Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2008-0381

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

AND IN THE MATTER OF a proceeding commenced by the Ontario Energy Board on its own motion to determine the accuracy of the final account balances with respect to account 1562 Deferred PILs (for the period October 1, 2001 to April 30, 2006) for certain 2008 and 2009 distribution rate applications before the Board.

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3. Excerpts from the *Ontario Energy Board Act, 1998,* S.O. 1998, c.15 as amended by the *Energy Pricing, Conservation and Supply Act, 2002,* S.O. 2002, c.23, section 79.3(2)

4. Excerpts from Ontario Regulation 339/02

5. *Ontario Energy Board Amendment Act, (Electricity Pricing),* S.O. 2003 c.8

6. Letter from the Minister of Energy to Chair of Ontario Energy Board dated December 19, 2003

7. OEB *Filing Guidelines: Applications for the Recovery of Regulatory Assets for April 1, 2004 Distribution Rate Adjustments* (January 15, 2004)

8. Excerpt from Ontario Energy Board Decision with Reasons, RP-2004-0117 / RP-2004-0118 / RP-2004-0100 / RP-2004-0069 / RP-2004-0069 / RP-2004-0064 ("Phase 2 Decision")

9. Ontario Energy Board "*Regulatory Asset Filing Guidelines for Phase 2 review for remaining distributors*", July 12, 2005

10. Excerpt from Ontario Energy Board Staff Discussion Paper "*Account 1562 – Deferred Payments in Lieu of Taxes – Methodology and Disposition of Balances for Electricity Distribution Companies affected by section 93 of the Electricity Act, 1998*", EB-2007-0820, August 20, 2008 ("PILS Discussion Paper")

11. Ontario Energy Board Decision and Order, RP-2005-0013 / EB-2005-0031 (February 24, 2006) *("Boniferro")*

12. *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)* [1989] S.C.J. No. 68 ("*Bell Canada v. CRTC*")

13. *Beau Canada Exploration v. Alberta (Energy & Utilities Board),* [2000] A.J. No. 507 (C.A.) ("*Beau Canada*")

14. *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] S.C.J. 40 ("*Bell Aliant*")

15. *EPCOR Generation Inc v. Energy and Utilities Board,* [2003] A.J. No. 1573 (*"EPCOR"*)

16. Ontario Energy Board Decision and Order, EB-2007-0744, October 30, 2008 ("GLPL")

17. *Great Lakes Power Ltd. v. Ontario Energy Board,* [2009] O.J. No. 3146 (Divisional Court) (*"GLPL"*)

TAB 1

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August 24, 2001

To: All Electricity Distribution Companies

Re: Impact of Proposed Proxy Taxes on Rates

Section 93 of the *Electricity Act, 1998* ("the Act"), which has yet to be proclaimed, provides that previously tax-exempt local electricity distributors ("LDCs") will become subject to payments in lieu of taxes ("PILs") commencing October 1, 2001. When proclaimed, the first PILs installments will be due October 31, 2001, which necessitates that LDCs ascertain the financial and rate making implications of this rapidly approaching requirement. It would therefore be expedient to establish a method for dealing with PILs for rate-making purposes in advance of the proclamation of section 93, to enable LDCs time to consider their particular circumstances, and to take account of various options available to them.

A number of divergent views relating to techniques for determining the appropriate tax gross-up and incorporating this into distribution rates have been received by the Board. The Board also has had several requests for consultations regarding this issue. Undoubtedly, in the Board's view, consultations on these matters are desirable, but given the anticipated October commencement of PILs prescribed by section 93, it is clear that it is prudent at this time to make some provision for the recovery of PILs, pending the Board's consultation process.

In general terms, the Board considers PILs on the wires-only portion of the LDC revenue as an additional expense that should be recovered through an increase in distribution rates. Moreover, in the Electricity Distribution Rates Handbook, the Board has already indicated that "the incorporation of PILs will be treated as a pass through".

After considering all the circumstances, the Board proposes that the recovery of PILs for the LDCs' current regulatory year be implemented by means of suitable adjustments to the LDCs upcoming March 1, 2002 rate applications. Therefore, recovery of the section 93 tax expense for the period from October 2001 to February 2002 would be deferred and collected through rates in the 2002-3 regulatory year, along with the utilities' annualized tax expense for 2002.

There are several advantages of this approach, including: reduction in the number of rate changes; reduction in administration and extra processes, especially in light of the short time period for any initial tax adjustment (until March 1, 2002); the opportunity for the Board to conduct consultations on the details relating to implementation of PILs; the utilities would not be impeded in their efforts for market readiness; and the special installment provisions contained in Regulation 162/01 significantly reducing utilities' 2001 PILs-related cash flow requirements.

To implement the above approach, the Board proposes to establish a deferral account with interest thereon, determined at the utilities' long-term debt rate as indicated in the Rate Handbook. The mechanics of this deferral account will be discussed during the Board's consultation process.

The Board is mindful that LDCs will face an increased cash flow burden for a few months under this deferral approach, and that some utilities may experience financial duress as a result. The Board will therefore provide an opportunity for utilities which can demonstrate financial distress to apply for an adjustment to their current rates, to include provisions for PILs based on its annualized 2001 PILs estimates. Further details, including suggested methodologies for estimating PILs, will be provided as soon as possible.

The Board will also announce particulars of the consultation process, in the near term, to be undertaken with stakeholders regarding the mechanics of the main tax adjustment to take effect on March 1, 2002. Among the issues to be considered are use of a true-up mechanism, non-utility adjustments, and use of deemed interest expense versus actual interest expense.

Utilities requiring further information or guidance on these matters should contact John Vrantsidis at 416-440-7637 (toll free, 1-800-632-2727) or E-mail at vrantsjo@oeb.gov.on.ca

Yours truly,

Paul Pudge

Board Secretary

TAB 2

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September 17, 2001

To: All Electricity Distribution Companies

Re: Immediate Pass-through of 2001 s. 93 PILs for Utilities Claiming Financial Distress

The Board's correspondence of August 24, 2001 indicated that local electricity distribution companies ("LDCs") should add the amount of their upcoming 2001 section 93 payments in lieu of taxes ("PILs") to their application for annual rate adjustments to be effective March 1, 2002 and that further details on this approach will be provided after consultations.

The Board also stated it was mindful that LDCs will face an increased cash flow burden for a few months under the above approach, and that utilities which can demonstrate financial distress would be provided with an opportunity to adjust their rates to include provisions for PILs based on their annualized 2001 PILs estimates. This correspondence will explain the suggested methodology to be followed in these circumstances.

While the PILs consultation process proceeds, the Board has set out two methods to adjusting rates to incorporate 2001 PILs. Utilities are cautioned that the methods outlined below may be modified as a result of the consultation process to a single, new tax gross-up methodology for use in the March 1, 2002 adjustments. Both methods used to incorporate a 2001 PILs provision into rates assume that the amount of PILs which can be passed on through distribution rates will be limited to the "wires-only" activities. For purposes of immediate applications to increase rates to reflect 2001 PILs due to financial distress, utilities are free to choose the approach that proves most suitable to their specific circumstances.

Please note that in the correspondence of August 24 the Board indicated that it would be discussing the mechanics of a deferral account at its upcoming consultation process. Whatever methodology results from the consultation process will be applied consistently to all utilities, and this may result in a variance to be recorded in a deferral account.

Method 1) Use Own 2001 PILs Estimate

The Board understands that in order to calculate the first PILs instalment due on October 31, 2001, LDCs must first estimate their total section 93 PILs liability for the 2001 short tax year. As most utilities have a calendar year-end, the 2001 tax year will generally cover the period October 1, 2001 to December 31, 2001.

Under this method, the applicant would use the 2001 PILs estimate produced for instalment purposes to generate an annualized tax gross-up figure for insertion into the current rate year RUD model. Detailed instructions are attached. Please note that utilities are required to provide their background tax calculations to support the estimates filed.

Method 2) Use (Revised) Tax Gross-up Formula

The current RUD model (sheet 8 - MARR with taxes) includes a tentative income tax gross-up formula. The Board has revised and expanded this calculation (for example, a capital taxes estimate was added), and therefore the present version of sheet 8 should not be used. A new formula is set out in a spreadsheet available for downloading at the Board's Web site (under "What's New?"). The final product of the formula is a dollar figure that should be manually inserted, in sheet 8 of the RUD model filed in the distribution rate unbundling application (at "MARR with taxes minus MARR without taxes"), as the 2001 tax gross-up amount. Detailed instructions are contained in the spreadsheet.

*****

Under both methods, LDCs will be required to re-run the RUD model filed with the unbundling application. The other data contained in the original model should not be changed (in other words, inserting a new tax figure at sheet 8 is the only change required).

Once the RUD model is re-run, it will generate a new set of rates. Applicants should file the new RUD model and revised 2001 rates schedules (see attached checklist).

Procedural Directions

The Board will treat any application for immediate pass-through of 2001 PILs as an amendment to the utility's rate application. Applicants will not be required to publish a new notice of application in conjunction with this rate adjustment, as the notice of applications previously published referred to the further phases of proceedings and to the future imposition of PILs.

Three copies of all supporting material must be filed with the Board's Secretary in the usual manner. A suggested covering letter, that formally requests an amendment, is

attached.

The Board directs that the applicant serve a copy of its submissions on all interveners and on all municipalities within its service area. A draft covering letter to accompany that material is attached and should be completed.

Unless otherwise necessary, the Board will process any applications received by way of written hearing.

Utilities requiring further information or guidance on these matters should contact John Vrantsidis (416 481-1967 or toll free, 1-888-632-6273) or e-mail at vrantsjo@oeb.gov.on.ca

Yours truly,

Peter O'Dell
Assistant Board Secretary

Covering Letter for 2001 PILs Financial Distress Application

Date

Mr. Paul Pudge
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
26th Floor
Toronto, Ontario
M4P 1E4

Re: [Insert: "*Electricity Distributor's Name*"]
File Number RP [Insert: File Number - e.g. 2000-XXXX]

Dear Mr. Pudge:

Section 93 of the *Electricity Act, 1998* will impose payments in lieu of taxes, commencing on October 1, 2001, upon local electricity distributors that were previously exempt from income and capital taxes.

As our utility will experience financial distress as a result of the new payments due to the Province, please consider this letter an amendment to our existing rate application, file number RP [Insert: File Number - e.g. 2000 -XXXX] to enable us to recover this added cost from our customers as of [Insert: date requested; no earlier than October 1, 2001].

[Insert:"*Electricity Distributor's Name*"] hereby applies to use the Board's standard method of implementation number [Insert: 1 or 2] as the basis for this increase. The procedural checklist issued by the Board has been completed and attached, as well as the supporting material required under the implementation method chosen.

A complete copy of the material filed in support of this amendment will be served on all interveners of record and on all municipalities within our service area.

For additional information regarding this application, [Provide: contact name] may be contacted at [Provide: telephone number and any email address].

Yours truly,

[Provide: Signing Officer Name]
[Provide: Position]
[Provide: Electricity Distributor's Name]
[Provide: License Number]

attachment(PILs Checklist)

2001 s. 93 PILs RATE ADJUSTMENT CHECKLIST

1. Documentation to establish financial distress.

2. Choose rate adjustment Method 1 or Method 2.

3. Provide either:

utility's own supporting tax calculations (Method 1)

or

completed Board-issued tax gross-up spreadsheet (Method 2)

4. Provide hard and electronic copy of RUD Model run after tax gross-up figure inserted.

5. Provide manager's summary and proposed new 2001 rates schedule.

Required Covering Letter to Interveners

Date

[To each intervener in original unbundling application,
and to all municipalities within service area]

Re: [Insert:"*Electricity Distributor's Name*"]
File Number RP [Insert: File Number - e.g. 2000-XXXX]

Dear Sir/Madame:

Section 93 of the *Electricity Act, 1998* will subject previously income tax-exempt local electrical distributors to payments in lieu of taxes commencing October 1, 2001.

As we believe our utility will experience financial distress as a result of the new payments due to the Province, we have applied to the Board for an amendment to our existing rate application, file number RP [Insert: File Number - e.g. 2000-XXXX], to enable us to recover this added cost from our customers as of [Insert: date requested; no earlier than October 1, 2001].

Please find attached a complete copy of the material filed in support of this amendment. This material will be served on all interveners of record and on all municipalities within our service area.

The Board has directed that any comments should be filed with the Board's Secretary, within two weeks of the date of this letter, at the address shown below.

For additional information regarding this application, the applicant or Board may be contacted at the addresses provided below.

Yours truly,

[Provide: Signing Officer Name]
[Provide: Position]
[Provide: Electricity Distributor's Name]
[Provide: License Number]

Addresses

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
26th Floor
Toronto, Ontario
M4P 1E4

Attention:
Mr. Paul B. Pudge
Board Secretary
1-888-632-6273 (Toll free)
416-440-7656 (Fax)

OR

[Insert: LDC Name]
[Insert: Full Mailing Address]

[Insert: Name of Contact Person]
[Insert: Title]
[Insert: Telephone number]
[Insert: Fax number]

Method #1 - Use Own 2001 s. 93 PILs Estimate

Note: A PILs estimate is required for each set of rates developed using the RUD model. For example, if an LDC filed separate rate schedules for specific companies, a PILs estimate should be calculated for each company and inserted into the RUD model establishing rates for that company. If rates were prepared for an amalgamated utility, for the purpose of determining a PILs estimate, please sum the tax estimate for each legal entity.

Unless otherwise indicated, the instructions below assume the case of a single LDC with a calendar year end. The same general approach, but with some adjustments, will be applied in other circumstances.

Step 1. Provide estimated total section 93 PILs liability for the period October 1 to December 31, 2001 (for "wires-only" business). $_____ .

This figure will need to be derived by tax-exempt electricity distribution utilities in any event, as these utilities are required by the Province to estimate total 2001 PILs in order to determine their October 31st PILs instalment. All utilities with a calendar year-end will have a short 2001 tax year.

Step 2. Provide supporting calculations for above total.

The Board will require reasonable justification for the total amount listed in step 1 before rates can be adjusted.

The Board requests the following level of supporting figures be provided, at a minimum, regarding the income tax calculation. Forms (attached as an appendix) have been provided as a guide to assist in the completion of this information. (These forms will also be helpful in completing the manager's summary under step 6.) Supporting calculations should be provided for each legal entity.

Wires-only Accounting Income

- Explicitly identify the removal of any non-wires income.
- List total revenues, expenses, and net operating profit
- Expenses should specifically identify the amount of interest expense claimed
- Any special adjustments to non-wires income made when estimating PILs used in determining tax instalments for "Provincial purposes" should be noted (for example, any regulatory adjustments recorded).

Timing and Permanent Differences

- Depreciation amount used (please indicate the asset values used to determine the depreciation expense used in the calculation)
- Capital Cost Allowance (please indicate the value of assets used in the calculation if it differs from the asset value used for depreciation above)
- Any pension and other post employment benefit differences
- Other significant differences.

Income Tax Expense

- Rates used for federal, federal surtax and provincial tax determination and the implications of any small business tax deductions.

Documentation regarding Other Taxes:

- Federal Large Corporation Tax (please provide the calculation supporting taxable capital or a proxy such as net assets used in the calculation, itemize any deductions claimed and indicate the rate used). Please also indicate the amount of federal surtax which offsets this tax.

- Ontario Capital Tax (please provide the calculation supporting taxable capital or proxy such as net assets used in the calculation, itemize any deductions claimed and indicate the rate used).

- Ontario Corporate Minimum Tax calculation details (if applicable).

Step 3. Annualize PILs estimate.

An annualized approach is employed as the RUD model uses an annual revenue requirement and annual volume information to establish rates at a sufficient level to recover a utility's base requirements on a "going-forward" basis.

In order for the RUD model to pass-through the proper amount of taxes to rates, the figure in step 1 should be multiplied by 12 and divided by the number of months between October, 2001 and the LDC's year end.

For example, for those utilities with a calendar year end, the figure in step 1 (which represents expected total PILs for the last three months of 2001) will end up being increased fourfold to arrive at a proxy for the annualized PILs expense.

Annualized s. 93 tax gross-up $_____.

Step 4. Insert tax gross-up into RUD model.

Insert the results under step 3 into cell C46 ("MARR WITH TAXES - MARR WITHOUT

TAXES") of sheet 8 of the final RUD model filed in the original unbundling application (or sheet 9, if you had local generation). The other input data in the RUD model should not be changed. The utility should use the RUD model supporting its Board-approved rates.

Step 5. Re-run RUD model.

Run the RUD model after completing step 4. The model will automatically generate a new set of 2001 rates. Provide both a hard copy of the new RUD model and file an electronic copy.

Step 6. Prepare manager's summary and new rates schedule.

Provide a short manager's summary.

Please state the proposed date for the new rates to come into effect. A complete revised rates schedule should be attached.

The manager's summary should include a variance analysis of the following key items comparing the original application details with the annualized pro-forma period. When undertaking the variance analysis, please refer to the information set out in the forms provided under step 2 (which are attached as an appendix).

- Significant changes in revenue and expense items as highlighted in the attached forms.
- Items deducted for tax purposes but not yet allowed for regulatory purposes (transition costs, extraordinary costs).
- Interest expense incurred and the debt structure associated with the interest.
- Interest expense incurred versus the amount allowed under the MARR calculation in the RUD model. If MARR is phased in over three years then the equity and interest gross-up are phased in over the same period.
- Pension costs and other post-employment benefits.
- Tax rates which differ from published rates.
- Book value of fixed assets compared to the values (FMV) used in the tax calculations.

Step 7. Serve material on Interveners.

Collect the evidence in support of financial distress, the background calculations supporting the section 93 proxy tax estimate used (steps 2 and 3), the new RUD model (step 5), manager's summary and proposed new rates schedule (step 6). All this supporting material, along with a signed copy of the draft covering letter provided, should be served on all interveners and on all municipalities within the utility's service area.

Step 8. File material with Board.

The material prepared in step 7 (including letters to interveners) should be filed with the Board's Secretary (three hard copies should be provided of the complete package, along with one electronic copy of the new RUD model).

APPENDIX
Method 1 -
Use Own s. 93 Pils Estimate

Utility:
RP-
Date:

Income Statement
For the _____months
Ended_____200___

	Wires Only Used in Original Application (1)	Wires Only Pro-forma Period (2)	Pro-forma Period Annualized (3)
Revenue Cost of power Distribution revenue Distribution expenses Administration expenses Other income			
Net distribution income			
Interest expense (4) Z- Factor items Transition costs Extraordinary items			
Net income before taxes			

Notes :

1) In most cases these numbers will be from the 1999 audited financial statements.

2) For most LDCs this will be for the pro-forma period October 1-December 31, 2001.

3) Annualization suggested is (pro-forma / 3) x 12 for a LDC with a December year end. If the pro-forma period is more than three months then it would be (pro-forma x 12) / number of months in pro-forma period.

4) Interest expense incurred by the utility on its actual borrowings.

APPENDIX
Method 1 -
Use Own s. 93 PILs Estimate

Utility
RP-
Date:

Tax Calculation

For the_____months
Ended_____200____

	Wires Only Pro-forma Period End Data	
Net income before taxes Add back: Depreciation Amortization Other items: - Deduct: CCA Ontario capital tax (2) Ontario minimum tax (2)		
Taxable income		
TAXES	**Wires Only Pro-forma Period End Data**	**Pro-forma Period Annualized**
Federal income tax (Rate used %) (1) Ontario income tax (Rate used %) (1) Large corporation tax (2) Ontario capital tax (2) Ontario minimum tax (2)		
Total taxes		(3)

Notes:

1) Please provide small business deduction calculations if taken.

2) Provide details of calculations showing, for example, federal surtax offset to LCT, etc.

3) The short tax year October 1-December 31, 2001 is a distinct tax year for those with December year ends. On January 1, 2002 a separate tax year begins for most LDCs. The annualized data is for comparative purposes only. For example, the small business deduction may be deductible for the short tax year but income may be too high in the twelve month tax year to take full advantage of small business deductions.

APPENDIX
Method 1 -
Use Own s. 93 PILs estimate

Utility
RP-
Date:

FIXED ASSETS / DEPRECIATION
UNDEPRECIATED CAPITAL COST (UCC)
CAPITAL COST ALLOWANCE (CCA)

Pro-forma period ended_____200___

	Wires Only From Original Application	Wires Only Pro-forma Period End (2) Book Values	Tax Values
Cost	(1)	(6)	(3)
Accumulated depreciation	(1)	(6)	
Net book value or UCC	(1)	(6)	(4)
Depreciation charge or CCA	(1)	(6)	(5)

Notes:

1) Fixed asset values used to calculate rate base in initial rate unbundling application.

2) For most LDCs the date for information will be the pro-forma period end, December 31, 2001. For those LDCs which were previously taxable, the date will be the year end month in 2002.

3) Cost values for tax purposes should be the fair market values (FMV) required by the tax authorities. Please provide explanations for unusual accounting/ tax cost differences.

4) Undepreciated capital cost on which the capital cost allowance is based.

5) Capital cost allowance from the utility's own tax calculations.

6) Relates to accounting records.

APPENDIX
Method 1 -
Use Own s. 93 PILs Estimate

Utility
RP-
Date:

Additional Information

For the_____months
Ended_____200____

	Wires Only Used in Original Application (1)	Wires Only Pro-forma Period (2)	Pro-forma Period Annualized (3)
Pension costs			
Other post-employment benefit costs			
Other significant differences Please list: - - -			

Notes :

1) In most cases this will be from the 1999 audited financial statements.

2) For most LDCs this will be for the pro-forma period October 1-December 31, 2001.

3) Annualization suggested is (pro-forma / 3) x 12 for a LDC with a December year end. If the pro-forma period is more than three months then it would be (pro-forma x 12) / number of months in pro-forma period.

TAB 3

Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15
Schedule B

Historical version for the period December 18, 2003 to March 31, 2004.

Amended by: 1999, c. 6, s. 48; 2000, c. 26, Sched. D, s. 2; 2001, c. 9, Sched. F, s. 2; 2002, c. 1, Sched. B; 2002, c. 17, Sched. F, Table; 2002, c. 23, s. 4; 2003, c. 3, ss. 2-90; 2003, c. 8.

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PART I
GENERAL

Board objectives, electricity

1. The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To facilitate competition in the generation and sale of electricity and to facilitate a smooth transition to competition.
2. To provide generators, retailers and consumers with non-discriminatory access to transmission and distribution systems in Ontario.
3. To protect the interests of consumers with respect to prices and the reliability and quality of electricity service.
4. To promote economic efficiency in the generation, transmission and distribution of electricity.
5. To facilitate the maintenance of a financially viable electricity industry.
6. To promote energy conservation, energy efficiency, load management and the use of cleaner energy sources, including alternative and renewable energy sources, in a manner consistent with the policies of the Government of Ontario.
7. To promote communication within the electricity industry and the education of consumers. 1998, c. 15, Sched. B, s. 1; 2002, c. 23, s. 4 (1); 2003, c. 3, s. 2.

Board objectives, gas

2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:

1. To facilitate competition in the sale of gas to users.
2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
3. To facilitate rational expansion of transmission and distribution systems.
4. To facilitate rational development and safe operation of gas storage.
5. To promote energy conservation and energy efficiency in a manner consistent with the policies of the Government of Ontario.

(4) REPEALED: 2003, c. 3, s. 51 (1).

Cancellation of licence

(5) The Board may cancel a licence upon the request in writing of the licence holder. 1998, c. 15, Sched. B, s. 77 (5); 2003, c. 3, s. 51 (2).

(6) REPEALED: 2000, c. 26, Sched. D, s. 2 (6).

Orders by Board, electricity rates

Order re: transmission of electricity

78. (1) No transmitter shall charge for the transmission of electricity except in accordance with an order of the Board, which is not bound by the terms of any contract. 2000, c. 26, Sched. D, s. 2 (7).

Order re: distribution of electricity

(2) No distributor shall charge for the distribution of electricity or for meeting its obligations under section 29 of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract. 2000, c. 26, Sched. D, s. 2 (7).

Rates

(3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*. 1998, c. 15, Sched. B, s. 78 (3).

Same

(4) The Board may make an order under subsection (3) with respect to the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998* even if the distributor is meeting its obligations through an affiliate or through another person with whom the distributor or an affiliate of the distributor has a contract. 1998, c. 15, Sched. B, s. 78 (4).

(5) REPEALED: 2003, c. 3, s. 52 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, section 78 is amended by the Statutes of Ontario, 2003, chapter 8, section 1 by adding the following subsections:

Same, separate rates for situations prescribed by regulation

(5) The Board shall approve or fix separate rates under this section for the different situations prescribed by the regulations made under clause 88 (1) (g.4). 2003, c. 8, s. 1.

Same, obligations under s. 29 of *Electricity Act, 1998*

(5.0.1) In approving or fixing just and reasonable rates for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*, the Board shall comply with the regulations made under clause 88 (1) (g.5). 2003, c. 8, s. 1.

See: 2003, c. 8, ss. 1, 13.

Same, Hydro One Inc. and subsidiaries

(5.1) In approving or fixing just and reasonable rates for Hydro One Inc. or a subsidiary of Hydro One Inc., the Board shall apply a method or technique prescribed by regulation for the calculation and treatment of transfers made by Hydro One Inc. or its subsidiary, as the case may be, that are authorized by section 50.1 of the *Electricity Act, 1998*. 2002, c. 1, Sched. B, s. 8; 2003, c. 3, s. 52 (2).

Same, statutory right to use corridor land

(5.2) In approving or fixing just and reasonable rates for a transmitter who has a statutory right to use corridor land (as defined in section 114.1 of the *Electricity Act, 1998*), the Board shall apply a method or technique prescribed by regulation for the treatment of the statutory right. 2002, c. 1, Sched. B, s. 8; 2003, c. 3, s. 52 (3).

Conditions, etc.

(6) An order under this section may include conditions, classifications or practices applicable to the transmission, distribution or retailing of electricity, including rules respecting the calculation of rates. 1998, c. 15, Sched. B, s. 78 (6).

Deferral or variance accounts

Purpose of payments

(4) The payments by the IMO that are required under this section are for the purpose of reimbursing consumers for part of the commodity price they paid for electricity. 2002, c. 23, s. 4 (11).

Repeal

(5) This section is repealed on a day to be named by proclamation of the Lieutenant Governor. 2002, c. 23, s. 4 (11).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (5) is amended by the Statutes of Ontario, 2003, chapter 8, section 3 by striking out "This section is" at the beginning and substituting "This section and clauses 88 (1) (p) and (q) are". See: 2003, c. 8, ss. 3, 13.

Orders under s. 78 in effect on Nov. 11, 2002

79.3 (1) If an order under section 78 was in effect on November 11, 2002, the order applies to electricity used on or after December 1, 2002. 2002, c. 23, s. 4 (11).

Interim orders

(2) If an interim order under section 78 was in effect on November 11, 2002, the order shall be deemed to be a final order and applies to electricity used on or after December 1, 2002. 2002, c. 23, s. 4 (11).

New or amended orders

(3) Subsections (1) and (2) are subject to,

(a) a new order under section 78 that is made pursuant to an application approved by the Minister under section 79.6;

(b) an amendment to an order under section 78 that is made pursuant to section 79.8;

(c) a new order under section 78 or an amendment to an order under section 78 that is made pursuant to section 79.9; or

(d) a new order under section 78 that is made pursuant to an application that is deemed to have been made under subsection 159.1 (7) of the *Electricity Act, 1998*. 2002, c. 23, s. 4 (11).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (3) is repealed by the Statutes of Ontario, 2003, chapter 8, section 4 and the following substituted:

New or amended orders

(3) Subsections (1) and (2) are subject to,

(a) a new order under section 78 that is authorized by law;

(b) an amendment to an order under section 78 that is authorized by law. 2003, c. 8, s. 4.

See: 2003, c. 8, ss. 4, 13.

Void orders

(4) The following orders are void:

1. Any order under section 78 that was made after November 11, 2002 and before this section came into force.
2. Any order under section 78 that was made on or before November 11, 2002 but was not in effect on November 11, 2002. 2002, c. 23, s. 4 (11).

