.

8.03 Attendance at a hearing should be limited to the number of representatives required to effectively monitor and provide input into the processes. When groups are not represented by counsel and/or experts, the reasonable out of pocket disbursements directly incurred for the attendance of a maximum of four group members will normally be accepted. When the group is represented by counsel and/or experts, the out of pocket disbursements incurred for the attendance of a maximum of to two group members, as advisors, will normally be accepted.

## 9. GOODS AND SERVICE TAX ("GST")

9.01 A party will be compensated for the GST it pays on goods and services which are