Pending applications, etc.

(5) The following proceedings are discontinued on the day this section comes into force:

1. Any application that was commenced before this section comes into force for an order under section 78.
2. Any appeal under section 33 that was commenced before this section comes into force from an order issued to a distributor under section 78.
3. Any petition under section 34 that was commenced before this section comes into force in respect of an order under section 78.
4. Any review under section 21.2 of the *Statutory Powers Procedure Act* that was commenced before this section comes into force of an order under section 78. 2002, c. 23, s. 4 (11).

Same

(6) Sections 33 and 34 of this Act and section 21.2 of the *Statutory Powers Procedure Act* do not apply to an order under section 78 that was in effect on November 11, 2002. 2002, c. 23, s. 4 (11).

Same

(2) The Minister may specify the terms of reference for the review, including the date the review is to begin and the date by which the report must be delivered to the Minister. 2002, c. 23, s. 4 (11).

Minister's power

(3) Despite any other provision of this Act, after receiving a report from the Board, the Minister may in writing require the Board to implement any recommendation of the Board or to take any other action specified by the Minister, including,

(a) revoking the order and issuing a new order in accordance with any conditions specified by the Minister; or

(b) amending the order in accordance with any conditions specified by the Minister. 2002, c. 23, s. 4 (11).

No hearing

(4) The Board shall comply with any requirement of the Minister under subsection (3) without holding a hearing. 2002, c. 23, s. 4 (11).

Hydro One Networks Inc.

79.10 Despite subsection 79.3 (1), the rates set out in Appendix A-2 and Appendix G-2 of the order made by the Board under section 78 on August 30, 2002 with respect to Hydro One Networks Inc. do not apply to electricity used on or after December 1, 2002. 2002, c. 23, s. 4 (11).

Repeal

79.11 Sections 79.3 to 79.10 are repealed on a day to be named by proclamation of the Lieutenant Governor that is not earlier than May 1, 2006. 2002, c. 23, s. 4 (11).

Note: On a day to be named by proclamation of the Lieutenant Governor, section 79.11 is repealed by the Statutes of Ontario, 2003, chapter 8, section 10 and the following substituted:

Repeal

79.11 (1) Sections 79.3 to 79.10, clauses 88 (1) (r) to (v) and subsections 88 (2.1) and (2.2) are repealed on a day to be named by proclamation of the Lieutenant Governor. 2003, c. 8, s. 10.

Same

(2) Any proclamation under subsection (1) may apply to all of the provisions referred to in subsection (1) or to any section, subsection or clause in those provisions, and proclamations may be issued at different times with respect to all of those provisions or any section, subsection or clause in those provisions. 2003, c. 8, s. 10.

Same

(3) Any provision in the provisions referred to in subsection (1) that is not repealed under that subsection before May 1, 2006 is repealed on May 1, 2006. 2003, c. 8, s. 10.

See: 2003, c. 8, ss. 10, 13.

Deferral accounts

79.12 (1) Hydro One Networks Inc. may establish a deferral account that records the amounts that, in the absence of section 79.10, it would have collected before the day named under section 79.11, if the Appendix G-2 referred to in section 79.10 had applied to electricity used on or after December 1, 2002. 2002, c. 23, s. 4 (11).

Same

(2) A distributor may establish a deferral account that, if the distributor made a payment to a consumer under subsection 79.1 (1) not later than December 31, 2002, records the amounts of other expenses incurred by the distributor in making that payment. 2002, c. 23, s. 4 (11).

Regulatory assets

79.13 The following amounts shall be deemed to be regulatory assets until the Board addresses the disposition of the amounts in an order under section 78:

1. An amount recorded by a distributor in Account 1570 established in accordance with the Accounting Procedures Handbook issued by the Board, as it read on the day this section comes into force.
2. An amount recorded in a Retail Settlement Variance Account established in accordance with the Electricity Distribution Rate Handbook issued by the Board, as it read on the day this section comes into force.
3. An amount recorded in a deferral account established under section 79.12.

4. An amount recorded in an account prescribed by the regulations. 2002, c. 23, s. 4 (11).

Overpayments

79.14 If a consumer pays an amount in excess of the amount that may be charged under this Part, the person to whom the amount was paid shall as soon as possible refund the excess to the consumer or credit the consumer's account with the excess. 2002, c. 23, s. 4 (11).

Note: On a day to be named by proclamation of the Lieutenant Governor, the Act is amended by the Statutes of Ontario, 2002, chapter 23, subsection 4 (12) by adding the following section:

Form of invoice

79.15 (1) The Minister may require that invoices issued to low-volume or designated consumers in respect of electricity be in a form approved by the Minister. 2002, c. 23, s. 4 (12).

Different forms

(2) The Minister may approve different forms of invoice and may specify the circumstances in which each form shall be used. 2002, c. 23, s. 4 (12).

Errors

(3) No defect, error or omission in the form or substance of an invoice issued to a low-volume or designated consumer in respect of electricity invalidates any proceeding for the recovery of the amount payable under the invoice. 2002, c. 23, s. 4 (12).

See: 2002, c. 23, ss. 4 (12), 7 (2).

Prohibition, generation by transmitters or distributors

80. No transmitter or distributor or affiliate of a transmitter or distributor shall acquire an interest in a generation facility in Ontario, construct a generation facility in Ontario or purchase shares of a corporation that owns a generation facility in Ontario unless it has first given notice of its proposal to do so to the Board and the Board,

(a) has not issued a notice of review of the proposal within 60 days of the filing of the notice; or

(b) has approved the proposal under section 82. 1998, c. 15, Sched. B, s. 80.

Prohibition, transmission or distribution by generators

81. No generator or affiliate of a generator shall acquire an interest in a transmission or distribution system in Ontario, construct a transmission or distribution system in Ontario or purchase shares of a corporation that owns a transmission or distribution system in Ontario unless it has first given notice of its proposal to do so to the Board and the Board,

(a) has not issued a notice of review of the proposal within 60 days of the filing of the notice; or

(b) has approved the proposal under section 82. 1998, c. 15, Sched. B, s. 81.

Review of acquisition

82. (1) If the Board has issued a notice of review under section 80 or 81, it shall expeditiously proceed to review the proposal. 1998, c. 15, Sched. B, s. 82 (1).

Order

(2) The Board shall make an order approving a proposal described in section 80 if it determines that,

(a) the impact of the proposal would not adversely affect the development and maintenance of a competitive market; or

(b) the proposal is required to maintain the reliability of the transmission or distribution system of the relevant transmitter or distributor. 1998, c. 15, Sched. B, s. 82 (2).

Same

(3) The Board shall make an order approving a proposal described in section 81 if it determines that the impact of the proposal would not adversely affect the development and maintenance of a competitive market. 1998, c. 15, Sched. B, s. 82 (3).

Condition for making order

(4) Unless the Board makes the determination described in subsection (2) or (3), it shall not make an order approving a proposal described in section 80 or 81, respectively. 1998, c. 15, Sched. B, s. 82 (4).

Standards, targets and criteria

TAB 4

Ontario Energy Board Act, 1998
Loi de 1998 sur la Commission de l'énergie de l'Ontario

ONTARIO REGULATION 339/02

Amended to O. Reg. 187/06

ELECTRICITY PRICING

Note: This Regulation was revoked on May 5, 2006. See: O. Reg. 187/06, s. 1.

This Regulation is made in English only.

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Definition, s. 79.1 (20) and 79.4 (4) of the Act

1. In subsections 79.1 (20) and 79.4 (4) of the Act,

"not connected to the IESO-controlled grid" means,

(a) not connected directly to the IESO-controlled grid, and

(b) not connected, indirectly through one or more transmission systems or other distribution systems, to the IESO-controlled grid. O. Reg. 339/02, s. 1; O. Reg. 479/05, s. 1.

Definitions, this Regulation

1.1 In this Regulation,

"designated consumer" means a consumer who, before April 1, 2005, was a designated consumer under section 56 of the Act;

"generation station service" has the same meaning as in the market rules;

"low-volume consumer" means a consumer who, before April 1, 2005, was a low-volume consumer under section 56 of the Act;

"total losses" has the same meaning as in the Retail Settlement Code. O. Reg. 433/02, s. 1; O. Reg. 479/05, s. 2.

2. REVOKED: O. Reg. 94/05, s. 1.

Exemptions: s. 79.1 of the Act

3. (1) Subsections 79.1 (1) and (14) of the Act do not apply to a distributor with respect to a consumer if,

A = subject to subsection (2), the total amount that the consumer was charged, by the distributor or retailer, in respect of the commodity price for electricity used, including total losses, during the period from May 1, 2002 to April 30, 2003,

B = subject to subsections (2) and (3), the total amount that the consumer was charged, by other persons that were distributors or retailers that billed the consumer under retailer-consolidated billing, in respect of the commodity price for electricity used, including total losses, during the period from May 1, 2002 to April 30, 2003,

C = subject to subsection (2), the total amount that the consumer would have been charged, by the distributor or retailer, in respect of the commodity price for electricity used, including total losses, during the period from May 1, 2002 to April 30, 2003, if the commodity price for electricity had been 4.3 cents per kilowatt hour during that period,

D = subject to subsections (2) and (3), the total amount that the consumer would have been charged, by other persons that were distributors or retailers that billed the consumer under retailer-consolidated billing, in respect of the commodity price for electricity used, including total losses, during the period from May 1, 2002 to April 30, 2003, if the commodity price for electricity had been 4.3 cents per kilowatt hour during that period.

O. Reg. 126/03, s. 2.

(2) If May 1, 2002 falls within a billing period that includes any day before that day, or if April 30, 2003 falls within a billing period that includes any day after that day, a distributor or retailer may, for the purpose of subsection (1), estimate the amounts charged during that billing period that relate to electricity used during the period from May 1, 2002 to April 30, 2003. O. Reg. 126/03, s. 2.

(3) The amounts of "B" and "D" in subsection (1) shall be deemed to be zero unless, not later than September 30, 2003, the distributor or retailer receives from the consumer or another person the information necessary to determine those amounts. O. Reg. 126/03, s. 2.

(4) The amounts of the payment that a distributor or retailer is required to make under section 3.4 to a consumer is the amount determined under subsection (1) or zero, whichever is greater. O. Reg. 126/03, s. 2.

(5) A distributor or retailer who is required to make a payment under section 3.4 shall do so by crediting the consumer's account and showing the credit on an invoice issued to the consumer or by some other form of payment mutually agreed on with the consumer at the most recent address provided by the consumer or at such other location as may be mutually agreed on. O. Reg. 126/03, s. 2.

(6) If a distributor maintains a PPVA account in respect of a consumer who is a designated consumer under paragraph 6.1 of section 2 and, on the day this section comes into force, there is a balance in the PPVA account to the credit of the distributor,

(a) subsection (1) does not apply to the consumer; and

(b) the distributor shall reduce the balance of the consumer's account to zero. O. Reg. 126/03, s. 2.

Exemptions: s. 79.4 of the Act

4. (1) Subsection 79.4 (1) of the Act does not apply to a consumer in respect of electricity retailed to the consumer by a distributor pursuant to the distributor's obligations under section 29 of the *Electricity Act, 1998* if, within 30 days after this subsection comes into force, the distributor delivers to the Minister a letter from the Board confirming that, during the period from May 1, 2002 to November 30, 2002, the average of the rates charged by the distributor for the retailing of electricity in order to meet its obligations under section 29 of the *Electricity Act, 1998* was less than 4.3 cents per kilowatt hour. O. Reg. 339/02, s. 4 (1).

(2) Despite subsection (1), subsection 79.4 (1) of the Act does not apply to,

(a) REVOKED: O. Reg. 3/04, s. 1.

(b) a consumer in respect of electricity retailed to the consumer by Fort Frances Power Corporation Distribution Inc., pursuant to its obligations under section 29 of the *Electricity Act, 1998*, for that volume of electricity supplied to Fort Frances Power Corporation Distribution Inc. by Abitibi-Consolidated Inc.; or

(c) a designated consumer described in paragraph 7 of section 2 for that portion of electricity consumption identified in the signed declaration provided to the distributor or retailer under clause 3.1.1 (4) (b) as not relating to farming business. O. Reg. 99/03, s. 4; O. Reg. 3/04, s. 1.

(3) Subsection 79.4 (1) of the Act does not apply to a consumer with respect to generation station service. O. Reg. 433/02, s. 4.

5. REVOKED: O. Reg. 94/05, s. 3.

Regulatory assets

6. The following accounts are prescribed for the purpose of paragraph 4 of section 79.13 of the Act:

1. Accounts 1508, 1525, 1562, 1571, 1572, 1574 and 2425 established in accordance with the Accounting Procedures Handbook issued by the Board, as it read on the day section 79.13 of the Act came into force.

2. $RCVA_{Retail}$ and $RCVA_{STR}$ Accounts established in accordance with the Electricity Distribution Rate Handbook issued by the Board, as it read on the day section 79.13 of the Act came into force. O. Reg. 433/02, s. 5.

Limitation — no double rebates

7. Despite any other provision of this Regulation,

(a) a person who has received or is eligible to receive any payment arising from any license conditions that relate to the Minister's directive, dated March 24, 1999, to the Board under section 28 of the Act and any subsequent directive under section 28.1 of the Act for any period, is not eligible to receive a rebate or payment under this Regulation in respect of the same period; and

(b) section 79.1 of the Act does not apply to a distributor or retailer with respect to a consumer if the consumer has received or is eligible to receive any payment arising from any license conditions that relate to the Minister's directive, dated March 24, 1999, to the Board under section 28 of the Act and any subsequent directive under section 28.1 of the Act. O. Reg. 126/03, s. 3.

LAST DAY FOR PAYMENTS

Last day for payments

8. No payment referred to in any of sections 3.1 to 3.5 shall be made after December 31, 2005. O. Reg. 479/05, s. 3.

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TAB 5

. Français

Explanatory Note

CHAPTER 8

An Act to amend the Ontario Energy Board Act, 1998 with respect to electricity pricing

Assented to December 18, 2003

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. Section 78 of the *Ontario Energy Board Act, 1998*, as amended by the Statutes of Ontario, 2000, chapter 26, Schedule D, section 2, 2002, chapter 1, Schedule B, section 8 and 2003, chapter 3, section 52, is amended by adding the following subsections:

Same, separate rates for situations prescribed by regulation

(5) The Board shall approve or fix separate rates under this section for the different situations prescribed by the regulations made under clause 88 (1) (g.4).

Same, obligations under s. 29 of *Electricity Act, 1998*

(5.0.1) In approving or fixing just and reasonable rates for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*, the Board shall comply with the regulations made under clause 88 (1) (g.5).

2. Subsection 79.1 (24) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is amended by striking out "This section is" at the beginning and substituting "This section and clauses 88 (1) (j) to (o) are".

3. Subsection 79.2 (5) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is amended by striking out "This section is" at the beginning and substituting "This section and clauses 88 (1) (p) and (q) are".

4. Subsection 79.3 (3) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is repealed and the following substituted:

New or amended orders

(3) Subsections (1) and (2) are subject to,

(a) a new order under section 78 that is authorized by law;

(b) an amendment to an order under section 78 that is authorized by law.

5. (1) Subsection 79.4 (1) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is repealed and the following substituted:

Commodity price for electricity: low-volume and designated consumers

(1) Despite section 79.3, despite any order under section 78 and, subject to subsection (6), despite any agreement to the contrary, the commodity price for electricity payable by a low-volume consumer or designated consumer is,

(a) with respect to electricity used on or after the day this clause comes into force and before May 1, 2005 or such earlier date as is prescribed by the regulations, the price determined in accordance with the regulations; and

(b) with respect to electricity used on or after May 1, 2005 or such earlier date as is prescribed by the regulations, the price determined by the Board in accordance with the regulations.

Same

(1.1) The Board shall not make any price determinations for the purpose of clause (1) (b) unless a regulation has been made under clause 88 (1) (r.1).

(2) Subsection 79.4 (3) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is amended by striking out "the day this section comes into force" and substituting "December 9, 2002".

(3) Subsection 79.4 (5) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is amended by striking out "the day this section comes into force" and substituting "December 9, 2002".

(4) Subsection 79.4 (6) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is amended by striking out "the day this section comes into force" at the end and substituting "December 9, 2002".

(5) Subsection 79.4 (7) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is repealed.

6. (1) Subsection 79.6 (1) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is repealed and the following substituted:

Applications under s. 78

(1) An application for an order under section 78 may be made only with the written approval of the Minister if the application relates to,

(a) rates for the distributing of electricity; or

(b) rates for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*.

(2) Clause 79.6 (2) (b) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is repealed and the following substituted:

(b) at the time the Minister's approval is sought, there is no order under section 78 in effect that relates to rates for,

(i) the distributing of electricity, if the approval is sought for an application that relates to rates for the distributing of electricity, or

(ii) the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*, if the approval is sought for an application that relates to rates for the retailing of electricity in order to meet those obligations;

(3) Subsection 79.6 (5) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is repealed and the following substituted:

Board may not commence proceeding

(5) Despite subsection 19 (4), the Board may not commence a proceeding of its own motion for an order under section 78 that relates to rates referred to in clause (1) (a) or (b).

7. Section 79.7 of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is repealed and the following substituted:

Board may not review

79.7 Section 21.2 of the *Statutory Powers Procedure Act* does not apply to an order under section 78 that relates to rates referred to in clause 79.6 (1) (a) or (b).

8. Subsection 79.8 (1) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is repealed and the following substituted:

Minister may require amendment

(1) Despite any other provision of this Act, the Minister may require the Board, in the manner specified by the Minister, to amend an order under section 78 that relates to rates referred to in clause 79.6 (1) (a) or (b), including an order referred to in subsection 79.3 (1) or (2) that relates to those rates.

9. Subsection 79.9 (1) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is repealed and the following substituted:

Minister may require review

(1) The Minister may require the Board to review any order under section 78 that relates to rates referred to in clause 79.6 (1) (a) or (b), including an order referred to in subsection 79.3 (1) or (2) that relates to those rates, or any part of such an order, and to report to the Minister on the results of the review, including any recommendations of the Board.

10. Section 79.11 of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is repealed and the following substituted:

Repeal

79.11 (1) Sections 79.3 to 79.10, clauses 88 (1) (r) to (v) and subsections 88 (2.1) and (2.2) are repealed on a day to be named by proclamation of the Lieutenant Governor.

Same

(2) Any proclamation under subsection (1) may apply to all of the provisions referred to in subsection (1) or to any section, subsection or clause in those provisions, and proclamations may be issued at different times with respect to all of those provisions or any section, subsection or clause in those provisions.

Same

(3) Any provision in the provisions referred to in subsection (1) that is not repealed under that subsection before May 1, 2006 is repealed on May 1, 2006.

11. (1) Subsection 88 (1) of the Act, as amended by the Statutes of Ontario, 2002, chapter 1, Schedule B, section 10, 2002, chapter 23, section 4 and 2003, chapter 3, section 56, is amended by adding the following clauses:

(g.4) prescribing different situations for which separate rates must be approved or fixed under section 78, with those situations being defined with reference to amounts of electricity used and times when electricity is used;

(g.5) governing the approving or fixing under section 78 of just and reasonable rates for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*, including prescribing methods of and procedures for approving or fixing rates, including requiring persons licensed under this Part to participate in those methods and procedures and to enter into contracts or other arrangements as part of those methods and procedures;

(2) Clause 88 (1) (r) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is repealed and the following substituted:

(r) prescribing prices or methods for determining prices for the purpose of clause 79.4 (1) (a), including prescribing separate prices or methods for different situations, including situations defined with respect to types of consumers and amounts of electricity used;

(r.1) governing the determination of prices by the Board under clause 79.4 (1) (b), including,

(i) prescribing methods of and procedures for determining prices, including requiring persons licensed under this Part to participate in those methods and procedures and to enter into contracts or other arrangements as part of those methods and procedures, and

(ii) prescribing different situations for which separate prices must be determined, including situations defined with respect to types of consumers, amounts of electricity used and times when electricity is used;

(r.2) prescribing a date earlier than May 1, 2005 for the purpose of clauses 79.4 (1) (a) and (b);

(3) Clause 88 (1) (t) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is repealed and the following substituted:

(t) prescribing prices or methods for determining prices for the purpose of subsection 79.5 (1), including prescribing separate prices or methods for different situations, including situations defined with respect to amounts of electricity used and times when electricity is used;

12. (1) Subsection 88.0.1 (1) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is amended by adding the following clauses:

(c.1) to provide for payments to consumers, if the Minister of Finance determines that, in respect of the period to which clause 79.4 (1) (a) applied, the amount received by the Financial Corporation in connection with this Act exceeds the amount expended by the Financial Corporation in connection with this Act;

(c.2) to compensate distributors, retailers and the IMO for payments made by them pursuant to clause (c.1);

(2) Subsection 88.0.1 (2) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is amended by adding the following clause:

(c.1) requiring distributors, retailers or the IMO to make payments to consumers to whom subsection 79.4 (1) applied during the period to which clause 79.4 (1) (a) applied;

(3) Clause 88.0.1 (2) (d) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is amended by striking out "clause (a), (b) or (c)" and substituting "clause (a), (b), (c) or (c.1)".

(4) Clause 88.0.1 (2) (h) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is amended by striking out "consumers who are not low-volume consumers or designated consumers, or" and substituting "consumers or".

(5) Subsection 88.0.1 (6) of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is amended by striking out "clause (2) (c), (d), (e), (f) or (g)" and substituting "clause (2) (c), (c.1), (d), (e), (f) or (g)".

(6) Section 88.0.1 of the Act, as enacted by the Statutes of Ontario, 2002, chapter 23, section 4, is amended by adding the following subsections:

No assignment

(6.1) An assignment by a consumer to a retailer of the entitlement to any payment does not apply to a payment that is required by the regulations made under clause (2) (c.1), whether the assignment was made before or after this subsection comes into force.

Purpose of payments

(6.2) Any payments that are required by the regulations made under clause (2) (c.1) are for the purpose of reimbursing consumers for part of the commodity price they paid for electricity.

Commencement

13. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

Short title

14. The short title of this Act is the *Ontario Energy Board Amendment Act (Electricity Pricing), 2003*.

Français Explanatory Note
Back to top

TAB 6

Minister of Energy
Hearst Block, 4th Floor
900 Bay Street
Toronto ON M7A 2E1
Tel.: 416 327 6715
Fax: 416 327 6754

Ministre de l'Énergie
Édifice Hearst, 4e étage
900, rue Bay
Toronto ON M7A 2E1
Tél.: 416 327 6715
Téléc.: 416 327 6754

Ontario

December 19, 2003

Mr. Howard Wetston
Chair
Ontario Energy Board
Suite 2601, 2300 Yonge Street
P.O. Box 2319
Toronto, Ontario
M4P 1E4

Howard

Dear Mr. Wetston:

As you know, legislation recently enacted by this government gives the Ontario Energy Board sweeping new responsibilities to set the commodity price of electricity. We believe it is appropriate that an independent agency have this responsibility and look forward to the Board taking on this role.

As you are also aware, amendments to the *Ontario Energy Board Act, 1998* which received Royal Assent in December 2002, and regulations made under the *Act*, deemed transition costs and certain variance account balances to be regulatory assets until such time as the Ontario Energy Board rules on the disposition of those amounts.

I am writing to advise you that I will be granting approval to local distribution companies to proceed to the Board with applications to amend electricity distribution rate orders under section 78 of the *Act* to enable the recovery of prudently incurred costs associated with regulatory assets over a four-year period commencing March 1, 2004.

I believe that the guidelines for the reporting of transition costs and the filing of regulatory assets, both of which have already been issued by the Board, will be invaluable in expediting this process. At the same time, the phase-in will allow additional time for the Board to conduct its own assessment of eligible transition costs and variance account balances.

.../cont'd

To further ensure our goal of customer protection is upheld, I am also requesting, pursuant to section 79.8, that the Board identify opportunities for any reductions to distribution rates and charges which could be implemented coincident with the recovery of regulatory assets. I would ask, as well, that you advise of any other anomalies which, in the Board's view, should be addressed.

In keeping with the Government's commitment that prices will reflect true costs, it is also our intention to permit local distribution companies to proceed to the Board to apply for the next instalment of their allowable return on equity beginning March 1, 2005. Where there are anomalies within this basic policy framework, I would simply ask the Board to exercise its discretion in light of the Government's policy objective of consumer protection with respect to prices and electricity service.

The Board's approval in regard to the final instalment should be conditional on a financial commitment to reinvest in conservation and demand management initiatives an amount equal to one year's incremental returns. The nature of these initiatives, and related timing and recovery issues, will be entirely at the Board's discretion. Obviously, we anticipate that the Board's own recommendations for initiatives in this area will be complementary.

In the matter of transmission rates, you are aware that the *Ontario Energy Board Amendment Act (Electricity Pricing), 2003* provides for an immediate and complete restoration of the normal regulatory framework.

I appreciate your assistance in implementing our decisions and look forward to a continuing and constructive relationship with the Board in meeting the challenges facing the energy sector.

Sincerely,

Dwight Duncan
Minister

TAB 7

Ontario Energy Board
P.O. Box 2319
26th. Floor
2300 Yonge Street
Toronto ON M4P 1E4
Telephone: 416- 481-1967
Facsimile: 416- 440-7656
Toll free: 1-888-632-6273

Commission de l'Énergie de l'Ontario
C.P. 2319
26e étage
2300, rue Yonge
Toronto ON M4P 1E4
Téléphone; 416- 481-1967
Télécopieur: 416- 440-7656
Numéro sans frais: 1-888-632-6273

Ontario

January 15, 2004

To: All Electricity Distribution Utilities

Re: Filing Guidelines: Applications for the Recovery of Regulatory Assets for April 1, 2004 Distribution Rate Adjustments

On December 23, 2003, the Ontario Energy Board (the "Board") issued its preliminary filing guidelines regarding the rate recovery of Regulatory Assets effective March 1, 2004. These final guidelines are issued to provide further instruction and clarification on the rate application process and replace the preliminary guidelines.

On November 25, 2003, the Government announced, in conjunction with introduction of Bill 4, the *Ontario Energy Board Amendment Act, (Electricity Pricing), 2003*, that Local Electricity Distribution Companies ("LDCs") could start recovering Regulatory Assets in their rates, beginning March 1, 2004, over a four year period.

On December 19, 2003 the Ontario Energy Board (the "Board") received a letter from the Minister of Energy informing the Board that he would be writing to electricity distributors to grant them approval to make rate applications to the Board with regard to the rate recovery of Regulatory Assets. The Regulatory Asset accounts are:

1508	Other Regulatory Assets
1518	Retail Cost Variance Account - Retail
1548	Retail Cost Variance Account - STR
1525	Miscellaneous Deferred Debits - includes costs of rebate cheques
1562	Deferred Payments in Lieu of Taxes
1563	PILs contra account
1570	Qualifying Transition Costs
1571	Pre-Market Opening Energy Variances
1572	Extraordinary Event Losses
1574	Deferred Rate Impact Amounts
1580	Retail Settlement Variance Account - Wholesale Market Service Charges
1582	Retail Settlement Variance Account - One-time Wholesale Market Service
1584	Retail Settlement Variance Account - Retail Transmission Network Charges
1586	Retail Settlement Variance Account - Retail Transmission Connection Charges
1588	Retail Settlement Variance Account - Power
2425	Other Deferred Credits

LDCs will be required to file applications for the recovery of the audited December 31,

2002 year-end balances in the Regulatory Asset accounts no later than January 23, 2004. LDCs should file 6 hard copies and 1 electronic copy of their application with the Board.

- **Scope of Recovery (final and/or interim rates)**

The Board will be reviewing a large number of applications within a very short time frame. In keeping with the Government's intention that Regulatory Assets be recovered over a four year period, the Board will provide for recovery of 25% of the total Regulatory Asset balances as at December 31, 2002 so that rate schedules can be amended for the March 1, 2004 effective date.

To this end, the Board's plan is to allow final recovery of the four primary Retail Settlement Variance Accounts (RSVA), effective March 1, 2004, up to a limit of 25% of the total regulatory assets applied for by each LDC. These accounts are:

1580 RSVA - Wholesale Market Service Charges
1584 RSVA - Retail Transmission Network Charges
1586 RSVA - Retail Transmission Connection Charges
1588 RSVA - Power

The four RSVA accounts will be approved on a final basis, subject to audit by the Board to validate account balance reporting.

If the total of these four accounts does not represent 25% of the total Regulatory Asset accounts, the remaining amount to reach the 25% threshold will be approved and the new rates set on an interim basis.

The Board's plan is that all other Regulatory Asset accounts will be reviewed for prudence by the Board after the initial April 1, 2004 rate schedules are issued. When these other Regulatory Assets or portions thereof are approved as final, amounts already recovered will be subtracted from the final total approved. The remaining balances will be recovered in three equal increments in each rate year from 2005 to 2007. The equal increments will be adjusted to reflect the actual recovery experience of LDCs.

The examples below illustrate this plan:

Example (1):

(a) Total Regulatory Assets applied-for (all accounts):	$ 1,000,000
(b) Total in the 4 designated RSVA accounts (approved for **final** recovery)	$ 500,000
(c) Amount recoverable [25% of (a)] for Mar.1, 2004 rates:	$ 250,000

(d) Subsequent final approval of non-RSVA accounts (reduced by $150,000 as a result of prudency review):	$	350,000
(e) Total for recovery (b+d):	$	850,000
(f) Total for recovery over 2005, 2006, 2007: (e-c)	$	600,000

In Example 1, the LDC applied for $1 million. Of that, $500,000 is in the 4 designated RSVA accounts and receives final approval. However, only $250,000 (25% of $1 million) is allowed for recovery in rates as of March 1, 2004. After a full prudency review of all accounts later in 2004, the Board gives final approval of $850,000 ($150,000 is disallowed) of the original $1 million (the $500,000 + $350,000 in other accounts). Therefore, the LDCs rates are adjusted to recover $600,000 over the next 3 years and total recovery is $850,000.

Example (2):

(a) Total Regulatory Assets applied-for (all accounts):	$	1,000,000
(b) Total in the 4 designated RSVA accounts (approved for **final** recovery)	$	200,000
(c) **Interim** amount approved to meet 25% threshold: (c-b)	$	50,000
(d) Amount recoverable [25% of (a)] for Mar.1, 2004 rates:	$	250,000
(e) Subsequent final approval of non-RSVA accounts (reduced by $150,000 as a result of prudency review):	$	650,000
(f) Total for recovery (e+b):	$	850,000
(g) Total for recovery over 2005, 2006, 2007: (f-d)	$	600,000

In Example 2, the LDC applied for $1 million. Of that, $200,000 is in the 4 designated RSVA accounts and receives final approval. However, $250,000 (25% of $1 million) is allowed for recovery in rates as of March 1, 2004; therefore another $50,000 in interim recoveries is granted. After a full prudency review of all accounts later in 2004, the Board gives final approval of $850,000 of the original $1 million (the $200,000 + $650,000 in other accounts). Therefore, the LDCs rates are adjusted to recover $600,000 over the next 3 years and total recovery is $850,000.

- **Evidence and Existing Regulatory Asset Filing Guidelines**

Utilities will not, at this time, be required to provide evidence justifying Regulatory Asset amounts. After the rate orders are issued effective March 1, 2004 and implemented on April 1, 2004, the Board will provide additional instructions for the filing of evidence to facilitate the prudency review of specific Regulatory Asset accounts. Utilities should have evidence prepared by the end of February, 2004.

Filing Guidelines regarding the Regulatory Asset accounts were released by the Board on September 15, 2003. In addition, specific Transition Cost filing guidelines were released on January 15, 2003. Both these documents are available from the Board's website at (www.oeb.gov.on.ca). LDCs are expected to review these guidelines and

make any adjustment necessary to the balances reported to the Board in the Reporting and Record Keeping filings.

- **Reporting and Record-Keeping Requirements (RRR)**

The Regulatory Asset evidence submitted by the LDC will be compared to the electronic RRR filings previously made to the Board (Requirement 2.1.1 due March 2003 and 2.1.7 due April 2003). Any discrepancies between the rate recovery filing and the RRR filing will require justification. If the LDC has not yet submitted the electronic RRR filing it should make this filing in January 2004.

- **Previously Denied Amounts**

Any amounts previously denied by the Board in another proceeding should not be included the account balances in this application.

- **Recovery on Variable Rate**

The Board has determined that the Regulatory Assets approved for recovery on March 1, 2004 will be recovered through the variable rate only. The variable rate will be adjusted using the 2002 year end total kWh and kWs by class, as submitted by the LDC.

- **Recovery to be added to 2002 Base Rates**

At the time distribution rates were last adjusted on March 1, 2002, the previous RUD Model-determined rates were adjusted in most cases for IPI-X and the second 1/3 MARR increment. These adjusted rates appeared on Sheet 4 of the 2002 Rate Adjustment Model as Base Rates. The Board intends that these rates shall provide the base on which the approved Regulatory Asset rate recovery will be added.

- **Monthly Service Charges to remain constant**

The Monthly Service Charge for each LDC should remain the same as in current rates. The Rate Adjustment Model is designed to accommodate this adjustment to achieve rate stability in the Monthly Service Charge for each class.

In addition, in the interests of rate stability, if the removal of 2001 Q4 PILs, interim transition costs and/or Z-factors from current rates and the addition of 25% of

Regulatory Assets results in an overall rate decrease, the LDC may apply to recover a higher percentage of Regulatory Assets.

- **PILs Proxy for 2004**

The 2002 PILs proxy approved for the March 1, 2002 rate adjustment will be used as the PILs proxy for 2004.

- **Rate Adjustment Model**

In order to assist the LDCs in their applications to recover Regulatory Assets and to provide for revised rate schedules, the Board has issued the 2004 Rate Adjustment Model (similar to the 2002 RA Model). It can now be downloaded from the Board's website. Page by page documentation of the model is found in the attached Appendix A.

- **Notice**

The Board will publish a generic notice in major Ontario newspapers after the filing deadline to notify ratepayers that LDCs have applied for an increase in rates. The notice will indicate that application details and bill impacts will be available from the LDC office in their particular service area. The notice will invite ratepayer submissions to the proceedings including submissions with respect to the proposed April 1, 2004 rate increase.

- **Bill Impacts**

The last two sheets of the 2004 RA Model calculate estimated bill impacts for customers at various consumption levels. As other regulated rates and loss factors differ for each utility, the bill impacts should be viewed as estimates.

The model provides for the calculation of two bill impact estimates: The bill impact as a result of the change in distribution rates only; and, the bill impact of the distribution rate change as well as the Bill 4 change to the electricity commodity price from 4.3 cents/kWh to a tiered price (4.7 cents/kWh for the first 750 kWh and 5.5 cents/kWh for the balance of monthly consumption).

As the Board's generic notice will refer ratepayers to the individual utilities for further information on the rate applications, utilities should brief customer service staff on the details of the application and bill impacts. The common bill impacts usually quoted are Residential Customers using 1000 kWh per month and General Service <50kW

customers using 2000 kWh per month. The Board's call center will use the submitted bill impact sheets to compile a list of bill impacts for all utilities to address concerns of ratepayers that call the Board.

- **Account 1571: Pre-Market Opening Energy Variance**

This account was established to capture the difference in the seasonal wholesale rates paid by the LDCs to Ontario Power Generation and the non-seasonal rates that ratepayers were subject to before the market opened. The Board expects LDCs that apply for recovery of these amounts will file evidence for separate amounts: 1) the January 1 to December 31, 2001 period; and, 2) the January 1 to April 30, 2002 period.

Disclosure requirements will be TOU, non-TOU and total power variances for each period. The balancing total will be the difference between the total amount the LDC incurred for power purchases and the total amount recovered from customers (including the unbilled revenue accruals). Rate recovery of any approved amounts will be from non-TOU customer classes only.

If an LDC's methodology differs from that noted above, a description of the methodology used is required at the time of filing.

- **Rate Changes on April 1, 2004**

The government has announced that LDCs can recover Regulatory Assets starting March 1, 2004. In addition, Bill 4 stipulates that the LDCs will introduce an inclining block structure pricing scheme for the electricity commodity on April 1, 2004. In order to minimize ratepayer concern and confusion regarding two electricity price increases in two months, the Board intends to approve the 25% Regulatory Asset amount for each LDC effective March 1, 2004 but for implementation on April 1, 2004. The approved amounts will be adjusted (grossed up) to allow recovery over 11 months. The approved distribution rates will be effective until February 28, 2005.

- **Implementation of New Rates**

In the Manager's Summary, utilities should provide the method of rate change implementation, ie, consumption will be pro-rated, with pre-April 1 consumption at the old distribution and commodity rates and post-April 1 consumption at the new distribution and tiered commodity rates; or proration is not possible and rates will be adjusted at the beginning of each customer's applicable billing cycle so that no pre-April 1 consumption is charged at the new rates.

- **Accounting for Recovered Amounts**

Any Regulatory Asset amounts recovered in rates after April 1, 2004 should be entered in a special-purpose balancing account to be used for disposition later when final Regulatory Assets are approved. The Board's Audit and Compliance Section will issue accounting instructions before April 1, 2004.

- **Manager's Summary**

Each application should include a manager's summary which should summarize the application, note any exceptions to the account balances and include an authorization by the utility's chief executive officer.

- **RP and EB File Numbers**

The Board will provide on its website, a listing of RP and EB file numbers for each LDC so Applications can be submitted with appropriate file numbers. Utilities are urged to check the Board's website for these file numbers which will be posted by January 19, 2004.

For More Information

Should a utility have any questions or concerns regarding the Regulatory Asset application process, please contact Harold Thiessen, 416-440-7637, e-mail: harold.thiessen@oeb.gov.on.ca

Yours truly,

original signed by

Paul B. Pudge
Assistant Secretary

Appendix A

2004 Rate Adjustment Model Documentation

Sheet 1 – December 31, 2002 Regulatory Assets

This sheet allows utilities to input their Regulatory Asset totals, as of December 31, 2002. It will also compute the 25% threshold and allow the LDC to complete either Section 1 (RSVA totals greater than 25% of the Regulatory Asset total) or Section 2 (RSVA totals less than 25% of the Regulatory Asset total) with additional interim approval to achieve the 25% level.

Each amount is grossed up by 12/11 to allow recovery of the amount over an 11 month period (April 1, 2004 to February 28, 2005).

Regulatory Asset amounts should agree with those filed with the Board under the Reporting and Record Keeping Requirements. If there are exceptions they should be noted and explained in the Manager's Summary.

Results are entered at Sheet 3 and Sheet 5 (if necessary).

Sheet 2 – 2002 Base Rate Schedule

2002 Base Rates from Sheet 4 of the utility's 2002 RAM model should be entered on this sheet. Base Rates are defined as 2001 RUD model determined rates adjusted for IPI-X and second increment of MARR only. (2001 Q4 PILs, 2002 PILS, any interim recovery of transition costs and any approved Z-factors removed.)

Utilities should also enter all approved specific service charges on this sheet.

Sheet 3 – 2002 Data and 4 RSVA Account Regulatory Assets

On this sheet the utility should enter year end totals for kW sales, kWh sales, customer numbers and distribution revenue by class. Entries on this sheet transfer automatically to Sheets 5 and 7. The total of the 4 major RSVA accounts are also entered here (whether 25% of the total Regulatory Assets or not) and distributed to the rate classes according to the proportion of kWh sales.

This sheet will also allocate class revenues to the variable rate only and calculate the increment to be added to the variable rates in each class.

Sheet 4 – Rates Calculated including 4 RSVA account Regulatory Assets

This sheet shows the new rates when the increment from Sheet 3 is added to rates shown on Sheet 2.

Sheet 5 – 2002 Data and remaining Regulatory Assets to meet 25%

The total of the remaining Regulatory Asset amounts are entered here (if necessary to meet the 25% threshold of the total Regulatory Assets) and distributed to the rate classes according to the proportion of distribution revenue per class. If the amount entered on Sheet 3 is already at the 25% level, no entry is made on this sheet.

This sheet will also allocate class revenues to the variable rate only and calculate the increment to be added to the variable rates in each class.

Sheet 6 – Rates Calculated including the remaining Regulatory Assets to meet 25%

This sheet shows the new rates when the increment from Sheet 5 is added to rates shown on Sheet 4.

Sheet 7 – 2002 Data and 2004 PILs proxy

The 2004 PILs proxy is entered on this sheet. This proxy is the same as the proxy used in the 2002 RA Model entered at Sheet 8 of that model. The 2004 PILs proxy is allocated to classes according to the proportion of distribution revenue per class, as it was in 2002.

This sheet will also allocate class revenues to the variable rate only and calculate the increment to be added to the variable rates in each class.

Sheet 8 – Rates Calculated including the 2004 PILs proxy

This sheet shows the new rates when the increment from Sheet 7 is added to rates shown on Sheet 6.

Sheet 9 – Service Charge Adjustment

This sheet provides the mechanism to adjust the rates in Sheet 8 to keep the Monthly Service at the same level as in current rates, while maintaining class revenue neutrality.

LDCs must enter their current fixed charges for each class class.

Sheet 10 – April 1, 2004 Rate Schedule

This is the rate schedule which will be printed and attached to your rate order. Please ensure that the name of utility is entered accurately and that the RP and EB file numbers are correct.

Also ensure that all specific service charges are transposed from Sheet 2.

Sheet 11 – Estimated Bill Impacts (no commodity increase)

This sheet will allow utilities to calculate the bill impact of this change in distribution rates. (without the impact of the commodity price change on April 1, 2004.) Please note that these impacts are estimates as the table does not adjust consumption for line losses and uses other regulated charges that may not apply to all utilities. In addition, for the General Service >50kW classes and the Large User class, a general estimate has been used for the commodity price. Individual customers in these classes will face varying commodity prices depending on their individual circumstances.

Utilities should enter their existing rates (not those from Sheet 2) to determine the appropriate bill impact. The Monthly Service Charge from Sheet 9 will automatically appear, however the current kWh rate will still have to be entered.

The Residential 1000 kWh per month customer and the General Service <50kW 2000 kWh per month customer should be used as common benchmarks by utilities to indicate estimated bill impact to ratepayers.

Sheet 12 – Estimated Bill Impacts (commodity increase included)

This sheet will allow utilities to calculate the bill impact of this change in distribution rates with the impact of the commodity price change on April 1, 2004. Again, please note that these impacts are estimates as the table does not adjust consumption for line losses and uses other regulated charges that may not apply to all utilities. Again, for the General Service >50kW classes and the Large User class, a general estimate has been used for the commodity price. Individual customers in these classes will face varying commodity prices depending on their individual circumstances.

The Residential 1000 kWh per month customer and the General Service <50kW 2000 kWh per month customer should be used as common benchmarks by utilities to indicate estimated bill impact to ratepayers.

TAB 8

RP-2004-0117
RP-2004-0118
RP-2004-0100
RP-2004-0069
RP-2004-0064

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

AND IN THE MATTER OF an Application by Hydro One Networks Inc, Toronto Hydro-Electric System Limited, Enersource Hydro Mississauga Inc., and London Hydro Inc for an order or orders approving or fixing just and reasonable rates pertaining to the Recovery of Regulatory Assets - Phase 2.

BEFORE: Paul Vlahos
Presiding Member

Jan Carr
Vice Chair and Member

Cynthia Chaplin
Member

DECISION WITH REASONS

December 09, 2004

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APPENDICES

Appendix A - Phase 2 Procedural Matters

1. Introduction and General Matters

1.0.1 Ontario's local electricity distribution companies (LDCs or distributors) have incurred a variety of costs in preparation for the competitive market which opened in May 2002. In addition to these transition costs, utilities have incurred other costs associated with regulatory directives related to market restructuring and the ongoing competitive market. These costs for retail settlements, power purchases and market readiness were recorded in deferral accounts[1] and would have been eligible for recovery through rates in accordance with the Board's review and audit guidelines and rate setting procedures. However, with the announcement of the *Electricity Pricing, Conservation and Supply Act* (Bill 210) on November 11, 2002, these 15 accounts were deemed to be regulatory assets (s. 79.13, Bill 210) until such time as the Board addressed their disposition.

1.0.2 The 15 regulatory asset accounts are:

1508 Other Regulatory Assets
1518 Retail Cost Variance Account - Retail
1548 Retail Cost Variance Account - STR
1525 Miscellaneous Deferred Debits - includes costs of rebate cheques
1562 Deferred Payments in Lieu of Taxes
1570 Qualifying transition costs
1571 Pre-Market Opening Energy Variances
1572 Extraordinary Event Losses
1574 Deferred Rate Impact Amounts
1580 Retail Settlement Variance Account - Wholesale Market Service Charges

[1]The terms deferral account and variance account are used interchangeably in this decision.

1.0.6 The Board published a notice in Ontario newspapers on February 5, 2004 informing ratepayers of this recovery process and inviting interventions and submissions. The Board issued decisions and rate orders for the Phase 1 applicants in March 2004 for implementation on April 1, 2004.

Phase 2

1.0.7 On May 5, 2004, the Board issued a letter indicating its intention to proceed with Phase 2 of the regulatory asset review. In response to the submissions of intervenors, for regulatory efficiency and in order for the evidence before the Board to be tested in cross examination, the Board determined that it would proceed by holding oral hearings for five large electricity distributors. The five distributors (collectively the "Applicants" in this proceeding) are:

Hydro One Networks Inc. (Hydro One)
Toronto Hydro-Electric System Limited (Toronto Hydro)
Enersource Hydro Mississauga Inc. (Enersource)
London Hydro Inc. (London Hydro)
EnWin Powerlines Limited (EnWin)[2]

1.0.8 The five distributors were selected based on being among the ten largest by customer count and on the basis of the relative level of their total regulatory asset and transition costs claimed.

1.0.9 In addition to the decisions for each of the five distributors, the Board indicated that the oral hearing would be used to assess what would constitute the best evidence, forum and process to determine the reasonableness of regulatory asset amounts to be claimed by the remaining distributors.

[2]The Board adjourned EnWin's Application on its request (details in Appendix A).

1.0.14 The account-specific chapters are followed by chapters dealing with other related issues, as follows:

8: Benchmarking
9: Implementation of the Decision by the Applicants
10: Phase 2 Process for remaining Distributors
11: Cost Awards and Cost Apportionment

1.0.15 In each section we provide a summary of the Applicants' evidence, a discussion of the issues raised by parties and the Board's findings. In some instances, these issues are generic in nature and apply to all the Applicants (and potentially all other distributors) and in some instances these issues are specific to one or more Applicants only. Generally, the decision addresses amounts first, followed by allocation to customer classes.

1.0.16 The Board has also made generic findings pertaining to the implementation, including recovery, of the Board's findings for the four Applicants and the remaining distributors. As set out in more detail later in this decision, the Board directs the Applicants to revise their filings to reflect the Board's findings in this decision. This direction is not necessarily repeated every time an adjustment for a specific item is ordered.

1.0.17 Where the Board directs that adjustments be made, associated carrying charges or interest[4] should also be adjusted where applicable. For adjustments to the Transition Costs Account (1570), carrying charges should be adjusted as of May 1, 2002. For other accounts, adjustments to carrying charges should be proportional to the relative share of the adjustment compared to the total claim. Where the Board disallows costs or carrying charges, these should be written off and will not be eligible for recovery in a future proceeding.

[4]The terms carrying charges and interest are used interchangeably in this decision.

information provided. It is our perception that this led to a lengthier and more complicated review.

TAB 9

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Ontario

July 12, 2005

To: All Electricity Distribution Utilities

Re: Filing Guidelines: Applications for Final Recovery of Regulatory Assets for May 1, 2006 Distribution Rate Adjustments

On December 9, 2005 the Ontario Energy Board (the "Board") issued its Decision with Reasons on the Review and Recovery of Regulatory Assets - Phase 2 (the "Decision") for Toronto Hydro, London Hydro, Enersource Hydro Mississauga and Hydro One. In Chapter 10 of the Decision, the Board outlined a Phase 2 process for the remaining distributors. These guidelines provide additional guidance for the remaining distributors.

The Decision can be found on the Board's website under "Industry Relations/Rules, Codes, Guidelines and Forms/Electricity/Electricity Distributor Recovery of Regulatory Assets Phase 2, Documents - Dec. 9 – 04".

Background

On November 25, 2003, the Government announced, in conjunction with the introduction of Bill 4, the *Ontario Energy Board Amendment Act, (Electricity Pricing), 2003*, that Local Electricity Distribution Companies ("LDCs") could start recovering regulatory assets in their rates, beginning March 1, 2004, over a four year period.

On December 19, 2003 the Board received a letter from the Minister of Energy informing the Board that he would be writing to electricity distributors to grant them approval to make rate applications to the Board with regard to the rate recovery of regulatory assets. The regulatory asset accounts are:

1508 Other Regulatory Assets
1518 Retail Cost Variance Account - Retail
1548 Retail Cost Variance Account - STR
1525 Miscellaneous Deferred Debits - includes costs of rebate cheques
1562 Deferred Payments in Lieu of Taxes
1563 PILs contra account
1570 Qualifying Transition Costs
1571 Pre-Market Opening Energy Variances
1572 Extraordinary Event Losses

1574 Deferred Rate Impact Amounts
1580 Retail Settlement Variance Account - Wholesale Market Service Charges
1582 Retail Settlement Variance Account - One-time Wholesale Market Service
1584 Retail Settlement Variance Account - Retail Transmission Network Charges
1586 Retail Settlement Variance Account - Retail Transmission Connection Charges
1588 Retail Settlement Variance Account - Power
2425 Other Deferred Credits

On January 15, 2004, the Board issued its final filing guidelines with respect to the recovery of regulatory assets for Phase 1 (April 1, 2004 implementation). On December 20, 2004 the Board issued its 2005 distribution rate adjustment filing guidelines which included the continuation of Phase 1 with the recovery of the second interim tranche.

The Notice informing the public of both the Phase 1 and Phase 2 regulatory assets recovery processes was published on February 3, 2004. The list of intervenors for Phase 2 is attached to these guidelines.

On April 1, 2004 LDCs began recovering 25% (or more if required for rate stability) of the audited December 31, 2002 year-end balances in the regulatory asset accounts as per the January 15, 2004 filing guidelines. On April 1, 2005 LDCs began recovering 33% of the audited December 31, 2003 year-end balances (adjusted for 2004 interim recoveries) in the regulatory asset accounts as part of the 2005 electricity distribution rate adjustment process and as per the December 20, 2004 filing guidelines.

Phase 2

On May 5, 2004, the Board initiated the Phase 2 oral hearing process for the five selected distributors. The Board indicated that in addition to the specific decisions for each of the five distributors, the oral hearing would also allow it to assess what would constitute the best evidence, forum and process to determine the reasonableness of the regulatory asset amounts claimed or to be claimed for the remaining distributors.

On December 9, 2004 the Board issued its decision in the above matter. Along with approving final recovery amounts for the four applicants (EnWin was adjourned on June 30, 2004) and approving allocations of said amounts, the Board recognized that subjecting the other distributors to the same process as the four applicants will be too onerous for distributors, intervenors and the Board.

As a result, the Board determined that an effective, expedient and efficient process shall be to subject all distributors to one of two possible reviews; minimum or comprehensive. Regardless of the review, all distributors would also provide a supplemental disclosure (described below) which would be certified either by an external auditor or self-certified by the Chief Executive Officer and/or the Chair of the Board of Directors (depending on

the amount per customer of the transition costs claimed).

Minimum Review

While the Decision indicated that a minimum review will involve an administrative process whereby the Board will generally conduct a written hearing and seek written submissions from intervenors, the Board will now accept minimum review applications in conjunction with the distributor's 2006 EDR application. The Board panel reviewing the distributor's EDR application will also assess the Regulatory Asset application under the minimum review.

The type of certification required for the supplemental disclosure is dependant on the level of transition costs that an LDC is claiming under a minimum review (see below).

The key aspect of the minimum review is that this review is for distributors that have transition costs per customer of $60 or less and are willing to accept 90% of reported transition costs, or for distributors that have more than $60 per customer of transition costs but are willing to accept the lesser of 90% of reported transition costs or $60 per customer.

Applicants should file their applications on the due date for their 2006 EDR application.

Comprehensive Review

A comprehensive review will involve a similar process to that undertaken by the four applicants in the first part of Phase 2, which may require an oral hearing involving at a minimum, the intervenors of record in the Phase 2 proceeding.

Distributors that choose a comprehensive review should also submit an application in conjunction with their 2006 EDR application. Distributors will be required to serve the intervenors of record in the Phase 2 oral hearing, with this application, including the comprehensive regulatory asset review application.

Applicants should file their applications on the due date for their 2006 EDR application and the Notice of Application will include a specific reference to the comprehensive Regulatory Asset review request.

As noted in the Decision, the distributor shall pay any Board-assessed intervenor costs awarded under a comprehensive review and the supplemental disclosure shall be certified by the distributor's external auditor.

Under a comprehensive review, applicants should include detailed submissions and supporting evidence for their claimed transition costs. Submissions on the transition cost categories should include details on a per initiative basis consistent with the January 15, 2003 transition cost reporting guidelines. The Board will expect rigorous evidence in support of costs claimed in excess of $60 per customer including any external audits on transition cost spending.

Supplemental Disclosure

As noted above, a supplemental disclosure will be required from each distributor (regardless which category of review that applies), and shall include the following:

a) a statement by the distributor's Chief Executive Officer or external auditor (as applicable) certifying that the information filed in the regulatory assets claim is consistent with the Board's accounting requirements and procedures in the Accounting Procedures Handbook, as modified by the Board's findings in the Decision and that the filing provided is consistent with the requirements of the Board's transition cost filing guidelines issued January 15, 2003, and the regulatory asset filing guidelines issued September 15, 2003
b) a statement as to which approach (billed or accrual) has been used for the RSVA accounts and Account 1571 and whether this approach has been used consistently over time and among accounts for the applicable period (see s.2.0.23 of the Decision)
c) a statement as to the interest rate used to record interest and whether this interest rate is consistent with or deviates from that stipulated in the Distribution Rate Handbook (DRH) for the distributor (see s.2.0.29 of the Decision)
d) a statement confirming whether the variance between Board-approved and actual line losses are reflected in the RSVA power (Account 1588) for the applicable period (see s.2.0.27 of the Decision)
e) a statement confirming whether the method used to calculate the balances for Account 1571 conforms to the methodology recommended in the Board's Decision (see s.3.0.24 of the Decision)
f) a statement confirming whether costs in Account 1525 relate solely to the costs associated with the issuance of rebate cheques and not other costs (with the

exception of Hydro One's environmental costs allocated to each embedded distributor), and that such cheques were issued on or before December 31, 2002 (see s. 5.0.15)

g) a reconciliation of the amounts claimed to the amounts previously filed with the Board (January 2004 and January 2005 filings for Phase 1 of this proceeding) setting out the differences and causes

h) a statement confirming whether customer education costs in Account 1570 do not exceed $10 per customer (see s.7.0.58 of the Decision), based on 2004 data

i) a statement confirming whether transition costs claimed do not include Electronic Business Transaction (EBT) costs or costs for settlement services as found in the Board's Decision (see s.7.0.56 and 7.0.57 of the Decision)

j) a statement confirming whether all cost categories in the transition cost account 1570 meet the materiality criterion as outlined in the filing guidelines issued January 15, 2003 (see section 7.0.18 of the Decision)

k) a statement confirming whether all regulatory assets claimed are allocated to the rate classes based on the findings in the Board's Decision (see s.2.0.35, 3.0.27, 4.0.16, 5.0.19, 5.0.25, 7.0.67 and 9.0.8 of the Decision)

l) any supplementary information, if applicable, on the use of an internal or external audit of transition cost amounts or on the distributor's adherence to tendering guidelines.

Qualification for a Minimum Review

To qualify for a minimum review, a supplemental disclosure must be provided and the distributor must be willing to accept or undertake the following:

a) a calculation showing the total December 31, 2004 reported transition costs (including interest) divided by the 2004 customer numbers

b) a calculation showing 90% of the total December 31, 2004 reported transition costs (including interest) divided by the 2004 customer numbers

c) 90% of its December 31, 2004 reported transition costs (including interest) or $60 per customer (based on 2004 data), whichever is less

d) the total reported (i.e. claimed) amount must be consistent with the calculations and statements included in the supplemental disclosure such as customer education costs not exceeding $10 per customer, no Electronic Business Transaction (EBT) costs, and meeting materiality thresholds.

e) the supplemental disclosure must be verified by the distributor's external auditor if the claimed amount is equal to or less than $60 but more than $30 per customer

f) the supplemental disclosure may be certified by the Chief Executive Officer if the claimed amount is less than $30 per customer

If the distributor reports an amount higher than $30 per customer but wishes to claim only $30 per customer OR is at or under the $30 per customer threshold once it has adjusted its qualifying transitions costs to 90% of the total (including interest), there is no requirement that the supplemental disclosure be certified by the distributor's external auditor.

To assist distributors, four examples of minimum review qualification are outlined below:

	Account 1570 $	**Customers**	**$/customer**	**90% of $/customer**	**Award $**
Utility "A"	1,000,000	23,000	43.48	39.13	900,000
Utility "B"	1,000,000	16,000	62.50	56.25	900,000
Utility "C"	500,000	16,000	31.25	28.13	450,000
Utility "D"	1,000,000	14,000	71.43	64.29	840,000

Utility "A" reports transition costs which are less than the $60 per customer threshold, and will qualify for minimum review if it is willing to accept 90% of its reported transition costs. Therefore, the utility would potentially be awarded 90% of the reported costs ($900,000 in the example).

Utility "B" reports transition costs per customer of $62.50. Although this places it above the threshold, the utility would qualify for minimum review if it accepts 90% of its reported transition costs. This would place the transition cost claim at $56.25 per customer. The potential award in this case would be $900,000.

Utility "C" is clearly under the $60 per customer threshold and would therefore qualify for a minimum review, if willing to accept 90% of its reported transition costs. There would be no requirement for the supplemental disclosure to be certified by an external auditor. A certification by the CEO would be acceptable since the transition cost amount would fall from $31.25 to $28.13 per customer once it accepted 90% of its reported costs.

Utility "D" is well above the $60 per customer threshold. However, it would qualify for minimum review if it accepts the lesser of 90% of its reported transition costs or $60 per customer. In this case, the utility would be required to accept $60 per customer or $840,000 since 90% of its reported transition cost total is still above the threshold at $64.29 per customer.

Minimum or Comprehensive Review: May 1, 2006 Implementation

All applicants shall implement their final rate riders on May 1, 2006 for a period of two years.

Since several of Hydro One's regulatory asset accounts include allocations of costs to distributors embedded within Hydro One's distribution system, their associated impacts should be reflected in the revised filings by the affected distributors. The Board approved these amounts for Hydro One in its January 10, 2005 Order in accordance with s.9.0.11 of the Decision. These amounts shall be added to the corresponding regulatory asset accounts of each of the embedded distributors for disposition. In the specific case of the low voltage related amounts, the Board has determined that the appropriate account for the distributors to capture these costs is the retail transmission connection account - 1586, RSVA cn (see s.9.0.8 of the Decision).

In regard to Hydro One's environmental costs recorded in account 1525, applicants should allocate their respective amounts to their customer classes on the basis of 2004 distribution revenue shares as per the Board's direction for Hydro One in s.5.0.25 of the Decision.

In its application for final recovery, a distributor shall reflect the Board's guidance in the Decision and shall include the following:

a) balances for each regulatory asset account (interest shown separately) as of December 31, 2004
b) a utility's gross transition costs (including carrying charges) should reflect the Jan. 15, 2003 transition cost guidelines, APH220, APH410 and APH480 AND the Board's latest definition for what qualifies transition costs for recovery - as per the Dec. 9 Decision regarding items disallowed (i.e. EBT and settlement costs and customer education costs exceeding $10 per customer should already have been removed before reducing the gross transition costs by 10% in the case of a minimum review)
c) write off of amounts not approved
d) projected interest for each account to April 30, 2006 to arrive at a gross balance for disposition
e) impacts arising from the Board's order for Hydro One
f) allocation of each account balance to rate classes as per the Board's decision
g) subtraction of the actual and estimated amounts recovered from any interim rate adjustments for the period April 1, 2004 to April 30, 2006, by rate class
h) subtraction, if applicable, of the actual interim transition cost amounts recovered for the period from March 1, 2002 to March 31, 2004, by rate class
i) net total amounts to be recovered over the next 2 years, by rate class
j) net total amount per rate class, divided by 2 and divided by 2004 energy use

(kWh) or demand (kW) as appropriate for each class to determine the potential rate rider for each class.

Reporting and Record-Keeping Requirements (RRR)

The regulatory asset evidence submitted by the LDC will be compared to the electronic RRR filings previously made to the Board (Requirement 2.1.1 due January 2005 and 2.1.7 due April 2005) and previous interim recovery applications in 2004 and 2005. Any discrepancies between the rate recovery filing and the RRR filing will require justification.

Previously Denied Amounts

Any amounts previously denied by the Board in another proceeding should not be included in the account balances in this application.

Accounts 1562 and 1563 (Payments in Lieu of Taxes)

Due to utility specific variability in the calculation of PILs and the fact that stakeholders did not have an opportunity to comment on the quantum and appropriate allocation methodology of the PILs amounts in the Phase 2 oral proceeding, the Board will not be considering amounts in the PILs variance accounts for final disposition at this time. In the meantime, the Board has continued to allow recovery of PILs during the first two interim recovery periods. The Board intends to address this issue at a later time through consultations with industry stakeholders.

Therefore, LDCs should not include amounts from accounts 1562 and 1563 in their applications for Phase 2 Review and Recovery of Regulatory Assets.

Miscellaneous Amounts recorded in Accounts 1508, 1525, 1572, 1574 and 2425

If an applicant has included amounts in one of the above accounts whose allocation to the classes has not been reviewed by the Board in the Phase 2 oral hearing, the applicant is expected to file evidence in support of both the quantum and the proposed allocation methodology to the customer classes. Each item must include separate evidence on a case by case basis, even if the applicant qualifies for the minimum review. This also applies to account 1525 for costs that do not relate to rebate cheques and Hydro One's environmental charges as per the guideline under the Supplemental Disclosure section of this document.

Hydro One charges to embedded distributors - January 1, 2004 to April 30, 2006

The December 9, 2004 Decision on the Review and Recovery of Regulatory Assets – Phase 2 (s.2.0.36 and s.9.0.8) and the Board's January 10, 2005 Order, approved Hydro One's charges to its embedded distributors based on Hydro One's approved December 31, 2003 RSVA balances. Embedded distributors have been directed to include these amounts (plus interest) in their phase 2 filings.

The 2006 Distribution Rate Handbook ("DRH") allows Hydro One to apply to recover LV costs from its embedded distributors beginning May 1, 2006. The DRH also provides embedded distributors with a mechanism to pass through the new LV charges to their customers beginning May 1, 2006.

However, LV charges and retail service variance account balances allocated to embedded distributors for the period January 1, 2004 to April 30, 2006 have not been considered to date. Therefore, the Board has included a placeholder in the regulatory assets worksheet for these amounts. Embedded distributors should only enter the appropriate data once they have received a communication from the Board regarding their respective amounts. If a distributor has not received its allocated Hydro One amounts from the Board by the time it is required to file its 2006 EDR application, the distributor should submit the worksheet without the relevant data. The Board Staff analyst assigned to each application will then enter the appropriate Hydro One charges (once they become available) and will communicate the results, along with the revised worksheet, to the distributor.

There is no provision for carrying charges associated with these amounts as Hydro One, pending approval from the Board, will not begin to charge distributors their allocated amounts before May 1, 2006.

Recovery on Variable Rate

The Board has determined that the regulatory assets approved for recovery beginning on May 1, 2006 for the remaining utilities will be recovered through the variable rate only. The variable rate will be adjusted using the 2004 year end total kWhs and kWs by class, as submitted by the LDC.

Definition of Customer Numbers

The Decision uses customer numbers to determine the threshold for minimum and comprehensive review, the threshold for CEO sign off versus external auditor sign off, customer education costs (allowed at no more than $10/customer) and for the allocation of transition costs and RCVA costs to classes. Therefore, customer counts used by all applicants should be consistent.

Customer numbers, for the purposes of thresholds for review/sign-off and for the customer education component, are defined as year-end 2004 total customers in the conventional classes only (Residential, General Service, Intermediate and Large User).

For transition cost and RCVA cost allocation purposes, numbers for street lights, sentinel lights and un-metered scattered loads are defined by customer numbers (not connections).

Application of Rate Riders on 2006 Base Rates

The first year of final Phase 2 recovery (for the four applicants) or the second year of interim recovery (for the remaining LDCs) was added to 2005 Base Rates.

In 2006, it is the Board's intention to allow the approved amounts for the remaining LDCs to be recovered beginning on May 1, 2006 via the application of the approved class specific rate riders applied to new re-based 2006 electricity distribution rates. The 2006 distribution rate adjustment filing guidelines were issued on May 11, 2005 in the form of the 2006 EDR Handbook. The Handbook is available on the Board's website at Industry Relations/OEB key initiatives/2006 electricity distribution rates/2006 final DRH.

Regulatory Assets Recovery Worksheet

In order to assist the remaining LDCs in their applications for final recovery of regulatory assets, the Board will issue the Regulatory Assets Recovery Worksheet, Version 2.0. The worksheet includes several pages to assist LDCs in determining their interim recoveries. The final outputs of the worksheet (Sheet 2) are the rate riders which are to be entered into the 2006 EDR rate determination model.

The worksheet will be made available for download from the Board's website along with the appropriate instructions.

Application Deadline

The deadline for applications regarding final recovery will be the same deadline as the distributor's 2006 rate filing. Distributors must indicate in their 2006 EDR Manager's Summary whether a minimum or comprehensive review is requested.

TAB 10

ONTARIO ENERGY BOARD

Staff Discussion Paper

Account 1562 - Deferred Payments in Lieu of Taxes

Methodology and Disposition of Balances for Electricity Distribution Companies affected by section 93 of the *Electricity Act, 1998*

EB-2007-0820

August 20, 2008

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1. INTRODUCTION

On March 3, 2008, the Ontario Energy Board (the "Board") issued a letter to all Licenced Electricity Distributors and all intervenors in the 2008 Distribution Rate Proceedings announcing that it intended to initiate a combined proceeding to determine the methodology to be used for the calculation and disposition of balances in account 1562 – Deferred PILs. The Board assigned file number EB-2007-0820 to the PILs Combined Proceeding. The combined proceeding will determine accurate balances in account 1562 for the seven cost of service Applicants that have requested disposition of account 1562 in their 2008 rate applications and provide guidance for the remaining distributors for use in their subsequent applications. The Board intends to initiate the EB-2007-0820 proceeding in the fall of 2008.

The purpose of this paper is to assist the parties in the combined proceeding in resolving outstanding issues in respect to the disposition of balances in account 1562.

The PILs matters before the Board are similar among the seven Applicants. These distributors have used a variety of interpretations and methods that impact the balances in account 1562 in each of the years 2001 to 2006 and may impact the balances of the other PILs related account, 1592 - PILs and Tax Variances for 2006 and Subsequent Years.

1.1 The EB-2007-0820 Process

In each year since 2001, distributors have been filing the Spreadsheet Implementation Model for Payments in Lieu of Taxes ("SIMPIL") as part of their Reporting and Record Keeping Requirements ("RRR").

The balances reported by distributors in their RRR filings for account 1562 under element 2.1.7 (Trial Balance) as at December 31, 2006 are expected to agree with the balance reported in the final PILs filing due August 11, 2006.

The methodology used in the SIMPIL model is underpinned by certain principles. The principles and methodology have not been reviewed by the Board in a proceeding. In order to determine the final balances in account 1562, the Board

must approve a final methodology. The approved methodology will form the basis for a final model to be drafted by Board staff, reflecting the Board's findings. This final model would include information for the entire October 1, 2001 to April 30, 2006 period.

Applicants could then use this model or their own to file an application for the Board's review and approval, including the disposition of the final balances in account 1562.

As stated in the March 3, 2008 letter, it is the Board's expectation that the combined proceeding decision (EB-2007-0820) will be used to determine the accuracy of the final balances in account 1562 for the remaining distributors. After the remaining distributors use the final model to file their account 1562 balances, the Board will review and dispose of their account 1562 balances.

The last PILs filings required were for the 2005 tax year. Parties can access the 2005 tax year SIMPIL model that distributors were to have filed in the summer of 2006, from the Board's website. The link to the website can be found at Appendix C, tab 6. The 2005 tax year SIMPIL model contains the principles and methodologies for each year for which a PILs filing was required.

1.2 Organization of this Paper

This discussion paper sets out the key features of:

- Account 1562 – Deferred PILs,
- The process of adding PILs to distribution rates, and
- The SIMPIL model.

This paper is organized into six parts. Following the introduction, sections 2 and 3 provide an overview of the history and workings of account 1562. Section 4 provides an overview of the process of adding PILs to distribution rates in the 2001 to 2005 period. Section 5 provides a brief overview of the current practice which became effective May 1, 2006.

The final section of this paper is comprised of three appendices:

Appendix A discusses how variances are tracked in account 1562 through the workings of the SIMPIL model and provides an overview of the established principles underpinning the current methodology.

Appendix B provides a list of items that this paper has identified as requiring resolution as part of this proceeding. This list is not presented as a definitive list of issues, but represents a draft list of items that Board staff believes require clarification.

Appendix C identifies the relevant Board documents related to account 1562, the SIMPIL model and the documents made available to guide distributors in their annual rate applications since 2001.

2. THE NEED FOR A PROCEEDING PRIOR TO DISPOSITION OF ACCOUNT 1562

The determination of PILs deferred expense amounts entered in account 1562 has followed a specific process over the last several years. There is an initial determination of an expense amount that is to be reflected in distribution rates. The amount collected varies depending on the number of customers and their consumption. The amount of PILs expense paid also varies based on revenues, costs and income. The total difference between the expected amount included in rates and the amount collected has been tracked in a deferral account. If this amount were to be disposed of in rates, it would be considered a flow through expense i.e. the actual amount is reconciled with the forecast amount. For the PILs expense, only a portion of the difference between the amount reflected in rates and that actually paid is tracked in a deferral account. There are specific factors used in the calculation of the actual PILs expense paid that are reconciled with the original forecast, but not all the factors are used in the reconciliation. There is a need to clarify how the differences should be determined and what, if any, disposition is to be made of those accounts.

Over the years, Board staff provided guidance on the recording and tracking of amounts in account 1562, how to determine the PILs expense for incorporating PILs in rates, and on how to complete the SIMPIL model. This guidance has taken the form of the Accounting Procedures Handbook ("APH"), responses to Frequently Asked Questions ("FAQs") and various letters, spreadsheets,

instructions and application filing guidelines issued by Board staff. To date, the Board has not provided any ruling on the disposition of account 1562. Therefore the guidance provided by Board staff has not been subject to a proceeding in which parties who object to, or wish to modify, the current process can have their views heard by the Board.

A review of account 1562 filings indicates that not all distributors have followed the instructions regarding the use of account 1562 and the SIMPIL model resulting in some inconsistency in the manner in which amounts have been recorded.

On July 12, 2005, as part of the 2006 EDR process, Board staff issued Filing Guidelines for applications for final recovery of regulatory assets. Those guidelines stated,

> "[D]ue to utility specific variability in the calculation of PILs and the fact that stakeholders did not have an opportunity to comment on the quantum and appropriate allocation methodology of the PILs amounts in the Phase 2 oral hearing proceeding, the Board will not be considering amounts in the PILs variance accounts for final disposition at this time. In the meantime, the Board has continued to allow for recovery of PILs during the first two interim recovery periods. The Board intends to address this issue at a later time through consultations with industry stakeholders."

In the current 2008 EDR proceedings, seven Applicants asked the Board to dispose of the balance in account 1562. A number of issues require resolution for this to occur. The issues are similar among the Applicants and include:

(1) Clarification of the proper treatment of account 1562 and any related issues with account 1563 – Contra Deferred PILs,
(2) Clarification of certain variances arising due to the manner in which PILs were incorporated into rates during the 2001 to 2006 period,
(3) Clarification as to when amended or reassessed tax returns can be incorporated to modify account entries.

Appendices have been added to this paper to provide background and detail on account 1562 from 2001 to 2006. As noted above, Appendix A discusses how variances are tracked in account 1562 through the workings of the SIMPIL model and provides an overview of the established principles underpinning the current

methodology. Appendix A describes aspects of the current SIMPIL model for which Board staff believes consensus exists, including those items for which some distributors have misinterpreted the Board's guidance.
Appendix B provides a list of items that this paper has identified as requiring resolution as part of this proceeding. This is not a definitive list of issues, but is a draft list of items that Board staff believes require clarification. Appendix B is also divided into two parts. Part I lists items where guidance was provided but where final resolution is still required arising from how the annual PILs expense was incorporated into rates. Part II lists items which are of a global nature, but relate to certain aspects of the SIMPIL model for which no guidance was provided.

3. ACCOUNT 1562 – DEFERRED PILS

Distributors became subject to PILs effective October 1, 2001 with the proclamation of section 93 of the *Electricity Act, 1998*. As of this date, payments were required to be made to the Ontario government.[1]

On August 24, 2001, the Board informed distributors by letter that a new deferral account would be established to implement the Board's approach to the recovery of PILs[2]. Following consultations which included Board staff, the Electricity Distributors Association and some member distributors in late 2001, the Board established this deferral account and later identified it as account 1562, Deferred PILs[3].

3.1 Entries to Account 1562

Entries to Account 1562 are designed to track and record:

- The variances resulting from the difference between the Board approved PILs amount and the amount of actual billings that relate to the recovery of PILs.

[1] Does not include payments in lieu of property taxes covered under other legislation.
[2] Appendix C, tab 2 – *with reference to* Board Letter to distributors dated August 24, 2001 regarding Impact of Proposed Proxy Taxes in Rates
[3] Appendix C, tab 2 – *with reference to* Accounting Procedures Handbook, Effective January 2000, Revised December 2001

- Variances between the PILS tax estimate and the actual tax liability caused by changes to tax legislation.
- The difference between certain items reported by the utility in the SIMPIL model and amounts reported for tax purposes (called "True-up Items").
- An allowance for deemed interest.

Refer to the April 2003 FAQs which can be found at Appendix C, tab 4, for specific details.

3.2 Tax Reassessment

In its 2006 EDR Handbook, the Board stated that it would allow account 1562 to stay open until the last year under which balances may accrue (2006) is no longer subject to tax reassessment. This matter is set out as item 1 of Part II in Appendix B. Reference to the 2006 EDR Handbook and Report of the Board can be found at Appendix C, tab 7.

3.3 Account 1563 – Contra Deferred PILs

In April 2003, in addition to identifying the specific account entries, FAQ#2 directed distributors to use one of three accounting methods for recording these entries in account 1562[4]. Once a method was chosen, a distributor was required to use this method in all subsequent years.

Method No.1 and Method No. 2 are similar, differing only in which income statement account the recovery of PILs approved by the Board would be recorded. Method No.3 requires the establishment of PILs Contra account 1563, to record the off-setting entries of PILs approved by the Board and posted to account 1562 (thereby not affecting the income statement). Under any of the three alternatives, the balance in account 1562 should be identical.

Account 1563 has been the source of some confusion. In certain rate applications filed with the Board, distributors have applied to dispose of the balance in this account. However, the balance in account 1562 establishes the obligation to, or the receivable from, the distributors' ratepayers. The purpose of account 1563 is to record the offsetting entries to those posted in account 1562.

[4] Appendix C, tab 4 - *with reference to* FAQ #2, April 2003

As such, account 1563 is merely a tracking account and applicable only when Method No. 3 is chosen. Amounts in account 1563 cannot be recovered in rates. This matter is identified in Part II in Appendix A.

4. HISTORY OF INCORPORATING PILS IN RATES (2001-2005)

A number of issues have arisen due to the specific circumstances of PILs incorporation into rates over the period 2001 to 2006. These are identified below and summarized in Part I of Appendix B.

4.1 2001 Rate Adjustment

Prior to 2001, distributor's distribution rates were bundled with the cost of power. In an effort to assist distributors in filing their unbundling rate applications, the Board provided distributors with the Rate Unbundling and Design ("RUD") model. Most distributors filed applications, including the RUD model, to unbundle rates in 2000 and 2001 for implementation in 2001. The RUD model also adjusted the newly unbundled distribution rates for the first instalment of the Market Adjusted Revenue Requirement ("MARR"). The rates approved in 2001 did not include a provision for PILs since legislation had not yet been enacted to require distributors to pay PILs.

The Board's communication with respect to PILs in these rate years is set out in Appendix C, tab 2.

4.2 2002 Rate Adjustment

Distributors became subject to PILs effective October 1, 2001 and accordingly, the 2002 rate adjustment included a provision for PILs. As noted above, rate application filing instructions for the 2002 rate adjustment were issued to distributors in December 2001 (amended on January 18, 2002). These instructions described the PILs calculation methodology and the methodology to be used to include the PILs expense in rates. The rates were effective March 1, 2002 for most distributors.

Board staff provided a model (the 2002 SIMPIL model) that calculated the PILs amounts that each distributor was entitled to recover in rates. The methodology underlying the 2002 SIMPIL model was used to develop all future models used to set PILs expenses in subsequent years. This model was superseded by the PILs/SIMPIL model for the March 1, 2002 rate adjustment mechanism.

The 2002 SIMPIL model calculated two amounts for PILs:

- the PILs expense for 2001, prorated for the final three months of the year given that distributors became subject to PILs on October 1st; and,
- the PILs expense for 2002.

Distributors incorporated these two PILs expenses into the main Rate Adjustment Model ("RAM") which generated the final distribution rates.

Board staff issued accounting instructions based on the assumption that the 2002 rates would be implemented for a full year[5]. For distributors that had an effective rate change date later than March 1, 2002 but that followed the instructions, an under-collection may have been created. The issue of whether distributors in this position should have prorated their 2002 PILs amount based on the effective date of the rate adjustment is set out in Item 1 of Part I in Appendix B.

The Board's communication regarding PILs in this rate year is set out in Appendix C, tab 3.

4.3 2003 Rate Adjustment

In November 2002, the *Electricity Pricing, Conservation and Supply Act* ("Bill 210") was passed. The Board's authority to change electricity rates was restricted by section 79 of the Act. Consequently, no rate adjustment was implemented in 2003.

The 3 month 2001 PILs expense, initially designed to remain in rates for one year (2002) only, remained in rates until March 2004.

[5] Appendix C, tab 2 - *with reference to* FAQ #15 - December 2001 and APH, Article 220, Account 1562

This meant that this expense was collected, not only for the 2002 rate year as intended, but also for 2003 and part of 2004, resulting in an over-collection of PILs. The question arises as to whether this should be treated as an "over collection" of PILs to be reflected in the final balance in account 1562. This issue is set out as Item 2 of Part I in Appendix B.

The 2002 PILs expense also remained in rates for 2003. However, since the 2002 expense was a twelve month expense consistent with annual income, no significant over or under collection was likely for this amount.

4.4 2004 Rate Adjustment

Notwithstanding the Bill 210 rate freeze, for the 2004 rate year the Minister of Energy permitted distribution rates to be adjusted for recovery of the first instalment of regulatory assets.

In order to mitigate the rate impact of permitting partial recovery of regulatory assets, the Minister requested that the Board identify opportunities for any reduction to distribution rates and charges which could be implemented coincident with the recovery of regulatory assets. Consequently, the 2001 PILs expense was removed from rates for purposes of calculating the 2004 rate adjustment. This rate adjustment was implemented in March 2004.

A new PILs expense for 2004 was not calculated and therefore the 2002 annual PILs expense remained in rates for the 2004 rate year.

The tax treatment of regulatory assets has varied among distributors. In its May 11, 2005 Report on the 2006 EDR process, the Board established a policy on the tax treatment of regulatory assets. In Chapter 7, on page 61, the Board stated, "A PILs or tax provision is not needed for the recovery of deferred regulatory asset costs, because the distributors have deducted, or will deduct, these costs in calculating taxable income in their tax returns." The Board repeated this position in several recent decisions.

Some distributors have adjusted their SIMPIL model filings over the years to reflect variances relating to regulatory assets even though they were not permitted a regulatory tax provision on regulatory assets. This issue has not

been addressed by the Board because account 1562 has not been approved for disposition. This issue is set out in more detail at Item 3 of Part I in Appendix B.

In addition, recovery of regulatory assets and the variances this causes in the PILs expenses are not posted to account 1562 after April 30, 2006 and beyond since filings for tax years after 2005 are not required. (see section 5.0 below)

This raises another issue pertaining to regulatory assets. The time period for recovery is 2004 to 2008 while the time period of the SIMPIL model calculation ends at April 30, 2006. This timing miss-match may result in tax expenses in 2006, 2007, and 2008, which are not trued-up through the SIMPIL model. As noted above, this matter is further explained as Item 3 of Part I in Appendix B.

The reference to the Board's communication regarding PILs in this rate year is set out in Appendix C, tab 5.

4.5 2005 Rate Adjustment

On January 1, 2005 most of the Bill 210 provisions restricting the Board's authority in electricity rate-making were repealed. On December 20, 2004 the Board issued rate application filing instructions to adjust rates, effective April 1, 2005. For most distributors, rates were adjusted for three items:

1. Final instalment of MARR;
2. Second instalment of regulatory asset recovery; and,
3. 2005 PILs expense.

The 2004 PILs expense was replaced with a 2005 PILs expense. Reference to the Board's communication regarding PILs in these rate years is set out in Appendix C, tab 6.

5. THE PERIOD MAY 1, 2006 TO PRESENT

After consultation with stakeholders in 2004 and 2005, the Board established a new framework for adjusting electricity rates in 2006. This process (2006 EDR) called for applications to adjust rates effective May 1, 2006. PILs were calculated and incorporated into rates in a similar manner as in previous years.

The 2005 PILs expense was replaced with an updated 2006 expense using the PILs model.

However, the Board changed its treatment of the tax expense variances as it embraced a more conventional concept, i.e., a forecast amount with very limited true-up. Only differences resulting from legislative or regulatory changes to tax rates or tax rules are allowed as a true-up entry. Account 1592 - PILs and Tax Variances for 2006 and Subsequent Years was established, replacing account 1562 from May 1, 2006 onward. Also, as noted in a December 2005 FAQ, account 1592 also captures any differences arising from changes to a distributor's opening 2006 tax account balances resulting from prior period assessments or reassessments[6].

The three 1562 PILs accounting methods (see section 3.3 above) ceased to be a requirement effective May 1, 2006. Account 1562 is only used for recording interest on the remaining 1562 principal balance and recording the impact of tax authority reassessments for 2001 to 2005 depending on the nature of the tax issues.

The treatment of the PILs variances for the period January 1, 2006 to April 30, 2006 is still unclear. Distributors have tax returns for 2005 but not for the affected period in 2006. This matter is further explained as Item 5 of Part I in Appendix B.

The Board's communication regarding PILs in the 2006 rate year is set out in Appendix C, tab 7.

[6] Appendix C, tab 6 – *with reference to* FAQ #19, December 2005

TAB 11

Ontario Energy Board

Commission de l'Énergie de l'Ontario

RP-2005-0013
EB-2005-0031

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

AND IN THE MATTER OF an Application by Great Lakes Power Limited for an order or orders approving or fixing just and reasonable rates.

BEFORE: Gordon Kaiser
Vice Chair and Presiding Member

Pamela Nowina
Vice Chair and Member

Paul Vlahos
Member

DECISION AND ORDER

This is the majority decision with reasons of Vice Chair Nowina and Board Member Vlahos. The minority reasons of Vice Chair Kaiser follow.

Background

On January 18, 2005, Great Lakes Power Limited ("GLP") submitted an application to the Ontario Energy Board for a distribution rate adjustment related to the recovery of the second interim tranche of regulatory assets pursuant to the Board's instructions found in the filing guidelines issued on December 20, 2004.

On February 16, 2005, Boniferro Mill Works Inc. ("Boniferro") submitted an intervention objecting to its classification as Larger Customer A and to its line loss rates.

On March 30, 2005, the Board issued a Decision and Interim Order approving distribution rate adjustments. In that decision, the Board declared GLP's rates interim effective April 1, 2005 and because of the outstanding matter relating to Boniferro, directed GLP to file written evidence with respect to the issues raised by Boniferro. The oral hearing focusing on Boniferro's issues was held on November 7 and 8, 2005 in the Board's hearing room in Toronto.

The rate classification that currently applies to Boniferro was first approved by the Board on an interim basis on May 13, 2002[1]. At that time, Domtar Wood Products was the distribution customer that owned the specific facilities at the site now owned by Boniferro at 45 Third Line West in Sault Ste. Marie. The interim decision approved the applied-for rates derived from the allocation of costs to proposed customer classes using the results of a study performed for GLP by Navigant Consulting Inc. The Navigant study classified Domtar as "Large Customer A", the only customer in that specific rate class. The basis for this classification was Domtar's unique demand, which was significantly higher than GLP's commercial customers in the General Service > 50 kW rate class, and significantly lower than GLP's largest distribution customer.

In December of 2002, GLP's interim rate order was made final as a result of Ontario Government legislation, Bill 210. By legislation, electricity distribution rates could only be altered with the permission of the Minister of Energy during the period December 2002 to January 2005.

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1 RP-2002-0109/EB-2002-0249

According to the evidence, Domtar started to wind down its operations in January 2003. The hardwood sawmill did not operate in February and March of 2003. Boniferro took over the hardwood sawmill operations from Domtar on or about the end of March 2003 but Domtar remained the customer of GLP for 45 Third Line West until it exited the site at the end of October 2003. During that time, Boniferro was paying Domtar for part of the electricity bill issued to Domtar from GLP. During that period some consumption was always registered on the meter.

The evidence shows that Boniferro requested electricity service from GLP by letter dated March 24, 2003. In that letter Boniferro indicated its expectations that it would be charged under the General Service > 50 kW rate class and, if not so, to be notified. By response dated April 25, 2003, GLP indicated that it would be classifying Boniferro in the Large Customer A class, the same as Domtar, and provided the reasons for such classification.

By letter to GLP dated January 21, 2004, Boniferro expressed concerns regarding its classification as Large Customer A. In that letter, Boniferro noted that its November and December 2003 average monthly peak demand was 1,113 kW and 1,119 kW respectively and that its future peak demand is expected to be in this range.

Boniferro paid GLP on the basis of the Large Customer A rates until June 2004. Beginning in July 2004, Boniferro began to remit an amount which it calculated would be payable if Boniferro was in the General Service > 50 kW rate class.

In this proceeding, Boniferro argued that the Domtar Large Customer A rate was not applicable as this 'site specific' rate was not related to a site specific cost, that the results of the Navigant study were not fair to Boniferro and that Boniferro should be more appropriately placed in the General Service > 50 kW class.

GLP argued that Boniferro's operations were not significantly different from Domtar's and was opposed to the reclassification of Boniferro on that basis. GLP acknowledged that the Board never had the opportunity to scrutinize the distribution rate application which included the Navigant study as the initial interim rates were made final by Bill 210, and not as a result of a proceeding before the Board. However, GLP maintained that the study was based on standard cost allocation and rate making principles which involved the sharing of costs and subsidies among customer classes.

GLP offered to mitigate the Large Customer A rate by adjusting the allocators in the Navigant study by using the volumes reflecting Boniferro's operations in 2004. This would generate lower Large Customer A rates for Boniferro. GLP also requested that in the event the Board decided to adjust Boniferro's rates due to either a reclassification or GLP's scenario of mitigating the Large Customer A rate, that the Board grant an accounting order to establish a deferral account to record any deficiencies.

With regard to the loss factor issue, Boniferro submitted that in the event that the Board reclassified Boniferro to the General Service > 50 kW class, Boniferro would accept the current line loss factor of 6.9%; otherwise it requested that GLP justify the 6.9% figure as applicable to the Large Customer A class.

GLP submitted that it did not specifically assign a unique loss factor to the Large Customer A class as a result of the specific classification found in the Navigant study. It noted that the currently applied loss factor is appropriate for Boniferro since it was calculated in accordance with the Board's formula for primary metered customers as set out in the Board's Retail Settlement Code. GLP also noted that the current loss factor is lower than the actual recorded loss factors currently experienced in the GLP system.

Board Findings

All panel members agree on the rate classification for Boniferro from April 1, 2005, when the rates became interim. There is disagreement on the appropriate treatment of the period before this. These are the findings of the majority.

The first issue to be dealt with is whether Boniferro should continue to be in the Large Customer A classification. We find that it should not.

GLP's General Service >50 kW rate class does not contain a maximum threshold. GLP's Large Customer A classification does not state a minimum or maximum threshold. This is the first opportunity for the Board to review the reasonableness of the establishment of GLP's Large Customer A Classification.

GLP's alternative solution in this proceeding, to revise the cost allocation by using the Boniferro loads from 2004, does provide some relief to Boniferro, as the costs assigned to the Large Customer A classification are based on monthly peak loads. However, this does not address the issue of the appropriateness of the Navigant study regarding classification in the first instance. We are not persuaded on the evidence in this proceeding that it is appropriate that one customer should make up a single rate class, especially as there was no direct assignment of costs to the Large Customer A class, only an allocation based on customer loads.

Establishing a single customer class is unusual, and there must be sufficient evidence to demonstrate why it is appropriate for a particular customer to have a unique rate. Although the Board had enough evidence before it to review the rate classification dispute between the two parties, this proceeding was not the forum to specifically address the Navigant study's rationale and methodology. The Board determined that it would review evidence on the issues raised by Boniferro in its intervention of GLP's application, within the context of the 2005

rate adjustment process. The generic Notice issued by the Board for the 2005 rates proceeding limited the scope of the proceeding to a rate adjustment based on changes reflecting (in GLP's case) the next interim instalment of the four year recovery of distributors' regulatory assets.

Intervenors are not limited to addressing issues brought forth by an Applicant. Therefore, the Board was willing to review the issues brought forth by Boniferro, namely their alleged misclassification. Although the Board did not ask for evidence on the Navigant Study itself, GLP had notice that the appropriateness of the Large Customer A rate would have been an issue. However, GLP did not provide sufficient evidence in our view to justify a continuation of the site specific rate for 45 Third Line West in Sault Ste. Marie.

We therefore find that Boniferro should be reclassified to the General Service > 50 kW class. The option remains open for GLP to propose otherwise based on a new study, or a review of the Navigant Study, which would demonstrate that Boniferro, as the occupant of 45 Third Line West in Sault Ste. Marie, should be assigned to a different rate class than the General Service > 50 kW class.

The second issue is the effective date of the reclassification. We find that the reclassification will be retroactive to the date interim rates were set – April 1, 2005. Boniferro's classification will not be changed for the period prior to April 1, 2005.

GLP's rates were approved by the Board on an interim basis by way of an interim order dated May 13, 2002, in the same way as all other electricity distributors in the province received approval for interim rates. By legislation (Bill 210), interim rate orders fixing rates under s. 78 of the *Ontario Energy Board Act, 1998* for electricity distributors were made final. During the period of the rate freeze (December 2002 to January 2005), applications to the Board for rate changes were permitted only with the leave of the Minister of Energy. The Board had not

received authority from the Minister to deal with this matter. Therefore, the Board was not able to review the reasonableness of GLP's rate classification prior to this proceeding.

Bill 210 made the interim GLP rate order a final rate order. Therefore we are of the view that changing rates prior to April 1, 2005 would be retroactive ratemaking. As the Board has stated in numerous cases, the Board does not endorse retroactive ratemaking. The Board must be mindful of the negative implications of retroactive rates. When investors and consumers cannot be assured that final rates are indeed final, the resultant risks increases costs for everyone. In addition, intergenerational inequities arise, with today's consumers paying the costs of past events. In this case, it is not appropriate for either the utility or its ratepayers to bear the implications of a retroactive rate change. To burden the utility would be contrary to the regulatory compact. To burden the ratepayers would be wrong, especially given the length of the retroactivity.

We are also of the view that the Board is limited in its decision by legal precedent. The Supreme Court of Canada has ruled on the issue of retroactive ratemaking.

In 1989, Bell Canada appealed a decision[2] of the CRTC which retroactively altered an interim rate that had previously been approved by the CRTC. The Court held that:

> It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order. [...] It is the interim nature of the order which makes it subject to further retrospective directions.

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2 *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)* [1989] 1 S.C.R. 1722

However, with regard to the status of final orders the Court stated that:

> [a] consideration of the nature of interim orders and the circumstances under which they are granted further explains and justifies their being, unlike a final decision, subject to retrospective review and remedial orders.

The Supreme Court re-iterated its position on retroactive rate-making in the ATCO decision[3]. Speaking for the majority, Mr. Justice Bastarache noted:

> [i]t is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates.

A decision of the Alberta Court of Appeal[4] also makes findings regarding retroactive rates. The Court found that:

> A fundamental principle of statutory interpretation is that retrospective power can only be granted through clear legislative language. This principle is based on notions of fairness and the reliability of expectations.

The *Ontario Energy Board Act, 1998* does not contain any provisions that deal specifically with retroactive ratemaking, and the Board is therefore not empowered to alter a final rate order retroactively. Furthermore, the Act requires that balances in deferral accounts should be reviewed by the Board at least annually. We infer from this that there is a policy against adverse impacts and inter-generational inequity that might be caused by out-of-period rate adjustments.

Therefore, for the above reasons, we find that GLP has had a valid order to charge the rates that it has charged to Boniferro for electricity consumption up to March 31, 2005. For consumption on and after April 1, 2005, however, GLP shall

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3 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board),* [2006] S.C.C. No. 4

4 *Beau Canada Exploration Ltd. v. Alberta (Energy and Utilities Board)* [2000] A.J. No. 507 (C.A.)

classify and invoice Boniferro on the basis of the General Service > 50 kW rate classification.

Having made the above findings, whether GLP erred or acted unreasonably by not placing Boniferro in the General Service > 50 kW rate class at the time Boniferro became a customer of GLP is not determinative. However, it became a focal point in the proceeding and we feel that we must comment on it. We conclude that GLP did not err or act unreasonably.

The essence of Bonifero's argument is that it should not have been classified as Large Customer A since it never accepted such classification. It argues that once Domtar exited the business, the revenue associated with the Large Customer A class disappeared and Boniferro should have been classified as a completely new customer, different from Domtar.

GLP had established and received Board approval for a rate classification based on a single customer, Domtar Wood Products. However, the rate classification described Large Customer A as the customer located at 45 Third Line West in Sault Ste. Marie and did not specifically name Domtar Wood Products. That classification was put in place at the time GLP had to unbundle its rates to conform with the Board's directions to all the electricity distributors in the province and was derived from the Navigant study. Domtar did not intervene in GLP's application at that time.

It is reasonable to expect that GLP would treat Boniferro the same as the previous owner of the site. It was the same property as Domtar's, the same distribution assets, and essentially the same business as Domtar's, served under the same meter. When Boniferro acquired certain assets from Domtar in 2003 and Boniferro replaced Domtar as the customer of GLP, Boniferro was properly assigned in our view the rate classification that applied to Domtar. The fact that the hardwood sawmill operations ceased for a period of two months does not

alter the fact that without experience as to what the changes, if any, would be to the monthly peak demand level of electricity, it would not be reasonable to expect GLP to assign Boniferro to a different classification at that time.

As a utility, GLP has a responsibility to act in a prudent fashion for all its customers. Changing the classification of an existing property without evidence of significant peak demand consumption patterns, would not be consistent with the utility's obligation to other customers who would, in the future, be required to pick up the shortfall.

Mr. Boniferro acknowledged that, prior to continuing his business as a customer of GLP, his assumption of 750 to 800 kW peak demand was his own. He neither received expert advice in forming that assumption, nor did he receive any indication from GLP that his business would be served under the General Service > 50 kW rate class. On the contrary, GLP had informed Boniferro in its response letter of April 25, 2003 that Boniferro would be billed under the same classification as Domtar. Mr. Reid, testifying on behalf of Boniferro, acknowledged that it is difficult to come up with a forecast for peak demand prior to operating a company like Boniferro. As it turned out, Boniferro's average of its 2005 monthly peak demands as of August 2005 was 1,556 kW or 15% lower than the average of Domtar's monthly peak demands in 2000.

For the above reasons, we are of the view that GLP acted reasonably in classifying Boniferro in the Large Customer A classification, replacing Domtar.

Also, by way of context, the Board was first notified of this dispute in October 2004 by way of a complaint lodged by Boniferro to the Board's Compliance Office. The Chief Compliance Officer, in a letter to Boniferro dated February 2005, found no violation of the rate order by GLP. Furthermore, in a letter to GLP dated April 27, 2005 in the context of the instant rates proceeding, the Board stated that, "The Board is of the view that this issue is not about GLPL's

compliance with its rate order but rather as to what is an appropriate rate for Boniferro going forward."

Boniferro's objection to be in the Large Customer A classification does not invalidate an existing Board rate order containing such classification.

The final issue relates to the treatment of GLP's forgone revenues resulting from the reclassification.

GLP requested that a deferral account be established to track underpayments or under recoveries of revenues as a result of this decision. The Board finds that a deferral account should be established by GLP to record the difference in revenue resulting from classifying Boniferro as a General Service > 50 kW customer effective April 1, 2005. These amounts should be considered in a future rates proceeding. The methodology used to dispose of these amounts will be determined at that time.

With respect to GLP's shortfall in revenue in the period July 2004 to March 2005, during which Boniferro was not paying GLP the invoiced amounts, it is the view of the Board that this a private collection matter between GLP and Boniferro. The Board found that the rate order was valid in this period and neither the utility nor its ratepayers should be burdened with retroactive ratemaking. However, the Board expects that GLP will exercise prudence in this regard so that it and its customers will continue to benefit from a future revenue stream and from continuing to utilize its distribution assets (no stranded assets) by having Boniferro as a customer.

We note Boniferro's position that if it were to be classified as a General Service > 50 kW customer, it would accept the 6.9% loss factor applied by GLP to that rate class. We find that that there should be no change to the previously approved 6.9% loss factor.

Therefore, the Board orders that:

1. GLP classify Boniferro as a customer in the General Service > 50 kW rate class, effective April 1, 2005.

2. GLP establish a deferral account to capture any revenue deficiency from Boniferro being classified as a General Service > 50 kW rate class customer from April 1, 2005.

DATED at Toronto, February 24, 2006

Original signed by

Pamela Nowina
Vice Chair and Member

Original signed by

Paul Vlahos
Member

MINORITY REASONS

These are the minority reasons of Vice Chair Kaiser.

This proceeding relates to a billing dispute between Great Lakes Power Ltd. ("GLP" or the "utility") and its customer, Boniferro Millworks Inc. ("Boniferro"). GLP has classified Boniferro in the Large Customer A category. Boniferro argues that it should be more properly classified as a General Service > 50 kW customer. This would result in a 25% reduction of the cost of electricity to Boniferro.

The evidence indicates that Boniferro at all times rejected this classification but for a period of time (November 2003 to June 2004) did pay the larger rate. However, since July 1, 2004 Boniferro has been paying at the lower rate under the General Service > 50 kW class. GLP argues that the customer has been underpaying and substantial monies are owed. Boniferro on the other hand, argues that if anything it has been overpaying.

This dispute came before the Board through an intervention by Boniferro in the general rate application filed by GLP on January 18, 2005. Further to the filing of the intervention by Boniferro on February 16th the Board issued various Procedural Orders which provided for interrogatories and the filing of evidence. The Board held an oral hearing in this matter on November 7th and 8th, 2005.

The rate order at issue in this case is somewhat unique. GLP's 2002 rate application was approved by the Ontario Energy Board on an interim basis on May 13, 2002, with rates made effective May 1, 2002. In December of 2002, this interim rate order was made final as a result of Ontario Government legislation, Bill 210. This final rate order set out a Large Customer A rate. While this is referred to as a rate class it in fact included only one customer and was designed specifically for that customer. The rate was set for Domtar Wood Products and

was based on the analysis performed by Navagant Consulting in a detailed cost allocation study.

In March 2003, Boniferro purchased part of the Domtar property and changed its operations. Boniferro did not assume or enter into any supply agreement with GLP and did not assume any agreements between GLP and Domtar. In November 2003, Domtar ceased all operations on the property and Boniferro was required to make its own arrangements with GLP.

When Boniferro acquired certain assets from Domtar, GLP assigned Boniferro to the Large Customer A class and began to charge distribution rates applicable to that class. Boniferro objected on the grounds that its usage was not the same as Domtar and that no cost allocation study had been done with respect to its usage.

GLP argued that the rate was "site specific" and that Boniferro was required to pay the rate.

The concept of a "site specific" rate is an unusual one. Rates are generally determined between customer classes on the basis of usage. Here there was no analysis of the usage, rather just a declaration that the rate was site specific. Moreover, this is really not a rate class; it was a one customer rate that was designed specifically for another customer.

It is clear that there were fundamental changes in the operation of Boniferro compared to the previous owner of the land, Domtar Wood Products. First, only part of the property was purchased from Domtar and second, detailed evidence was presented by the president of Boniferro as to the changed functionality. Counsel for GLP admitted in argument that in 2004 the average monthly peak demand for Boniferro was approximately 1,400 kW which was around 24% less

than the 1,831 kW that was used for the purpose of creating a Large Customer A class in the first place.

Aside from the reduced electricity use by Boniferro, evidence was presented by Boniferro that indicated that GLP was requiring Boniferro to bear an excessive cost burden. Boniferro pointed to the fact that the dedicated facilities used to serve their plant consisted of 3.65 km of line which at its brand new installed cost, as opposed to the current depreciated cost, was only $250,000. Notwithstanding that, Boniferro was allocated close to $1 million in system costs which they say did not relate to the cost of serving Boniferro.

Boniferro wants to pay the General Service > 50 kW rate from the date service commenced in November 2003. They would accordingly recover the amounts which they overpaid for a period of eight months. The majority hearing this case concluded that the lower rate can go into effect only on April 1, 2005 because to do otherwise would constitute retroactive rate-making. I disagree. This is not a case of retroactive rate-making. This is an error in customer classification.

Retroactivity

There are a number of reasons why the retroactivity issue does not arise in this case. First, there is good reason to believe that the Domtar rate disappeared. While the Domtar rate is called the Large Customer A class, it's a class in name only. It was designed for a specific customer and was based on a cost allocation study that related solely to that customer. It is argued by Boniferro that when Domtar ceased operations that rate order disappeared. If the rate order disappeared, there are no retroactive rates applying to that rate order.

Second, even if the rate did not disappear, it was not meant to apply to Boniferro and should not have been applied to Boniferro. Boniferro should not have been put in that rate class; rather, it should have been put in the General Service > 50

kW rate class. It is true that the utility classified Boniferro in this rate class during a period where the utility's rates were deemed to be a final order by legislation. But this does not mean that this classification was correct or that Boniferro should bear the costs of this classification. Does the rule against retroactive rate making mean that Boniferro should bear these costs? It is not Boniferro's fault that this matter has taken this long to resolve. Boniferro has been complaining about misclassification since the very beginning. Put differently, there is an unjust enrichment when a customer has paid a rate which does not apply to that customer, and the Board may remedy that by ordering a refund. The test for unjust enrichment was recently addressed by the Supreme Court of Canada[5]. Iacobucci J. stated the test for unjust enrichment for the Court, as follows:

> As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reasons for the enrichment. (Paragraph 30)

The *Garland* case is particularly relevant because it addressed the payment of utility rates. In that case, the Court applied an earlier finding that the interest rate on outstanding utility bills was unlawful in the context of the test for unjust enrichment. In applying that test, the Court had no trouble finding that the utility was enriched and the rate payer was deprived. The real issue there, as well as here, was whether there was a juristic reason for the enrichment. There, as here, the utility argued that the enrichment had a juristic justification because it was authorized by a Board Order. The Court, who found that the order was unlawful and therefore inoperative, held that the order could not be relied upon as a juristic reason for the enrichment. According to the Court:

> As a result, the question of whether the statutory framework can serve as a juristic reason depends on whether the provision is held to be inoperative. (Paragraph 51)

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5 *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629.

Thus, because the provision was inoperative, the Court ordered that the payment be refunded. I believe that this is the appropriate context to consider the relevance of retroactive rate making.

No one disputes that retroactive rate-making is improper. This is most recently recognized by the Supreme Court of Canada in the ATCO decision and numerous decisions before[6]. In *Northwestern Utilities Ltd. v. City of Edmonton*, Estey J. stated on page 691:

> It's clear from the many provisions of *The Gas Utilities Act* that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered from rates established for past periods.

The general principle is that when a Board establishes a Final Order with respect to rates, that rate is in effect until replaced, i.e. the final rate either is replaced by an Interim Rate or is replaced by a new Final Rate Order in a subsequent proceeding. The reason is that the regulatory compact assumes that between rate hearings, there will always be over earnings or under earnings but the utility must accept the consequences. It is not entitled to be reimbursed if it does not make its full allowed rate of return. On the other hand, the utility does not have to give money back to the ratepayers if it earns in excess of that amount. Rates are to be corrected at the time of the next hearing on a going forward basis. They are not made retroactive. This allows the utility to finance its operations on a predictable basis and provides finality to proceedings.

As a result, if the rate was properly applicable to Boniferro during the entire period, then, under the unjust enrichment doctrine, the rate would be operative.

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6 *Northwestern Utilities Ltd. v. City of Edmonton*, [1979], 1 S.C.R. 684; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical* Canada *Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641, aff'd (1983), 42 O.R. (2d) 731

As a result, there would be a juristic reason for the utility's enrichment, i.e., the enrichment would not be unjust. Furthermore, given the rule against retroactive rate making, the Board could not now amend that rate to cover a previous period. However, this is not the case here. I am not proposing that the rate be changed; I am finding that it did not apply. The rate was not operative as applied to Boniferro. It therefore does not constitute a juristic reason for the enrichment.

The prohibition against retroactivity assumes that a Final Order has been made by the Board and properly applies to the customer at issue. Here, the Board did not make these rates final as applied to that customer. The customer's inability to challenge the applicability of the rate occurred through a legislative "accident" when the legislature enacted Bill 210. It's hard to argue that the intent of Bill 210 was to create a final order that prohibited a customer from obtaining relief in an ongoing dispute regarding customer classification.

Fundamentally, this case is about customer misclassification. Boniferro applied for service on the basis that it was in the General Service > 50 kW category. That was rejected and the utility placed them in a unique Domtar category called Large Customer A. This dispute has continued on the basis of that alleged misclassification.

The application of the retroactivity doctrine to this case assumes that the Board is adjusting the Domtar or Large Customer A rate retroactively. That with respect is not the issue. Boniferro has never asked for that relief. Rather, Boniferro has asked to be placed in the proper customer classification and to have that take effect from the date service commenced.

In the circumstances, throughout the period starting November 2003, Boniferro should be paying the applicable rates of the General Service > 50 kW class.

It is also important that considerable evidence has been placed before the Board as to the financial difficulties facing Boniferro in its current operations. The over payment at issue is a serious matter for this particular customer. The utility needs to remain prudent that it not arbitrarily determine rates that would lead to the disappearance of the customer and to stranded assets. That will generate a revenue deficiency much greater that that created by reclassification.

How is the deficiency recovered?

Under both the minority and majority decisions there will be a revenue deficiency for the utility. GLP's filing in the 2005 rate case was based on a revenue requirement that assumed that the customer in the Large Customer A class was properly classified and is paying that rate. In both the minority and majority decisions this is not the case. The difference is the length of period that the deficiency relates to.

The minority decision states that the misclassification took place at the beginning of service in November 2003 and the lower rate should prevail from that point. The majority decision states that the lower rate should be effective only from April 1, 2005 because a lower rate prior to that date amounts to retroactive rate-making.

The majority decision analyses the prudence of the utility in the initial classification and finds no fault. It is clear that Boniferro argues that the decision was an error and that they should not have been assigned the Domtar rate and certainly not without a proper cost allocation study. There is some support for that position in the record. There is evidence that the utility declared the rate "site specific" and failed to take into account the differences in functionality of the new operator. The utility admitted in argument that the usage of Boniferro was 24% less than the demand used in striking the Domtar rate.

The Board addressed the prudence test in its Decision in the Enbridge case regarding the prudence of the Alliance contracts[7].

The test is well known but its worth repeating in the context of these proceedings. The first principle is this; when a utility makes decisions in operating its business, the regulator assumes that those decisions, whether they relate to investments or otherwise, are prudent. In other words, there is a burden on those challenging the prudence to demonstrate, on reasonable grounds, that there has been a lack of prudence.

The second principle is that, in analysing whether the utility was prudent or not, the Board must look at the facts and circumstances that were known or ought to be known to the utility at the time the decision was made. In other words, hindsight should not be used to determine prudence.

Put differently, the utility's decision can turn out to be wrong but still have been prudent. Given the limited nature of the record before us and the presumption of prudence on the part of the utility, I find that the decision by the utility to classify Boniferro in the Large Customer A category was a prudent decision. That doesn't mean it was the right decision. In fact, it was the wrong decision.

However, the consequence of this finding is that the shareholder should not bear the deficiency which would result from the reclassification of the customer. The deficiency should be recovered from the other rate classes and the exact disposition of that can be dealt with by the Panel hearing that rate case. The deficiency may be recovered from all customer classes or it may be recovered only from the General Service > 50 kW class. A Procedural Order can be issued to deal with this issue. It's not unusual in rate cases that cost allocation issues between customers will arise and be dealt with by Panels hearing those cases.

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7 Re: Enbridge, RP-2001-0032, Para. 3.12.2

Boniferro's remedy

Given the concern with retroactivity, I would order that Boniferro be classified in the General Service > 50 kW class from the date service commenced. The utility will be directed to provide a credit towards amounts to be paid by Boniferro in the future in an amount equal to the overpayment. The overpayment can be readily calculated and submissions can be made if necessary with respect to the accounting.

There is ample authority in the regulatory jurisprudence that credits going forward do not constitute retroactive rate-making.[8] This is particularly the case where it reflects a one time fixed amount adjustment to an overpayment that the tribunal finds unjust.

I would also order that the utility be directed to pay Boniferro's costs in this proceeding in an amount to be taxed in the usual fashion.

In summary, I agree with the majority that GLP should charge Boniferro the General Service > 50 kW rates and that the utility establish a deferral account to track any revenue deficiency that results. I disagree with the majority regarding the effective date of the reclassification. GLP should reclassify Boniferro to the General Service > 50 kW class as of the date which service commenced, November 2003. I also disagree with the majority regarding the effective date of the deferral account. The deferral account should track any revenue deficiency as of November 2003 and the disposition of these amounts should be considered by the Panel hearing the 2006 rate case. The allocation as between different customer classes can be determined at that time.

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[8] *New York Water Service Corp. v. Public Service Commission*, 208 N.Y. S. 2d 587 (1960). In that case, a utility commission ruled that gains on the sale of real estate should be taken into account to reduce rates annually over the following period of 17 years (p.864). The regulator's order was upheld by the New York State Supreme Court (Appellate Division). See also *ATCO Gas and Pipelines Ltd v. Alberta Energy and Utilities Board* [2006] S.C.J. 4 at Para. 137.

DATED at Toronto, February 24, 2006

Original signed by

Gordon Kaiser
Vice Chair and Presiding Member

TAB 12

Case Name:

Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)

The Canadian Radio-Television and Telecommunications Commission, appellant;
v.
Bell Canada, respondent;
and
The Attorney General of Canada, the Consumers' Association of Canada, the Canadian Business Telecommunications Alliance, CNCP Telecommunications and the National Anti-Poverty Organization, interveners.

[1989] S.C.J. No. 68

[1989] A.C.S. no 68

[1989] 1 S.C.R. 1722

[1989] 1 R.C.S. 1722

60 D.L.R. (4th) 682

97 N.R. 15

J.E. 89-994

38 Admin. L.R. 1

16 A.C.W.S. (3d) 1

File No.: 20525.

Supreme Court of Canada

1989: February 21 / **1989:** June 22.

Present: Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law -- CRTC jurisdiction -- CRTC ordering Bell Canada to grant a one-time credit to its customers -- Order to remedy imposition of interim rates approved by CRTC in 1984 and 1985 and found to be excessive in 1986 -- Whether CRTC had jurisdiction to make such an order -- Whether CRTC's interim rate order may be reviewed in a retrospective manner -- Whether CRTC's power to fix "just and reasonable" rates for Bell Canada involves the regulation of its revenues -- Railway Act, R.S.C., 1985, c. R-3, ss. 335(1), (2), (3), 340(5) -- National Transportation Act, R.S.C., 1985, c. N-20, 52, 60, 66, 68(1).

In March 1984, Bell Canada filed an application with the CRTC for a general rate increase. To prevent a serious deterioration in Bell Canada's financial situation while awaiting the hearing and the final decision on the merits, the CRTC granted Bell Canada an interim rate increase of 2 per cent effective January 1, 1985. The interim rate increase was calculated on the basis of financial information provided by Bell Canada. In its decision, however, the CRTC clearly expressed the intention to review this interim rate increase in its final decision on Bell Canada's application on the basis of complete financial information for the years 1985 and 1986. In 1985, given Bell Canada's improved financial situation, the CRTC ordered Bell Canada to file revised tariffs effective as of September 1, 1985. As a result of this decision, Bell Canada was forced to charge the rates effective before its application for a rate increase filed in March 1984. These new rates too were interim in nature. In October 1986, notwithstanding Bell Canada's request to withdraw its initial application for a general rate increase, the CRTC reviewed Bell Canada's financial situation and the appropriateness of its rates. The CRTC established appropriate levels of profitability for Bell Canada on the basis of its return on equity and found that, in 1985 and 1986, it had earned excess revenues for a total of $206 million. Although Bell Canada always charged rates approved by the CRTC, the latter decided that Bell Canada could not retain these excess revenues and ordered it to distribute the excess revenues through a one-time credit to be granted to certain classes of customers. On appeal, the Federal Court of Appeal quashed the CRTC's order. This appeal is to determine (1) whether the CRTC had the legislative authority to review the revenues made by Bell Canada during the period when interim rates were in force; and (2) whether the CRTC had jurisdiction to make an order compelling Bell Canada to grant a one-time credit to its customers.

Held: The appeal should be allowed.

The CRTC's decisions are subject to appeal to the Federal Court of Appeal on questions of law or jurisdiction by virtue of s. 68(1) of the National Transportation Act. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise. Here, Bell Canada is challenging the CRTC's decision on a question of law and jurisdiction involving the nature of interim decisions and the extent of the powers conferred on the CRTC when it makes interim decisions. This question cannot be solved without an analysis of the procedural scheme created by the Railway Act and the National Transportation Act. The decision impugned by Bell Canada is therefore not a decision which falls within the CRTC's area of special expertise and is pursuant to s. 68(1) subject to review in accordance with the principles governing appeals. Indeed, the CRTC was not created for the purpose of interpreting the Railway Act or the National Transportation Act but rather to ensure, amongst other duties, that telephone rates are always "just and reasonable".

The fixing of tolls and tariffs that are "just and reasonable" necessarily involves, albeit in a seemingly indirect manner, the regulation of the revenues of the regulated entity as the administrative tribunal must balance the interests of the customers with the necessity of ensuring that the regulated entity is allowed to make sufficient revenues to finance the costs of the services it sells to the public. In fixing fair and reasonable tolls in this case, the CRTC had to take into consideration the level of revenues needed by Bell Canada.

The CRTC had the power to revisit the period during which interim rates were in force. Such power is implied in the power to make interim orders within the statutory scheme established by the Railway Act and the National Transportation Act. It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order. It is the interim nature of the order which makes it subject to further retrospective directions. The circumstances under which they are granted also explains and justifies their being, unlike final orders, subject to retrospective review and remedial orders. Interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are traditionally granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. To hold in this case that the interim rates could not be reviewed would not only be contrary to the nature of interim orders, it would also frustrate and subvert the CRTC's order approving interim rates which clearly indicates its intention to review the rates charged for 1985 up to the date of the final decision.

There should be no concern over the financial stability of regulated utility companies where one deals with the power to revisit interim rates. The very purpose of interim rates is to allay the prospect of financial instability which can be caused by the duration of proceedings before a regulatory tribunal. The added flexibility provided by the power to make interim orders is meant to foster financial stability throughout the regulatory process. The power to revisit the period during which interim rates were in force is a necessary corollary of this power without which interim orders made in emergency situations may cause irreparable harm and subvert the fundamental purpose of ensuring that rates are just and reasonable.

Even though Parliament has decided to adopt a positive approval regulatory scheme for the regulation of telephone rates, the added flexibility provided by the power to make interim orders indicates that the CRTC is empowered to make orders as of the date at which the initial application was made or as of the date the CRTC initiated the proceedings of its own motion. The power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order. As a result, the rate review process does not begin at the date of the final hearing; instead, the rate review begins when the CRTC sets interim rates pending a final decision on the merits.

Finally, once it is decided that the CRTC has the power to revisit the period during which interim rates were in force for the purpose of ascertaining whether they were just and reasonable, it follows that it has the power to make a remedial order where, in fact, these rates were not just and reasonable. In any event, s. 340(5) of the Railway Act provides a sufficient statutory basis for the power to make remedial orders including an order to give a one-time credit to certain classes of customers. While the one-time credit order will not necessarily benefit the customers who were actually billed excessive rates, once it is found that the CRTC has the power to make a remedial order, the nature

and extent of this order remain within its jurisdiction in the absence of any specific statutory provision on this issue.

Cases Cited

Approved: Re Coseka Resources Ltd. and Saratoga Processing Co. (1981), 126 D.L.R. (3d) 705; referred to: Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227; Douglas Aircraft Co. of Canada Ltd. v. McConnell, [1980] 1 S.C.R. 245; Alberta Union of Provincial Employees v. Board of Governors of Olds College, [1982] 1 S.C.R. 923; Re Ontario Public Service Employees Union and Forer (1985), 52 O.R. (2d) 705; Re City of Ottawa and Ottawa Professional Firefighters' Association, Local 162 (1987), 58 O.R. (2d) 685; Greyhound Lines of Canada Ltd. v. Canadian Human Rights Commission (1987), 78 N.R. 192; Canadian Pacific Ltd. v. Canadian Transport Commission (1987), 79 N.R. 13; British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia, [1960] S.C.R. 837; Northwestern Utilities Ltd. v. City of Edmonton, [1929] S.C.R. 186; City of Calgary v. Madison Natural Gas Co. (1959), 19 D.L.R. (2d) 655; United States v. Fulton, 475 U.S. 657 (1986); Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978); Regina v. Board of Commissioners of Public Utilities (1966), 60 D.L.R. (2d) 703; Re Eurocan Pulp & Paper Co. and British Columbia Energy Commission (1978), 87 D.L.R. (3d) 727; Nova v. Amoco Canada Petroleum Co., [1981] 2 S.C.R. 437.

Statutes and Regulations Cited

CRTC Telecommunications Rules of Procedure, SOR/79-554, Parts III, VII.
National Energy Board Act, R.S.C., 1985, c. N-7, s. 64.
National Transportation Act, R.S.C., 1985, c. N-20, ss. 49, 52, 60(2), 61, 66, 68(1).
Railway Act, R.S.C., 1985, c. R-3, ss. 334 to 340.

APPEAL from a judgment of the Federal Court of Appeal, [1988] 1 F.C. 296, 43 D.L.R. (4th) 30, 78 N.R. 58, quashing an order of the CRTC. Appeal allowed.

Raynold Langlois, Q.C., Greg Van Koughnett, and Luc Huppé, for the appellant.
Gérald R. Tremblay, Q.C., and Michel Racicot, for the respondent.
Graham Garton, for the intervener the Attorney General of Canada.
Janet Yale, for the intervener the Consumer's Association of Canada.
Kenneth G. Engelhart, for the intervener the Canadian Business Telecommunications Alliance.
Michael Ryan, for the intervener CNCP Telecommunications.
Andrew Roman and Robert Horwood, for the intervener the National Anti-Poverty Organization.

Solicitor for the appellant: Avrum Cohen, Hull.
Solicitors for the respondent: Clarkson, Tétrault, Montréal.
Solicitor for the intervener the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.
Solicitor for the intervener the Consumers' Association of Canada: Janet Yale, Ottawa.
Solicitor for the intervener Canadian Business Telecommunications Alliance: Kenneth G. Engelhart, Toronto.
Solicitor for the intervener the CNCP Telecommunications: Michael Ryan, Toronto.

Solicitors for the intervener the National Anti-Poverty Organization: Andrew Roman and Glenn W. Bell, Ottawa.

The judgment of the Court was delivered by

1 GONTHIER J.:-- The present case is an appeal against a decision of the Federal Court of Appeal which quashed one of the orders made by the appellant in Telecom Decision CRTC 86-17 ("Decision 86-17"). The impugned order compelled the respondent to distribute $206 million in excess revenues earned in the years 1985 and 1986 through a one-time credit to be granted to certain classes of customers. The respondent does not contest the factual findings on which Decision 86-17 is based nor does it claim that this order would unduly prejudice its financial position. None of the other orders made in Decision 86-17 are challenged.

2 The appellant claims that the purpose of the challenged order was to provide telephone users with a remedy against interim rates which turned out to be excessive on the basis of the findings of fact made by the appellant following a final hearing held in the summer of 1986 for the purpose of setting rates to be charged by the respondent in the years 1985 and following. These findings of fact are reported in Decision 86-17. Since this case turns on the proper characterization of the one-time credit order made in Decision 86-17, it is important to describe the procedural history of the administrative proceedings which led to the order now contested by the respondent.

I - The facts

3 On March 28, 1984, the respondent applied for a general rate increase under Part VII of the CRTC Telecommunications Rules of Procedure, SOR/79-554, which provides for a summary public process to deal with special applications. The respondent claimed that the Canadian Government's restraint program restricting rate increases of federally regulated utilities to 5 per cent and 6 per cent was sufficient justification to dispense with the normal procedure for general rate increase applications set out in Part III of the CRTC Telecommunications Rules of Procedure. In Telecom Decision CRTC 84-15, the appellant rejected this application on the ground that the respondent had failed to use the appropriate procedure set out in Part III of these rules. However, the appellant indicated that if the respondent was to suffer financial prejudice as a result of the delays involved in preparing for the more complex procedure set out in Part III, it could always apply for interim relief pending a hearing and a decision on the merits (at pp. 8-9):

> The Commission recognizes that, in 1985 and beyond, in the absence of rate relief, a deterioration in the Company's financial position could occur. In this regard, if the Company should find it necessary to file an application for a general rate increase under Part III of the Rules, the Commission would be prepared to schedule a public hearing on such an application in the fall of 1985. Should Bell consider it necessary to seek rate increases to come into effect earlier in 1985 than this schedule would allow, it may of course apply for interim relief. In the event Bell were to seek such interim relief, it would be open to the Company to suggest that the Commission's traditional test for determining interim rate appli-

> cations is overly restrictive in light of the Commission hearing schedule and to put forward proposals for an alternative test for consideration. [Emphasis added.]

On September 4, 1984, the respondent filed an application for a general rate increase based on 1985 financial data which would come into effect on January 1, 1986. At the same time, the respondent applied for an interim rate increase of 3.6 per cent.

4 In Telecom Decision CRTC 84-28 ("Decision 84-28") rendered on December 19, 1984, the appellant set out the following policy previously adopted in Telecom Decision CRTC 80-7 with respect to the granting of interim rate increases (at pp. 8-9):

> The Commission's policy concerning interim rate increases, enunciated in Decision 80-7, is as follows:
>
> > The Commission considers that, as a rule, general rate increases should only be granted following the full public process contemplated by Part III of its Telecommunications Rules of Procedure. In the absence of such a process, general rate increases should not in the Commission's view be granted, even on an interim basis, except where special circumstances can be demonstrated. Such circumstances would include lengthy delays in dealing with an application that could result in a serious deterioration in the financial condition of an applicant absent a general interim increase. [Emphasis added.]

The respondent argued that its financial situation warranted an interim rate increase and did not question the reasonableness of this policy. The appellant agreed with the respondent's submission that, in the absence of interim rate increases, it might suffer from serious financial deterioration and awarded an interim rate increase of 2 per cent. In this decision, the appellant required the respondent to prepare for a hearing to be held in the fall of 1985 for the purpose of assessing the respondent's application for a final order increasing its rates on the basis of two test years, 1985 and 1986. Decision 84-28 also states at p. 10 the reasons why the interim rate increase was set at 2 per cent:

> In determining the amount of interim rate increases required under the circumstances, the Commission has taken into account the following factors:
>
> 1) While the company stated that an interest coverage ratio of 4.0 times is required, the Commission regards the maintenance of the coverage ratio of 3.8 times, projected by the Company for 1984, as sufficient for the purposes of this interim decision.
> 2) With regard to the level of ROE ["return on equity"], the Commission is of the view that, for 1985, and subject to review in the course of its consideration of the Company's general rate increase application in the fall of 1985, 13.7% is appropriate for determining the amount of rate increases to be permitted pursuant to this interim increase application.
> 3) With regard to the Company's 1985 expense forecasts, the Commission notes that the inflation factor used by the Company is higher than the current consensus forecast of the inflation rate for 1985 and

> considers that Bell's forecast of its 1985 Operating Expenses could be overestimated by approximately $25 million.
>
> Taking the above factors into account, the Commission has decided that an interim rate increase of 2% for all services in respect of which rate increases were requested by the Company in the interim application is appropriate at this time. This increase is expected to generate additional revenues of $65 million from 1 January 1985 to 31 December 1985. To permit the review of the Company's 1985 revenue requirement by the Commission at the fall 1985 public hearing, Bell is directed to file its 4 June 1985 general rate increase application on the basis of two test years, 1985 and 1986. [Emphasis added.]

The reasons set out in the appellant's decision indicate that the interim rate increase was calculated on the basis of financial information provided by the respondent without placing this information under the scrutiny normally associated with hearings made under Part III of the CRTC Telecommunications Rules of Procedure. Furthermore, the appellant clearly expressed the intention to review this interim rate increase in its final decision on the respondent's application for a general rate increase on the basis of financial information for the years 1985 and 1986. Given the content of the appellant's final decision, it is also important to note that the 2 per cent interim rate increase was calculated on the assumption that the respondent's return on equity for 1985 should be 13.7 per cent, subject to review in the final decision.

5 The respondent's financial situation later improved thereby reducing the necessity to proceed with an early hearing for the purpose of obtaining a general and final rate increase. By letter dated March 20, 1985, the respondent asked for this hearing to be postponed to February 10, 1986, suggesting however that the 2 per cent interim increase be given immediate final approval. In CRTC Telecom Public Notice 1985-30 dated April 16, 1985, the appellant granted the postponement but refused to grant the final approval requested by the respondent without further investigation into this matter. The Commission added that it would monitor the respondent's financial situation on a monthly basis and ordered the filing of monthly statements (at p. 4):

> In view of the improving trend in the Company's financial performance, the Commission further directs as follows:
>
> Bell Canada is to provide to the Commission for the balance of 1985, within 30 days after the end of each month, commencing with April 1985, a full year forecast of revenues and expenses on a regulated basis for the year 1985, together with the estimated financial ratios including the projected regulated return on common equity.
>
> The Commission will monitor the Company's financial performance during 1985, in order to determine whether any further rate action may be necessary. [Emphasis added.]

Again, the appellant clearly expressed its intention to prevent abuse of interim rate increases.

6 After a review of the July financial information filing ordered in CRTC Telecom Public Notice 1985-30, the appellant asked the respondent to provide reasons why the interim rate increase of 2

per cent should remain in force given its improved financial situation. The respondent was unable to convince the appellant that this interim increase remained necessary to avoid financial deterioration and was accordingly ordered to file revised tariffs effective as of September 1, 1985, at pp. 4-5 of Telecom Decision CRTC 85-18:

> In view of the improving trend in Bell's financial performance, the Commission is satisfied that the company no longer needs the 2% interim increases which were awarded in Decision 84-28 in order to avoid serious financial deterioration in 1985. Accordingly, Bell is directed to file revised tariffs forthwith, with an effective date of 1 September 1985, to suspend these increases.
>
> In arriving at its decision the Commission has estimated that, with interim rates in effect for the complete year, the company would earn an ROE ["return on equity"] of approximately 14.5% in 1985, a return well in excess of the 13.7% considered appropriate for determining the 2% interim rate increases. The Commission also projected that interest coverage would be approximately 3.9 times. This would improve on the actual 1984 coverage of 3.8 times. These estimates are not significantly different from Bell's current expectation of its 1985 results.
>
> The Commission will make its final determination of Bell's revenue requirement for the year 1985 in the general rate proceeding currently scheduled to commence with an application to be filed on 10 February 1986. [Emphasis added.]

As a result of this decision, the respondent was forced to charge the rates effective before its application for a rate increase filed on March 28, 1984. However, even though the rates effective as of September 1, 1985, were numerically identical to the rates in force under the previous final decision prior to the interim increase, these new rates remained interim in nature. In fact, the appellant reiterated its intention to review the rates actually charged during 1985 and 1986.

7 On October 31, 1985, the respondent decided not to proceed with its application for a general rate increase and requested that its procedures be withdrawn. In CRTC Telecom Public Notice 1985-85, the appellant decided to review the respondent's financial situation and therefore the appropriateness of its rates notwithstanding its request to withdraw its initial application for a general rate increase (at pp. 3-4):

> In light of these forecasts and the degree to which the company's rate structure is expected to be considered in separate proceedings, Bell stated that it wished to refrain from proceeding with the application scheduled to be filed on 10 February 1986. Accordingly, the company requested the withdrawal of the amended Directions on Procedure issued by the Commission in Public Notice 1985-30.
>
> . . .
>
> The Commission notes that the appropriate rate of return for Bell has not been reviewed in an oral hearing since the proceeding which culminated in Bell Canada - General Increase in Rates, Telecom Decision CRTC 81-15, 20 September 1981 (Decision 81-15). The Commission considers that, given Bell's current forecasts, it would be appropriate to review the company's cost of equity for the

> years 1985, 1986 and 1987 in the proceeding scheduled for 1986. Such a review would allow consideration of the changing financial and economic conditions since Decision 81-15 and the impact of Bell's corporate reorganization on its rate of return. The Commission notes that other issues arising from the reorganization would also be addressed in the 1986 proceeding. [Emphasis added.]

This interim decision indicates that the appellant wished to continue the original rate review procedure initiated by the respondent in March of 1984. Thus, the rates in force as of January 1, 1985 until the final decision now challenged by the respondent were interim rates subject to review.

8 The hearing which led to the final decision lasted from June 2 to July 16, 1986 and this final decision, Decision 86-17, was rendered on October 14, 1986. In this decision, the appellant first established appropriate levels of profitability for the respondent on the basis of its return on equity. The appellant then calculated the amount of excess revenues earned by the respondent in 1985 and 1986 along with the necessary reduction in forecasted revenues for 1987. It was found that the respondent had earned excess revenues of $63 million in 1985 and $143 million in 1986 for a total of $206 million (at p. 93):

> After making further adjustments for the compensation for temporarily transferred employees and including the regulatory treatment for non-integral subsidiary and associated companies, the Commission has determined that a revenue requirement reduction of $234 million would provide the company with a 12.75% ROE ["return on equity"] on a regulated basis in 1987. Similarly, the Commission has determined that $143 million is the required revenue reduction to achieve the upper end of the permissible ROE on a regulated basis in 1986, 13.25%.
>
> With respect to 1985, after making the adjustments set out in this decision, the Commission has determined that Bell earned excess revenues in the amount of $63 million, the deduction of which would provide 13.75%, the upper end of the permissible ROE on a regulated basis.

It is important to note that the evidence and the arguments presented by the interested parties as well as interveners were carefully scrutinized by the appellant at pp. 77 to 92 of Decision 86-17. It is for all practical purposes impossible to engage in such a meticulous and painstaking analysis of all relevant facts when faced with an application for interim relief. Finally, it is also useful to note that the permissible return on equity of 13.7 per cent allowed by the appellant in its interim decision, Decision 84-28, was increased to 13.75 per cent in Decision 86-17. Thus, the appellant realized that the interim rates approved for 1985 yielded greater rates of return than initially anticipated and that the rate of return actually recorded for that year even exceeded the greater allowable rate of return fixed in the final decision, Decision 86-17. Such differences between projected and actual rates of return are common and certainly call for a high level of flexibility in the exercise of the appellant's regulatory duties.

9 The Commission decided that the respondent could not retain excess revenues earned on the basis of interim rates and issued the order now challenged by the respondent in order to provide a remedy for this situation. This order reads as follows, at pp. 95-96:

> Concerning the excess revenues for the years 1985 and 1986, the Commission directs that the required adjustments be made by means of a one-time credit to subscribers of record, as of the date of this decision, of the following local services: residence and business individual, two-party and four-party line services; PBX trunk services; centrex lines; enhanced exchange-wide dial lines; exchange radiotelephone service; service-system service and information system access line service. The Commission directs that the credit to each subscriber be determined by pro-rating the sum of the excess revenues for 1985 and 1986 of $206 million in relation to the subscriber's monthly recurring billing for the specified local services provided as of the date of this decision. The Commission further directs that the work necessary to implement the above directives be commenced immediately and that the billing adjustments be completed by no later than 31 January 1987. Finally, the Commission directs the company to file a report detailing the implementation of the credit by no later than 16 February 1987.
>
> The Commission considers that 1987 excess revenues are best dealt with through rate reductions to be effective 1 January 1987. [Emphasis added.]

Although the respondent always charged rates approved by the appellant, the appellant found it necessary to make sure that its assessment of allowable revenues for 1985 and 1986 would be complied with. The appellant argues that the order now challenged by the respondent was the most efficient way of redistributing these excess revenues to the respondent's customers even though they would not necessarily be refunded to those who actually had to pay the rates in force during that period.

10 It is therefore obvious that the appellant only allowed interim rates to be charged after January 1, 1985 on the assumption that it would review these rates in a hearing to be held in order to deal with an application for a general rate increase. Every interim decision which led to Decision 86-17 confirmed the appellant's intention to review the interim rates at the final hearing. Finally, the interim rates were ordered for the purpose of preventing any serious deterioration in the respondent's financial situation while awaiting for a final decision on the merits. Of necessity, these interim rates were determined on the basis of incomplete evidence presented by the respondent. It cannot be said that the purpose of the interim rate increase ordered by the appellant was to serve as a temporary final decision.

II - The Issue and the Arguments Raised by the Parties

11 In this Court as well as in the Federal Court of Appeal, the parties have agreed that the only issue arising out of the facts of this case is whether the appellant had jurisdiction to order the respondent to grant a one-time credit to its customers. The appellant's findings of fact, its determination with respect to the respondent's revenue requirements for 1985 and 1986 and its computation of the amount of excess revenues earned during this period are not contested by the respondent. In my opinion, this issue can be divided in two sub-questions:

1- whether the appellant had the legislative authority to review the revenues made by the respondent during the period when interim rates were in force;

2- whether the appellant had jurisdiction to make an order compelling the respondent to grant a one-time credit to its customers.

12 The main arguments raised by the appellant can be summarized as follows:

1- the Railway Act and the National Transportation Act grant the appellant the power to review the period during which a regulated entity was allowed to charge interim rates for the purpose of comparing the revenues earned during this period to the appropriate level of revenues set in the final decision;

2- the power to make a one-time credit order is necessarily ancillary to the power to review the period during which interim rates were charged and the appellant has jurisdiction to determine the most efficient method of providing a remedy in cases where excess revenues were made.

13 The main arguments raised by the respondent can be summarized as follows:

1- the power to set tolls and tariffs does not include the power to review and make orders with respect to the respondent's level of revenues;

2- the appellant has no power to make a one-time credit order with respect to revenues earned as a result of having charged rates which the respondent, by virtue of the Railway Act, was obliged to charge, whether these rates were set by interim order or by a final order.

14 Counsel for the National Anti-Poverty Organization ("NAPO") has also argued that the appellant's decisions concerning the interpretation of statutes which grant them jurisdiction to deal with certain matters are entitled to curial deference and cannot be reviewed unless they are patently unreasonable. This argument raises the issue of the scope of review allowed by s. 68(1) of the National Transportation Act, R.S.C., 1985, c. N-20, (now the National Telecommunications Powers and Procedures Act), and must be dealt with prior to any analysis of the relevant statutory provisions claimed to be the source of the appellant's jurisdiction to make the one-time credit order found in Decision 86-17.

15 The present case raises difficult questions of statutory interpretation and it will therefore be necessary to examine the relevant provisions of the Railway Act, R.S.C., 1985, c. R-3, and the National Transportation Act before moving to a detailed analysis of the decision of the Federal Court of Appeal and the arguments raised by the parties.

III - Relevant Legislative Provisions

16 The appellant derives its power to regulate the telephone industry from ss. 334 to 340 of the Railway Act ("Provisions Governing Telegraphs and Telephones") and from ss. 47 et seq. of the National Transportation Act ("General Jurisdiction and Powers in Respect of Railways"). The Railway Act sets out the general criteria concerning the setting of rates and tariffs to be charged by telephone utility companies whereas the National Transportation Act sets out the appellant's procedural powers in the context of decisions concerning, amongst other matters, telephone rates and tariffs.

17 Sections 335(1), 335(2) and 335(3) of the Railway Act (formerly ss. 320(2) and 320(3)) state the principle upon which the appellant's regulatory authority rests, namely that telephone rates and tariffs are subject to approval by the appellant, cannot be changed without its prior authorization and may be revised at any time by the appellant:

> 335. (1) Notwithstanding anything in any other Act, all telegraph and telephone tolls to be charged by a company, other than a toll for the transmission of a message intended for reception by the general public and charged by a company licensed under the Broadcasting Act, are subject to the approval of the Commission, and may be revised by the Commission from time to time.
>
> (2) The company shall file with the Commission tariffs of any telegraph or telephone tolls to be charged, and the tariffs shall be in such form, size and style, and give such information, particulars and details, as the Commission by regulation or in any particular case prescribes.
>
> (3) Except with the approval of the Commission, the company shall not charge and is not entitled to charge any telegraph or telephone toll in respect of which there is default in filing under subsection (2), or which is disallowed by the Commission ... [Emphasis added.]

The most important requirement governing the appellant's power to set telephone rates is found in s. 340(1) of the Railway Act which provides that all such rates must be "just and reasonable":

> 340. (1) 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. [Emphasis added.]

Section 340 also prohibits discriminatory telephone rates and gives the appellant the power to suspend, postpone, or disallow a tariff of tolls which is contrary to ss. 335 to 340 and substitute a satisfactory tariff of tolls in lieu thereof.

18 Finally, s. 340(5) of the Railway Act gives the appellant the power to make orders with respect to traffic, tolls and tariffs in all matters not expressly covered by s. 340:

> 340. ...

> (5) In all other matters not expressly provided for in this section, the Commission may make orders with respect to all matters relating to traffic, tolls and tariffs or any of them.

Although the power granted by s. 340(5) could be construed restrictively by the application of the ejusdem generis rule, I do not think that such an interpretation is warranted. Section 340(5) is but one indication of the legislator's intention to give the appellant all the powers necessary to ensure that the principle set out in s. 340(1), namely that all rates should be just and reasonable, be observed at all times.

19 Sections 47 et seq. of the National Transportation Act set out, from a procedural point of view, the appellant's jurisdiction with respect to the powers granted by the Railway Act. Section 49(1) gives the appellant jurisdiction over all complaints concerning compliance with the Act while s. 49(3) gives the appellant jurisdiction over all matters of fact or law for the purposes of the Railway Act and of ss. 47 et seq. of the National Transportation Act. However, s. 68(1) provides an appeal to the Federal Court of Appeal, with leave, on any question of law or jurisdiction and it is under this provision that the respondent has challenged Decision 86-17.

20 In many respects, ss. 47 et seq. of the National Transportation Act have been designed to further the policy objectives and the regulatory scheme set out in the Railway Act governing the approval of telephone rates and tariffs. Thus, s. 52 of the National Transportation Act gives the appellant the power to inquire into, hear or determine, of its own motion or upon request from the Minister, any matter which it has the right to inquire into, hear or determine under the Railway Act:

> 52. The Commission may, of its own motion, or shall, on the request of the Minister, inquire into, hear and determine any matter or thing that, under this part or the Railway Act, it may inquire into, hear and determine upon application or complaint, and with respect thereto has the same powers as, on any application or complaint, are vested in it by this Act.

Section 52 is therefore the corollary of the appellant's power to "revise [tolls] ... from time to time" found in s. 335(1) of the Railway Act. Thus, the appellant has the power to review, from time to time, its own final decisions on a proprio motu basis. Similarly, s. 61 provides that the appellant is not bound by the wording of any complaint or application it hears and may make orders which would otherwise offend the ultra petita rule:

> 61. On any application made to the Commission, the Commission may make an order granting the whole or part only of the application, or may grant such further or other relief, in addition to or in substitution for that applied for, as to the Commission may seem just and proper, as fully in all respects as if the application had been for that partial, other or further relief.

21 By virtue of s. 60(2) of the National Transportation Act, the appellant also has the power to make interim orders:

> 60. ...

> (2) The Commission may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application.

22 Finally, by virtue of s. 66 of the National Transportation Act, the appellant has the power to review any of its past decisions whether they are final or interim:

> 66. The Commission may review, rescind, change, alter or vary any order or decision made by it or may re-hear any application before deciding it.

23 It is obvious from the legislative scheme set out in the Railway Act and the National Transportation Act that the appellant has been given broad powers for the purpose of ensuring that telephone rates and tariffs are, at all times, just and reasonable. The appellant may revise rates at any time, either of its own motion or in the context of an application made by an interested party. The appellant is not even bound by the relief sought by such applications and may make any order related thereto provided that the parties have received adequate notice of the issues to be dealt with at the hearing. Were it not for the fact that the appellant has the power to make interim orders, one might say that the appellant's powers in this area are limited only by the time it takes to process applications, prepare for hearings and analyse all the evidence. However, the appellant does have the power to make interim orders and this power must be interpreted in light of the legislator's intention to provide the appellant with flexible and versatile powers for the purpose of ensuring that telephone rates are always just and reasonable.

24 The question before this Court is whether the appellant has the statutory authority to make a one-time credit order for the purpose of remedying a situation where, after a final hearing dealing with the reasonableness of telephone rates charged during the years under review, it finds that interim rates in force during that period were not just and reasonable. Since there is no clear provision on this subject in the Railway Act or in the National Transportation Act, it will be necessary to determine whether this power is derived by necessary implication from the regulatory schemes set out in these statutes.

IV - The Decision of the Court Below

25 In the Federal Court of Appeal, the respondent in this Court argued that in order to find statutory authority for the power to make a one-time credit order, it was necessary to find that s. 66 (power to "review, rescind, change, alter or vary" previous decisions) or s. 60(2) (power to make interim orders) of the National Transportation Act provide powers to make retroactive orders. Of course, the respondent argued that these provisions did not grant such a power and the majority of the Federal Court of Appeal composed of Marceau and Pratte JJ. agreed with this argument, Hugessen J. dissenting.

26 Marceau J. held that the appellant in this Court only had the power to fix telephone tolls and tariffs and that it has no statutory authority to deal with excess revenues or deficiencies in revenues arising as a result of a discrepancy between the rate of return yielded from the interim rates in force prior to the final decision and the permissible rate of return fixed by this final decision. Marceau J. was of the opinion that the wording of s. 66 of the National Transportation Act is neutral with respect to retroactivity and that the presumption against retroactivity should therefore operate. Marceau J. added that the power to make interim orders does not carry with it the power to remedy any discrepancy between interim and final orders because the respondent could not be forced to reim-

burse revenues earned by charging rates approved by the appellant. Thus, according to Marceau J., the regulatory scheme set out in the Railway Act and the National Transportation Act is prospective in nature and, in the context of such a scheme, the power to make interim orders only involves the power to make orders "for the time being".

27 Pratte J., who concurred in the result with Marceau J., rejected all arguments based on the retroactive nature of the powers granted by ss. 60(2) and 66 of the National Transportation Act. Pratte J. was of the opinion that the impugned order was not retroactive in nature since its effect was to force the respondent to grant a credit in the future rather than change the rates charged in the past in a retroactive manner. Pratte J. then stated that if legislative authority existed for Decision 86-17, it must be found in s. 60(2) of the National Transportation Act which provides for "further directions" to be made at a later date following an interim decision. However, Pratte J. was of the opinion that any "further direction" must be in the nature of an order which can be made under s. 60(2) in the first place. It follows from that reasoning that if no one-time credit order can be made by interim order, no "further direction" to that effect can be made under s. 60(2). Pratte J. then agreed with Marceau J. that the respondent could not be forced to reimburse revenues made by charging rates approved by the appellant whether by interim order or by a "further direction" made in a final order.

28 Hugessen J. dissented on the basis that, within the statutory framework set out in the Railway Act and the National Transportation Act, all orders whether final or interim can, by virtue of ss. 60(2) and 66 of the National Transportation Act, be modified by a further prospective order; thus, the proposed rule that interim orders can only be modified by a further prospective order would, in Hugessen J.'s opinion, effectively eliminate any distinction between final and interim orders and defeat the legislator's intention to provide the appellant with a distinct and independent power to make interim orders. In order to differentiate interim orders from final orders, Hugessen J. was of the opinion that the appellant in this Court must have the power to fix just and reasonable rates as of the date at which interim rates came into effect. Thus, only interim rates can be modified in a retrospective manner by a final order. Hugessen J. then stated that the interim rates in force in 1985 and 1986 must not be divided into the previous rate and the interim rate increase of 2 per cent: the resulting rate must be viewed as interim in its entirety because all the rates charged after January 1, 1985 were authorized by interim orders. Finally, Hugessen J. stated that the one-time credit order was a valid exercise of the power to set just and reasonable rates as of January 1, 1985 and that the choice of the appropriate remedy was an "'administrative matter' properly left for the Commission's determination". Hugessen J. also noted that the appellant's order was in substance though not in form a "matter relating to tolls and tariffs" within the meaning of s. 340(5) of the Railway Act.

V - Analysis

(A) Curial Deference Towards the Decisions of the CRTC

29 NAPO argues that the appellant's decisions are entitled to "curial deference" because of their national importance and that these decisions should not be overturned unless they are patently unreasonable. NAPO cites the following cases as authority for this proposition: Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227 ("CUPE"); Douglas Aircraft Co. of Canada Ltd. v. McConnell, [1980] 1 S.C.R. 245; Alberta Union of Provincial Employees v. Board of Governors of Olds College, [1982] 1 S.C.R. 923; Re Ontario Public Service Employees Union and Forer (1985), 52 O.R. (2d) 705 (C.A.); Re City of Ottawa and Ottawa Professional Firefighters' Association, Local 162 (1987), 58 O.R. (2d) 685 (C.A.); Greyhound

Lines of Canada Ltd. v. Canadian Human Rights Commission (1987), 78 N.R. 192 (F.C.A.); and Canadian Pacific Ltd. v. Canadian Transport Commission (1987), 79 N.R. 13 (F.C.A.) ("Canadian Pacific").

30 With the exception of the Canadian Pacific case, all these cases involved judicial review of decisions which were either protected by a privative clause or by a provision stating that no appeal lies therefrom. Where the legislator has clearly stated that the decision of an administrative tribunal is final and binding, courts of original jurisdiction cannot interfere with such decisions unless the tribunal has committed an error which goes to its jurisdiction. Thus, this Court has decided in the CUPE case that judicial review cannot be completely excluded by statute and that courts of original jurisdiction can always quash a decision if it is "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237). Decisions which are so protected are, in that sense, entitled to a non-discretionary form of deference because the legislator intended them to be final and conclusive and, in turn, this intention arises out of the desire to leave the resolution of some issues in the hands of a specialized tribunal. In the CUPE case, Dickson J., as he then was, described the legislator's intention as follows, at pp. 235-36:

> Section 101 constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

However, it is important to stress the fact that the decision of an administrative tribunal can only be entitled to such deference if the legislator has clearly expressed his intention to protect such decisions through the use of privative clauses or clauses which state that the decision is final and without appeal. As formulated, NAPO's argument on curial deference must therefore be rejected because it fails to recognize the basic difference between appellate review and judicial review of decisions which do not fall within the jurisdiction of the lower tribunal.

31 Although s. 49(3) of the National Transportation Act provides that the appellant has full jurisdiction to hear and determine all matters whether of law or fact for the purposes of the Railway Act and of Part IV of the National Transportation Act, the appellant's decisions are subject to appeal, with leave, to the Federal Court of Appeal on questions of law or jurisdiction by virtue of s. 68(1) which reads as follows:

> 68. (1) An appeal lies from the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave therefor being obtained from that Court on application made within one month after the making of the order, decision, rule or regulation sought to be appealed from or within such fur-

> ther time as a judge of that Court under special circumstances allows, and on notice to the parties and the Commission, and on hearing such of them as appear and desire to be heard.

It is trite to say that the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. In principle, a court is entitled, on appeal, to disagree with the reasoning of the lower tribunal.

32 However, within the context of a statutory appeal from an administrative tribunal, additional consideration must be given to the principle of specialization of duties. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise. The Canadian Pacific case is an example of a situation where curial deference towards a decision of the Canadian Transport Commission involving the interpretation of a tariff was appropriate. The decision of the Canadian Transport Commission was appealed to a review committee and then to the Federal Court of Appeal. Urie J. held that the decision of the review committee must not be reversed unless it is unreasonable or clearly wrong, at pp. 16-17:

> On the appeal from that decision to this court, the appellant advanced essentially the same grounds and arguments which it had submitted to the RTC. As to the first ground, I am of the opinion that the RTC correctly interpreted the two items from the tariff and since its view was confirmed by the Review Committee, that committee did not commit an error in construction. No useful purpose would be served by my restating the reasons of the R.T.C. for interpreting the items as they did and I respectfully adopt them as my own. This Court should not interfere with an interpretation made by bodies having the expertise of the R.T.C. and the Review Committee in an area within their jurisdiction, unless their interpretation is not reasonable or is clearly wrong. Neither situation prevails in this case. [Emphasis added.]

Although the very purpose of the review committee is to interpret the tariff and although such questions of interpretation fall within the Review Committee's area of special expertise, it does not follow that its decisions can only be reviewed if they are unreasonable. However the principle of specialization of duties justifies curial deference in such circumstances.

33 In this case, the respondent is challenging the appellant's decision on a question of law and jurisdiction involving the nature of interim decisions and the extent of the powers conferred on the appellant when it makes interim decisions. This question cannot be solved without an analysis of the procedural scheme created by the Railway Act and the National Transportation Act. It is a question of law which is clearly subject to appeal under s. 68(1) of the National Transportation Act. It is also a question of jurisdiction because it involves an inquiry into whether the appellant had the power to make a one-time credit order.

34 Except as regards the choice, amongst remedies available to the appellant, of the most appropriate remedy to achieve the goal of just and reasonable rates throughout the interim period, the decision impugned by the respondent is not a decision which falls within the appellant's area of special expertise and is therefore pursuant to s. 68(1) subject to review in accordance with the principles

governing appeals. Indeed, the appellant was not created for the purpose of interpreting the Railway Act or the National Transportation Act but rather to ensure, amongst other duties, that telephone rates are always just and reasonable.

(B) The Power to Regulate Bell Canada's Revenues

35 The respondent argues that the appellant only has jurisdiction to regulate tolls and tariffs and that this power does not include the power to regulate its level of revenues or its return on equity.

36 The fixing of tolls and tariffs that are just and reasonable necessarily involves the regulation of the revenues of the regulated entity. This has been recognized by this Court interpreting provisions similar to s. 340(1) of the Railway Act which prescribe that "[a]ll tolls shall be just and reasonable". In British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia, [1960] S.C.R. 837, Locke J. said the following about para. 16(1)(b) of the Public Utilities Act, R.S.B.C. 1948, c. 277, which provided that in fixing a rate the Public Utility Commission of British Columbia should take into consideration the "fair and reasonable return upon the appraised value of the property of the public utility used ... to enable the public utility to furnish the service" (at p. 848):

> I do not think it is possible to define what constitutes a fair return upon the property of utilities in a manner applicable to all cases or that it is expedient to attempt to do so. It is a continuing obligation that rests upon such a utility to provide what the Commission regards as adequate service in supplying not only electricity but transportation and gas, to maintain its properties in a satisfactory state to render adequate service and to provide extensions to these services when, in the opinion of the Commission, such are necessary. In coming to its conclusion as to what constituted a fair return to be allowed to the appellant these matters as well as the undoubted fact that the earnings must be sufficient, if the company was to discharge these statutory duties, to enable it to pay reasonable dividends and attract capital, either by the sale of shares or securities, were of necessity considered. Once that decision was made it was, in my opinion, the duty of the Commission imposed by the statute to approve rates which would enable the company to earn such a return or such lesser return as it might decide to ask. [Emphasis added.]

In Northwestern Utilities Ltd. v. City of Edmonton, [1929] S.C.R. 186, Lamont J. described the relevant factors in the determination of what are just and reasonable rates as follows (at p. 190):

> In order to fix just and reasonable rates, which it was the duty of the Board to fix, the Board had to consider certain elements which must always be taken into account in fixing a rate which is fair and reasonable to the consumer and to the company. One of these is the rate base, by which is meant the amount which the Board considers the owner of the utility has invested in the enterprise and on which he is entitled to a fair return. Another is the percentage to be allowed as a fair return.

Such provisions require the administrative tribunal to balance the interests of the customers with the necessity of ensuring that the regulated entity is allowed to make sufficient revenues to finance the costs of the services it sells to the public.

37 Thus, it is trite to say that in fixing fair and reasonable tolls the appellant must take into consideration the level of revenues needed by the respondent. In fact, the respondent would be the first to complain if its financial situation was not taken into consideration when tolls are fixed. By so doing, the appellant regulates the respondent's revenues albeit in a seemingly indirect manner. I would therefore dismiss this argument.

(C) The Power to Revisit the Period During Which Interim Rates Were in Force

(i) Introduction

38 As indicated above, the appellant has examined the period during which interim rates were in force, i.e. from January 1, 1985 to October 14, 1986, for the purpose of ascertaining whether these interim rates were in fact just and reasonable. Following a factual finding that these rates were not just and reasonable, the one-time credit order now contested before this Court was made in order to remedy this situation. Thus, the effect of Decision 86-17 was not retroactive in nature since it does not seek to establish rates to replace or be substituted to those which were charged during that period. The one-time credit order is, however, retrospective in the sense that its purpose is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive. Thus, the question before this Court is whether the appellant has jurisdiction to make orders for the purpose of remedying the inappropriateness of rates which were approved by it in a previous interim decision.

39 This question involves a determination of whether rates approved by interim order are inherently contingent as well as provisional or whether the statutory scheme established by the Railway Act and the National Transportation Act is so prospective in nature that it precludes such a retrospective review of interim rates approved by the appellant. Finally, it is also necessary to determine whether the appellant has jurisdiction to order the reimbursement of amounts which exceed the revenues actually collected as a direct result of the interim rates.

(ii) The Distinction Between Interim and Final Orders

40 The respondent argues that the Railway Act and the National Transportation Act establish a regulatory regime which is exclusively prospective in nature because all rates, whether interim or final, must be just and reasonable. Thus, if interim rates have been approved on the basis that they are just and reasonable, no excessive revenues can be earned by charging such rates; interim rates, by reason only of their approval by the appellant, are presumed to be just and reasonable until they are modified by a subsequent order. According to the respondent, interim orders are therefore orders made "for the time being" until a more permanent order is made.

41 In his dissenting reasons, Hugessen J. points out quite accurately that if interim orders are simply orders made "for the time being", it will be impossible to distinguish final orders from interim orders within the statutory scheme established by the Railway Act and the National Transportation Act since all final orders may be revised by the appellant of its own motion and at any time: s. 335(1) of the Railway Act and s. 52 of the National Transportation Act. It is therefore impossible to say that final orders made under these statutes are final in the sense that they may never be reconsidered. The on-going nature of the appellant's regulatory activities necessarily entails a continuous

review of past decisions concerning tolls and tariffs. Thus, all orders, whether final or interim, would be orders "for the time being" within the statutory scheme established by the Railway Act and the National Transportation Act.

42 Both the appellant and Hugessen J. rely heavily on Re Coseka Resources Ltd. and Saratoga Processing Co. (1981), 126 D.L.R. (3d) 705 (Alta. C.A.) for the proposition that interim decisions must be distinguished from final decisions in that they may be reviewed in a retrospective manner. This distinction is based on the fact that interim decisions are made subject to "further direction" as prescribed by s. 60(2) of the National Transportation Act which, for convenience, I cite again:

> 60. ...
>
> (2) The Commission may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application. [Emphasis added.]

The statutory scheme analysed by the Alberta Court of Appeal in Re Coseka is substantially similar to though more clearly prospective than the statutory scheme established by the Railway Act and the National Transportation Act. Furthermore, s. 52(2) of the Public Utilities Board Act, R.S.A. 1970, c. 302, is identical in wording to s. 60(2) of the National Transportation Act. Laycraft J.A., as he then was, cited with approval by Hugessen J., wrote the following with respect to the possibility of revisiting the period during which interim rates were in force for the purpose of deciding whether those interim rates were in fact just and reasonable, at pp. 717-18:

> In my view, to say that an interim order may not be replaced by a final order is to attribute virtually no additional powers to the Board from s. 52 beyond those already contained in either the Gas Utilities Act or the Public Utilities Board Act to make final orders. The Board is by other provisions of the statute empowered by order to fix rates either on application or on its own motion. An interim order would be the same, and have the same effect, as a final order unless the "further direction" which the statute contemplates includes the power to change the interim order. On that construction of the section the interim order would be a "final" order in all but name. The Board would need no further legislative authority to issue a further "final" order since it may fix rates under s. 27 on its own motion without a further application. The provision for an interim order was intended to permit rates to be fixed subject to correction to be made when the hearing is subsequently completed.
>
> It was urged during argument that s. 52(2) was merely intended to enable the Board to achieve "rough justice" during the period of its operation until a final order is issued. However, the Board is required to fix "just and reasonable rates" not "roughly just and reasonable rates". The words "reserve for further direction", in my view, contemplate changes as soon as the Board is able to determine those just and reasonable rates. [Emphasis added.]

43 I agree with Hugessen J. and with the reasons of Laycraft J.A. in Re Coseka where he made a careful review of previous cases. The statutory scheme established by the Railway Act and the Na-

tional Transportation Act is such that one of the differences between interim and final orders must be that interim decisions may be reviewed and modified in a retrospective manner by a final decision. It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order. I hasten to add that the words "further directions" do not have any magical, retrospective content. Under the Railway Act and the National Transportation Act, final orders are subject to "further [prospective] directions" as well. It is the interim nature of the order which makes it subject to further retrospective directions.

44 The importance of distinguishing final orders from interim orders is illustrated by the case of City of Calgary v. Madison Natural Gas Co. (1959), 19 D.L.R. (2d) 655 (Alta. C.A.). In Madison, the Public Utility Board (the "Board") was faced with an application by the City of Calgary for the reimbursement of amounts earned in excess of the rates of return allowed in orders 34 and 41 for the sale of natural gas. The Board had allowed a rate of return of 7 per cent but, due to its lack of useful information to predict the effect of rates on the actual financial performance of the regulated entity, the rates per volume fixed by the Board actually yielded greater profits than anticipated. The Board refused to grant the demands made in the application because it felt it had no jurisdiction to revisit periods during which rates approved in a final decision were in force. This decision was confirmed by the Court of Appeal on the basis that, contrary to arguments made by the City of Calgary, orders 34 and 41 were final orders not governed by s. 35a(3) of the Natural Gas Utilities Act, which read as follows:

> 35a -- ...
>
> (3) The Board is hereby authorized, empowered and directed, on the final hearing, to give consideration to the effect of the operation of such interim or temporary order and in the final order to make, allow or provide for such adjustments, allowances or other factors, as to the Board may seem just and reasonable.

Order 34 provided that the price was set at 9 cents per mcf and that "if it should turn out that there is a surplus, it can be dealt with when the time arrives" which led to the argument that this order was in fact an interim order. Johnson J.A. dismissed this argument in the following terms, at pp. 662-63:

> It is the submission of the appellants that O. 34 and O. 41 are interim or temporary orders and the Board can now deal with these surpluses in accordance with s-s (3). As I have mentioned, orders fixing interim prices were made while the Board was hearing the application and considering its report. These, of course, were superseded by the order now under consideration. Orders 34 and 41 are, of course, not final orders in the sense that judgments are final. The Act contemplates that subsequent applications will be made to change the price fixed by these orders. They are nonetheless final so far as each application is concerned.

It is useful to note that the respondent relies heavily on the Madison case for the proposition that a regulated entity cannot be forced to disgorge profits legally earned by charging rates approved by the relevant regulatory authority on the basis that they are just and reasonable. Since the City of Calgary sought to obtain the reimbursement of profits earned by charging rates approved by final order, this case does not support the respondent's position.

45 A consideration of the nature of interim orders and the circumstances under which they are granted further explains and justifies their being, unlike final decisions, subject to retrospective review and remedial orders. The appellant may make a wide variety of interim orders dealing with hearings, notices and, in general, all matters concerning the administration of proceedings before the appellant. Such orders are obviously interim in nature. However, this is less obvious when an interim order deals with a matter which is to be dealt with in the final decision, as was the case with the interim rate increase ordered in Decision 84-28. If interim rate increases are awarded on the basis of the same criteria as those applied in the final decision, the interim decision would serve as a preliminary decision on the merits as far as the rate increase is concerned. This, however, is not the purpose of interim rate orders.

46 Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order.

47 In Decision 84-28, the appellant granted the respondent an interim rate increase on the basis of the following criteria which, for convenience, I cite again (at p. 9):

> The Commission considers that, as a rule, general rate increases should only be granted following the full public process contemplated by Part III of its Telecommunications Rules of Procedure. In the absence of such a process, general rate increases should not in the Commission's view be granted, even on an interim basis, except where special circumstances can be demonstrated. Such circumstances would include lengthy delays in dealing with an application that could result in a serious deterioration in the financial condition of an applicant absent a general interim increase.

Decision 84-28 was truly an interim decision since it did not seek to decide in a preliminary manner an issue which would be dealt with in the final decision. Instead, the appellant granted the interim rate increase on the basis that such an increase was necessary in order to prevent the respondent from having serious financial difficulties.

48 Furthermore, the appellant consistently reiterated throughout the procedures which led to Decision 86-17 its intention to review the rates charged for the test year 1985 and up to the date of the final decision. Holding that the interim rates in force during that period cannot be reviewed would not only be contrary to the nature of interim orders, it would also frustrate and subvert the appellant's order approving interim rates.

49 It is true, as the respondent argues, that all telephone rates approved by the appellant must be just and reasonable whether these rates are approved by interim or final order; no other conclusion can be derived from s. 340(1) of the Railway Act. However, interim rates must be just and reasonable on the basis of the evidence filed by the applicant at the hearing or otherwise available for the interim decision. It would be useless to order a final hearing if the appellant was bound by the evidence filed at the interim hearing. Furthermore, the interim rate increase was granted on the basis that the length of the proceedings could cause a serious deterioration in the financial condition of

the respondent. Only once such an emergency situation was found to exist did the appellant ask itself what rate increase would be just and reasonable on the basis of the available evidence and for the purpose of preventing such a financial deterioration. The inherent differences between a decision made on an interim basis and a decision made on a final basis clearly justify the power to revisit the period during which interim rates were in force.

50 The respondent argues that the power to revisit the period during which interim rates were in force cannot exist within the statutory scheme established by the Railway Act and the National Transportation Act because these statutes do not grant such a power explicitly, unlike s. 64 of the National Energy Board Act, R.S.C., 1985, c. N-7. The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes. I have found that, within the statutory scheme established by the Railway Act and the National Transportation Act, the power to make interim orders necessarily implies the power to revisit the period during which interim rates were in force. The fact that this power is provided explicitly in other statutes cannot modify this conclusion based as it is on the interpretation of these two statutes as a whole.

51 I am bolstered in my opinion by the fact that the regulatory scheme established by the Railway Act and the National Transportation Act gives the appellant very broad procedural powers for the purpose of ensuring that telephone rates and tariffs are, at all times, just and reasonable. Within this regulatory framework, the power to make appropriate orders for the purpose of remedying interim rates which are not just and reasonable is a necessary adjunct to the power to make interim orders.

52 It is interesting to note that, in the context of statutory schemes which did not provide any power to set interim rates, the United States Supreme Court has held that regulatory agencies have both the power to impose interim rates and the power to make reimbursement orders where the interim rates are found to be excessive in the final order: United States v. Fulton, 475 U.S. 657 (1986), at pp. 669-71; Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978), where Brennan J. wrote the following comments at pp. 654-56:

> Finally, petitioners contend that the Commission has no power to subject them to an obligation to account for and refund amounts collected under the interim rates in effect during the suspension period and the initial rates which would become effective at the end of such a period.... In response, we note first that we have already recognized in Chessie that the Commission does have powers "ancillary" to its suspension power which do not depend on an express statutory grant of authority. We had no occasion in Chessie to consider what the full range of such powers might be, but we did indicate that the touchstone of ancillary power was a "direc(t) relat(ionship)" between the power asserted and the Commission's "mandate to assess the reasonableness of ... rates and to suspend them pending investigation if there is a question as to their legality." 426 U.S., at 514.
>
> . . .

> Thus, here as in Chessie, the Commission's refund conditions are a "legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation," in that they allow the Commission, in exercising its suspension power, to pursue "a more measured course" and to "offe(r) an alternative tailored far more precisely to the particular circumstances" of these cases. Since, again as in Chessie, the measured course adopted here is necessary to strike a proper balance between the interests of carriers and the public, we think the Interstate Commerce Act should be construed to confer on the Commission the authority to enter on this course unless language in the Act plainly requires a contrary result.

This approach to the interpretation of statutes conferring regulatory authority over rates and tariffs is only the expression of the wider rule that the court must not stifle the legislator's intention by reason only of the fact that a power has not been explicitly provided for.

53 The appellant has also argued that the power to "vary" a previous decision, whether interim or final, found in s. 66 of the National Transportation Act, includes the power to vary these decisions in a retroactive manner. Given my conclusion based on the inherent nature of interim orders, it is unnecessary for me to deal with this argument.

(iii) The Relevance of the Distinction Between Positive Approval and Negative Disallowance Schemes of Rate Regulation

54 Much was said in argument about the difference between positive approval schemes and negative disallowance schemes with respect to the power to act retrospectively. The first category includes schemes which provide that the administrative agency is the only body having statutory authority to approve or fix tolls payable to utility companies; these schemes generally stipulate that tolls shall be "just and reasonable" and that the administrative agency has the power to review these tolls on a proprio motu basis or upon application by an interested party. The second category includes schemes which grant utility companies the right to fix tolls as they wish but also grant users the right to complain before an administrative agency which has the power to vary those tolls if it finds that they are not "just and reasonable". It has generally been found that negative disallowance schemes provide the power to make orders which are retroactive to the date of the application by the ratepayer who claims that the rates are not "just and reasonable". On the other hand, positive approval schemes have been found to be exclusively prospective in nature and not to allow orders applicable to periods prior to the final decision itself. A full discussion of this issue was made by Estey J. in Nova v. Amoco Canada Petroleum Co., [1981] 2 S.C.R. 437, at pp. 450-51, and I do not propose to repeat or to criticize what was said in that case with respect to the power to review rates approved by a previous final order. I am of the opinion that the regulatory scheme established by the Railway Act and the National Transportation Act is a positive approval scheme inasmuch as the respondent's rates are subject to approval by the appellant. However, the Nova case only dealt with the power to review rates approved in a previous final decision and, as I have said before, entirely different considerations apply when interim rates are reviewed.

55 It has often been said that the power to review its own previous final decision on the fairness and the reasonableness of rates would threaten the stability of the regulated entity's financial situation. In Regina v. Board of Commissioners of Public Utilities (1966), 60 D.L.R. (2d) 703, Ritchie J.A., wrote the following comments on this issue, at p. 729:

> The distributor contends that in the absence of any express limitation or restriction or an express provision as to the effective date of any order made by the board, the jurisdiction conferred on the board by the Legislature includes jurisdiction to make orders with retrospective effect. Reliance is placed on Bakery and Confectionery Workers International Union of America, Local 468 v. Salmi, White Lunch Ltd. v. Labour Relations Board of British Columbia, 56 D.L.R. (2d) 193, [1966] S.C.R. 282, 55 W.W.R. 129 which it is contended must be applied when interpreting s. 6(1) of the Act.
>
> The clear object of the Act is to ensure stability in the operation of public utilities and the maintenance of just, reasonable and non-discriminatory rates. That object would be defeated if the board having, on November 14, 1962, made an order fixing the rates to be paid by the distributor for natural gas purchased from the producer, reduced those rates on February 19, 1966, more than three years later, and directed the reduced rates be effective as from January 1, 1962, or as from any other date prior to February 19, 1966.

and further at p. 732:

> In no section of the Act do I find any wording indicating an intention on the part of the Legislature to confer on the board authority to make orders fixing rates with retrospective effect or any language requiring a construction that such authority has been bestowed on the board. To so interpret s. 6(1) would render insecure the position of not only every public utility carrying on business in the Province but also the position of every customer of such public utility.

However, Ritchie J.A.'s comments deal with the Public Utilities Act, R.S.N.B. 1952, c. 186, which did not provide the Board with any power to make interim orders. I readily agree that Ritchie J.A.'s concerns about the financial stability of utility companies are valid when one is faced with the argument that a Board has the power to revisit its own previous final decisions. Since no time limit could be placed on the period which could be revisited, any power to revisit previous final decisions would have to be explicitly provided in the enabling statute. Furthermore, even if final orders are "for the time being", it does not necessarily follow that they must be stripped of all their finality through the judicial recognition of a power to revisit a period during which final rates were in force.

56 However, there should be no concern over the financial stability of regulated utility companies where one deals with the power to revisit interim rates. The very purpose of interim rates is to allay the prospect of financial instability which can be caused by the duration of proceedings before a regulatory tribunal. In fact, in this case, the respondent asked for and was granted interim rate increases on the basis of serious apprehended financial difficulties. The added flexibility provided by the power to make interim orders is meant to foster financial stability throughout the regulatory process. The power to revisit the period during which interim rates were in force is a necessary corollary of this power without which interim orders made in emergency situations may cause irreparable harm and subvert the fundamental purpose of ensuring that rates are just and reasonable.

57 Even though Parliament has decided to adopt a positive approval regulatory scheme for the regulation of telephone rates, the added flexibility provided by the power to make interim orders

indicates that the appellant is empowered to make orders as of the date at which the initial application was made or as of the date the appellant initiated the proceedings of its own motion. The underlying theory behind the rule that a positive approval scheme only gives jurisdiction to make prospective orders is that the rates are presumed to be just and reasonable until they are modified because they have been approved by the regulatory authority on the basis that they were indeed just and reasonable. However, the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order. As a result, it cannot be said that the rate review process begins at the date of the final hearing; instead, the rate review begins when the appellant sets interim rates pending a final decision on the merits. As was stated in obiter in Re Eurocan Pulp & Paper Co. and British Columbia Energy Commission (1978), 87 D.L.R. (3d) 727 (B.C.C.A.), with respect to a similar though not identical legislative scheme, the power to make interim orders effectively implies the power to make orders effective from the date of the beginning of the proceedings. In turn, this power must comprise the power to make appropriate orders for the purpose of remedying any discrepancy between the rate of return yielded by the interim rates and the rate of return allowed in the final decision for the period during which they are in effect so as to achieve just and reasonable rates throughout that period.

(iv) The Power to Make a One-time Credit Order

58 Once it is decided, as I have, that the appellant does have the power to revisit the period during which interim rates were in force for the purpose of ascertaining whether they were just and reasonable, it would be absurd to hold that it has no power to make a remedial order where, in fact, these rates were not just and reasonable. I also agree with Hugessen J. that s. 340(5) of the Railway Act provides a sufficient statutory basis for the power to make remedial orders including an order to give a one-time credit to certain classes of customers.

59 CNCP Telecommunications argues that the one-time credit order should be limited to the amount of revenues actually derived as a direct result of the 2 per cent interim rate increase and that these excess revenues should be refunded to the actual customers who paid them. The presumption behind this argument is that the portion of the interim rates corresponding to the final rates in force prior to the beginning of the proceedings cannot be held to be unjust or unreasonable until a final decision is rendered. As I have held that the appellant has jurisdiction to review the fairness and the reasonableness of these interim rates in their entirety because the rate-review process starts as of the date of the beginning of the proceedings, this argument must be dismissed.

60 Finally, it is true that the one-time credit ordered by the appellant will not necessarily benefit the customers who were actually billed excessive rates. However, once it is found that the appellant does have the power to make a remedial order, the nature and extent of this order remain within its jurisdiction in the absence of any specific statutory provision on this issue. The appellant admits that the use of a one-time credit is not the perfect way of reimbursing excess revenues. However, in view of the cost and the complexity of finding who actually paid excessive rates, where these persons reside and of quantifying the amount of excessive payments made by each, and having regard to the appellant's broad jurisdiction in weighing the many factors involved in apportioning respondent's revenue requirement amongst its several classes of customers to determine just and reasonable rates, the appellant's decision was eminently reasonable and I agree with Hugessen J. that it should not be overturned.

VI - Conclusion

61 In my opinion, the appellant had jurisdiction to review the interim rates in force prior to Decision 86-17 for the purpose of ascertaining whether they were just and reasonable, had jurisdiction to order the respondent to grant the one-time credit described in Decision 86-17 and has committed no error in so doing.

62 I would allow the appeal and confirm the appellant's decision, with costs in all courts.

qp/i/qlcvd

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TAB 13

Indexed as:

Beau Canada Exploration Ltd. v. Alberta (Energy and Utilities Board)

Between
Beau Canada Exploration Ltd., appellant, and
Alberta Energy and Utilities Board, Northstar Energy Corporation and Rustum Petroleums (1993) Limited, respondents

[2000] A.J. No. 507

2000 ABCA 132

186 D.L.R. (4th) 690

261 A.R. 131

22 Admin. L.R. (3d) 16

96 A.C.W.S. (3d) 1055

Docket: 99-18491

Alberta Court of Appeal
Calgary, Alberta

Hunt, Fruman and Wittmann JJ.A.

Heard: March 2, 2000.
Judgment: filed April 24, 2000.

(51 paras.)

Appeal from decision 99-21 of the Alberta Energy and Utilities Board. Dated September 28, 1999.

Counsel:

J.W. Rose, Q.C. and B.J. Roth, for the appellant.
F. Foran, Q.C. and S.C. Lee, for the respondents Northstar Energy and Rustum Petroleums.
A.E. Domes, for the respondent Alberta Energy and Utilities Board.

REASONS FOR JUDGMENT RESERVED

The judgment of the Court was delivered by

1 HUNT J.A.:-- In Decision 99-21 issued on September 28, 1999, ("Decision"), the Alberta Energy and Utilities Board ("Board") decided to shut in a gas well. Although the well had always produced less than its allowable amount, the Board recalculated and reduced the allowable production for past years, resulting in a recalculated overproduction. Leave to appeal the Decision was granted on the following questions, pursuant to s. 44 of the Energy Resources Conservation Act, R.S.A. 1980, c. E-11:

1. Whether the Board exceeded its jurisdiction or erred in law in ordering Beau Canada's well located at LSD 12-22-41-28 W4 ("Well") to be shut in on the basis of recalculated 1997 and 1998 allowables as a result of the submission to the EUB of relevant 1996 pressure data previously withheld.
2. Whether the Decision is patently unreasonable to the extent that the EUB concluded the Well should not be subject to an off-target penalty but held that the penalty should be applied until after the overproduction, to the date of the Decision, is retired.

2 I am of the view that the Board did not have the jurisdiction to shut in the Well. The appeal must be allowed, the order vacated and the matter returned to the Board for further consideration. Therefore, it is unnecessary to answer the second question.

FACTS

3 The Appellant Beau Canada Exploration Ltd. ("Beau") purchased APL Oil & Gas Ltd. ("APL") in 1998, thereby acquiring the Well which APL had drilled and begun to produce in 1993. The Well had been drilled outside the prescribed target area. The Board therefore assessed an off-target penalty in relation to the Well in 1994. Off-target penalties reduce the allowable production of a well by a penalty factor. In the industry, it is commonly understood that drilling in target areas promotes conservation by requiring uniform drainage of pools. It also reduces unfair drainage of reserves from adjacent drilling spacing units of other operators and provides for the orderly development of surface facilities. (AB 12)

4 Beginning in 1994, the Board made annual orders specifying allowable production from the Well. Each time a new annual allowable order was made, the previous allowable order was rescinded. APL produced in compliance with these orders.

5 The Board issued Interim Directives ("IDs") concerning off-target penalties in October 1994, which modified the imposition of penalties. APL then applied to have its off-target penalty removed, arguing that the penalty was no longer appropriate. APL's application was opposed by the Respondent Northstar Energy Corporation ("Northstar") which owns two wells that produce from the same pool as the Well. Northstar also owns mineral rights on Section 21 which adjoins the section where the Well is located, but does not have a producing well on Section 21. APL's application was denied. APL did not agree with the decision and applied for a review, but abandoned the review

request because the new allowable set by the Board allowed it to produce without significant restrictions.

6 In 1995, asserting that the allowables were too high given the actual pressure decline in the pool from which the Well produces, Northstar asked the Board to change its procedures so that the allowables from the Well would be determined at three-month intervals. While the Board did not agree, its June 8th, 1995 letter to Northstar said it would require annual pressure tests of the Well. APL eventually received a copy of this letter, although not from the Board itself.

7 This appeal arises from Northstar's October 1998 application to the Board to shut in the Well, on the basis that production was inequitable and that Northstar, a common pool owner, had suffered losses (AB 69). In November 1998, Beau applied to have its off-target penalty rescinded, asserting that the Well was not off-target towards a gas well and that, according to the IDs, it should not be subject to a penalty. (AB 85)

8 On January 22, 1999, a staff decision was made ordering the Well shut in (AB 89). It referred to the fact that APL had conducted pressure tests on the Well in 1996 but had not submitted the results to the Board until November 6, 1998 (shortly after the Northstar application). Because annual pressure data had not been submitted, the allowables for 1997 and 1998 did not account for the actual reservoir depletion in the pool. As a result, the Well had been "overproduced" and had to be suspended. Another staff decision to similar effect followed in February 1999 (AB 92). Beau requested a public hearing concerning Northstar's application.

THE BOARD'S DECISION

9 The Board allowed Beau's application and decided that the off-target penalty should be suspended as of the date of the Decision. However, the Board upheld the staff decision to shut in the Well. The Board decided that "overproduction" of the Well should be calculated based on the 1996 pressure data using the pool pressure decline indicated in the 1996 test. The Board recalculated the past allowables resulting in "overproduction", applied a penalty factor and decided the Well should be shut in immediately.

10 At AB 367, the Board referred to its 1995 letter requiring annual pressure tests. It concluded that the letter was unclear as to whether the requirement for annual pressure testing would later be formalized. Accordingly, neither APL nor Beau could be held accountable for not submitting annual pressure tests thereafter.

11 The Board discussed two substantive issues. First, in regard to the allowable calculation (AB 367), it referred to s. 11.120 of the Oil and Gas Conservation Regulations, A. R. 151/71 ("Regulations")(set out below), which requires that reservoir pressure data be submitted to the Board. Failure to submit data is a "serious breach" of the Regulations since "[r]eservoir pressure data are critical to the evaluation and administration of off-target gas wells" and since the Board must ensure that "no operator gains a competitive advantage through failing to comply with its Regulations". If submitted, the 1996 data would have been used to determine the 1997 allowable, which would have been smaller to reflect the actual pressure decline in the pool.

12 The Board added:

> The 1999 allowable should therefore be adjusted to reflect cumulative overproduction resulting from the steeper pressure decline trend confirmed by the June

> 1996 test. For this purpose the Board believes a pressure decline rate of 25 per cent per year is reasonable and notes that both parties acknowledged that this is representative of the decline rate over this time period. (emphasis added)

13 A table attached to the Decision at AB 371 shows the Board's calculation of the allowable status for the well from 1996 to 30 April 1999. The table quantifies the "overproduction" based on the 1996 pressure data, as well as the portion of the resulting "overproduction" subject to a 50 per cent penalty.

14 Second, in regard to the off-target penalty (AB 368), the Board agreed that the reserves being drilled into by the Well were underneath Section 21, where Northstar held rights. Since Northstar had not drilled a well in that section, however, the Board was "not prepared to accept that inequitable drainage of these reserves is occurring" and so was not prepared to apply the off-target penalty to the Well. The Board did not believe that the Well gained access to the pool as a result of its off-target location, being satisfied that the Well would have also accessed the pool if it had been drilled within its target area. While there might be some advantage to the off-target location, "the Board does not consider the potential difference significant enough to warrant application of the off-target penalty." In the result, the Board decided once the "overproduction" was retired, the off-target penalty factor would not be applied.

LEGISLATION

15 The purposes of the Oil and Gas Conservation Act ("Act"), R.S.A. 1980, c. O-5 are found in s. 4:

> (a) to effect the conservation of, and to prevent the waste of, the oil and gas resources of Alberta;
> (b) to secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, completing, reworking, testing, operating and abandonment of wells and in operations for the production of oil and gas;
> (c) to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta;
> (d) to afford each owner the opportunity of obtaining his share of the production of oil or gas from any pool;
> (e) to provide for the recording and the timely and useful dissemination of information regarding the oil and gas resources of Alberta;
> (f) to control pollution above, at or below the surface in the drilling of wells and in operations for the production of oil and gas and in other operations over which the Board has jurisdiction.

16 Section 1(1)(a) defines "allowable" as:

> when that term is used in connection with a well, means the amount of oil or gas a well is permitted to produce, in accordance with an order of the Board for this purpose, after application of any applicable penalty factor;

17 Section 19(a.1) provides:

> The Board may

. . .

> shut in the well for a definite period of time or indefinitely if it is made to appear to the Board that a contravention of this Act, the regulations or an order of the Board has occurred with respect to the well

18 Sections 97 and 99 contemplate penalties for, among other things, a contravention of the Act or the Regulations.

19 Section 4.060 of the Regulations authorizes the imposition of off-target penalties. In Part 10, entitled "Production Rates and Accounting", s. 10.020(1) provides:

> A licensee or operator of a production entity or any person authorized by the licensee or operator may take production from the production entity only at rates in accordance with the subsisting MRL Order of the Board where it applies or in accordance with any applicable order or authorization governing rates of production.

20 Section 10.060 states:

> The Board, upon its own motion or upon application therefor, where it is satisfied that any provision in this Part is not or should not be applicable to the circumstances of a particular case, may vary, alter or exempt from application any provision of this Part and may make such other provision as it considers suitable or necessary to effect the purposes of the Part.

21 Central to this appeal is s. 10.200(1) of the Regulations, which, for the purposes of sections 10.210 to 10.270, defines "overproduction" as "the production of ... gas in excess of the ... gas allowable ... determined in accordance with a subsisting order or directive of the Board" (emphasis added). Sections 10.280(1)(c) and (3) deal with the consequences of cumulative "overproduction":

> Where the cumulative overproduction of an allowable or a control well rate at a production entity
>
> (c) for gas at the end of an allowable period is 20% or more of the gas allowable for the allowable period, the Board, without further notice, may restrict the gas allowable in the next succeeding period to an amount equivalent to the gas allowable that the production entity would otherwise have less an amount equal to 0.50 times the cumulative overproduction in excess of 10% of the gas allowable for the period ending.
>
> . . .
>
> (3) Notwithstanding subsection (1), where a well is overproduced and, after notice, the well continues to be overproduced, the Board may take such measures as may be necessary to remedy the overproductive status, including shutting in the well.

22 It was apparently pursuant to s. 10.280(1)(c) that the Board applied the 50 per cent penalty to the Well and to subsection (3) that it shut in the well. Section 10.300(4) authorizes the Board to "revise or rescind" a maximum daily allowable, either upon application or upon its own motion.

23 Section 11.120(1), the provision referred to by the Board in noting APL's breach of the Regulations, obligates the licensee of a well to provide the Board the data and results of tests without delay.

STANDARD OF REVIEW

24 It is common ground that the Board must be correct on a question pertaining to its jurisdiction. The Board points out that courts should be slow to characterize a matter before an administrative tribunal as "jurisdictional" and thus subject to a standard of correctness. I.L.W.U., Local 514 v. Prince Rupert Grain Ltd. (1996), 135 D.L.R. (4th) 385 (S.C.C.).

THE POSITIONS OF THE PARTIES

25 The Appellant asserts that the Board retroactively recalculated the allowables and was able to find "overproduction" only because the 1997 and 1998 production exceeded the recalculated allowables. It says there was never "overproduction" vis-à-vis the original allowables since APL had always produced in compliance with existing orders. It argues the Board exceeded its jurisdiction in determining that there was "overproduction" as a result of the recalculated allowables, since neither the Act nor the Regulations permit the Board to retroactively or retrospectively adjust an allowable.

26 The Board emphasizes its technical expertise regarding the regulation of the oil and gas industry in suggesting that the Decision was within its jurisdiction. It underscores that the definition of "overproduction" in the Regulations (set out above) applies specifically to sections of the Regulations not in issue. It notes that Northstar nominally applied pursuant to 10.280(3) of the Regulations but asserts that, in reality, Northstar was asking the Board to craft a remedy to deal with APL's failure to promptly submit the 1996 pressure data.

27 Northstar relies in part (as does the Board) on s. 19(a.1) of the Act as providing jurisdiction for the Board's decision to shut in the Well. In its view, rather than retroactivity, the issue is the duration of the shut-in status which is a question of fact or mixed fact and law, not of jurisdiction.

ISSUES

1. DOES THE BOARD HAVE THE JURISDICTION TO RECALCULATE THE ALLOWABLES?

28 A fundamental principle of statutory interpretation is that retrospective power can only be granted through clear legislative language. Calgary & Home Oil v. Madison Nat. Gas (1959), 19 D.L.R. (2d) 655 at 661 (Alta. S.C. App. Div.). See also Re Northwestern Utilities and City of Edmonton (1978), 89 D.L.R. (3d) 161 at 170 (S.C.C.). This principle is based on notions of fairness and the reliability of expectations. R. Sullivan, Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994) at 513. Although it has been suggested that retroactive orders "change past transactions" while retrospective orders "attach new consequences to past transactions", the distinction is of little import here. Nova v. Amoco Canada Petroleum Company Ltd. et al. (1981), 32 A.R. 613 at 620 (S.C.C.).

29 In my view, the legislation does not authorize the Board to recalculate past allowables leading to a finding of overproduction; to impose penalties for the resulting overproduction; and to shut in a

well while that overproduction is being retired. Therefore, the Board exceeded its jurisdiction in purporting to make such an order.

30 It was conceded by Northstar that there is no such specific authorization in the Act or the Regulations. By contrast, the legislative authority to make retroactive orders is explicit in other sections of the Act. For example, in the context of common purchasers, carriers and processors, s. 45 of the Act authorizes the Board to make orders effective on a date "previous to the date the declaration or order is made".

31 While the Act is silent about the authority to recalculate allowables, it empowers the Board to make regulations concerning allowables. But s. 10(1)(e.1) and (o), the relevant regulation-making powers, are couched in forward-looking language: "rules by which the base allowable ... may be determined" and "rules for the calculation of allowables".

32 The Regulations themselves shed little light on this issue. Section 10.020(1) states that a licensee may take production "in accordance with any applicable order or authorization governing rates of production." Beau says it did exactly that: it produced at an allowable rate set by the Board.

33 Section 10.060 authorizes the Board to "vary, alter or exempt from application any provision of this Part and may make such other provision as it considers suitable or necessary to effect the purposes of the Part." There is nothing to suggest that this includes the power to recalculate a past allowable. While the language is broad, it is unlikely that this provision in the Regulations could authorize an after-the-fact undoing of long-standing Board orders (some of which had been rescinded and replaced), let alone justify the imposition of penalties for "overproduction" created by the recalculation.

34 Section 10.095 states that the gas base allowable will be a formula (Qmax) as shown in "the subsisting annual gas allowable order". This language also suggests that the Board's power to set allowables is prospective only.

35 The Board emphasizes that the definition of "overproduction" found in s. 10.200(1) (which refers to a "subsisting" Board order) applies only to sections 10.210 to 10.270, whereas reliance here is on s. 10.280. This argument seems to suggest that the term "overproduction" in s. 10.280 means something different than it does in the several sections that precede it. The Board also points to s. 10.280(3) as providing authority for its Decision.

36 There are two problems with these arguments. First, it is difficult to ascribe a meaning to the term "overproduction" in s. 10.280 other than its definition in s. 10.200(1). In any event, the fact that this definition is not specifically stated to be applicable to 10.280 would not, by itself, authorize the past recalculation of an allowable.

37 Second, s. 10.280(3) is not directed at the sort of problem presented here. Section 10.280(1)(c) refers to "cumulative overproduction" in the context of "the end of an allowable period", authorizing the Board to restrict production in "the next succeeding period", including a penalty factor. This language is clearly prospective. The notion of overproduction in subsection (3) must be based on subsection (1), since subsection (3) applies "notwithstanding subsection (1)". Logically, then, "overproduction" in subsection (3) cannot mean "overproduction" resulting from an after-the-fact allowable recalculation. And, in any event, subsection (3) only authorizes the Board to take necessary measures after notice of the "overproduction" contemplated by subsection (1) has been given.

38 The unfairness of any other interpretation is apparent when one considers the significant penalty factor authorized by subsection (1) and applied in this case. Were the Board able to recalculate allowables after the gas had been produced, a producer could be penalized heavily despite having produced in compliance with an earlier order. Given the changing price of commodities such as natural gas and the various costs associated with production, such a retroactive order could have grave financial consequences for a producer. The statutory language would have to be much clearer to accomplish this result.

39 Nor does the language of s. 10.300(4), enabling the Board to "revise or rescind" an allowable order, seem to contemplate the retroactive exercise of this power.

40 Northstar relies on several cases that interpret other statutes as permitting retroactive regulation. Since these cases involve the interpretation of different statutes in the context of other regulatory problems, they are unhelpful in resolving the present problem. For example, in Nova, supra, the overall regulatory scheme permitted the company to set initial rates and the Board to vary or confirm them upon receipt of a complaint. At 623, Estey J. concluded that this legislative pattern allowed the Board to vary the rates retroactively at least to the date of the complaint, if it considered the rates unjust and unreasonable. Here, in contrast, the Board itself set the initial allowables. See also Re Eurocan Pulp & Paper Co. Ltd. and B.C. Energy Comm. (1978), 87 D.L.R. (3d) 727 (B.C. C.A.). Nfld. Telephone v. Bd. of Comm. (1990), 45 Admin. L.R. 291 (Nfld. C.A.) is also not persuasive since the Court characterized the order not as retrospective but as an affirmation of an earlier order, a power clearly within the Board's jurisdiction.

41 On the other hand, in Calgary & Home Oil, supra, at 661, it was determined that giving "the Board retrospective control would require clear language and there is here a complete absence of any intention to so empower the Board." See also Re Northwestern Utilities, supra. In my view, the latter authorities are applicable.

2. DOES THE BOARD HAVE THE JURISDICTION TO SHUT IN THE WELL FOR BREACH OF A REGULATION?

42 The Board did not have jurisdiction to shut in the Well on the basis of "overproduction" resulting from a recalculation of the allowable production rate. Both the Board and Northstar argue that the Board nevertheless had jurisdiction to make the impugned order, primarily based on s. 19(a.1) of the Act which empowers the Board to shut in a well if the Act, the Regulations or a Board order have been contravened.

43 The objects of the Act, set out above, leave no doubt that the Board's function is highly specialized. "Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes." Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722 at 1756. Given the Board's function and the context of this case, do other legislative provisions authorize it to shut in the Well?

44 Section 19(a.1) of the Act clearly permits the Board to shut in a well when a regulation has been breached. Beau acknowledges that APL breached s. 11.120(1) of the Regulations when it failed to remit the 1996 pressure test data. In the circumstances of this case, however, there are at least two reasons why s. 19(a.1) cannot provide the basis for the Decision.

45 First, the foundation of Northstar's October 1998 application was not APL's failure to file timely pressure test data but its alleged overproduction. The application was grounded on an allegation that the production from the Well was "inequitable" and that, as a working interest owner in a common pool, Northstar had suffered resulting losses (AB 69). Northstar's assertion of inequitable drainage was rejected by the Board. Although Northstar relied on APL's failure to comply with the Board's 1995 letter concerning the need for annual pressure data (AB 73), the Board also concluded that neither APL nor Beau could be faulted for not providing annual pressure tests.

46 Northstar's failure to rely on s. 19(a.1) in its application is not dispositive in this case, since presumably it did not find out about APL's 1996 test results until a few weeks after its application was filed. On the other hand, by the time of the hearing it was apparent to everyone that the 1996 test results had been filed late. Northstar nevertheless continued to emphasize s. 10.280(3) of the Regulations before the Board. See e.g. AB 315 and 354. A brief of law submitted by Northstar in response to Beau's brief of law does not mention s. 19(a.1). The opening remarks by the Board's Acting Chairman state that Northstar's application was pursuant to s. 10.280(3) (AB 123). During oral argument before this Court, Northstar conceded it had never relied on s. 19(a.1) before the Board.

47 Second, there is no mention of s. 19(a.1) in the Decision. Rather, the emphasis is on recalculating the allowables dating back to 1997, based on the 1996 pressure test. This is especially apparent from the table attached to the Decision which refers throughout to "adjusted allowables" and to "overproduction". As Beau points out, a hearing which focussed on an appropriate penalty for the breach of a regulation, rather than on "overproduction" resulting from a recalculation, might have given rise to other issues. For example, there was evidence that Northstar had also failed to file test results in a timely way. See especially AB 299. Had the focus in the hearing been on crafting an appropriate remedy for APL's failure to file the 1996 test results, Beau might have emphasized, among other things, the effect of Northstar's own failure to file test results. It may also be that such a focus in the hearing would have led to a different remedy than that granted in the Decision.

48 Northstar argues that, so long as the legislation authorizes what was done, the Board does not have to specify the provision upon which it is relies. This may be true generally but, for the reasons just given, that outcome would be unfair in this case. It would also require the Court to place a characterization on the Decision that it seems unable to bear. Additionally, such a view of the Decision would fly in the face of s. 29 (2) of the Energy Resources Conservation Act, which entitles parties whose rights may be adversely affected by a Board decision to have a reasonable opportunity to learn the facts relevant to the application and to furnish evidence relevant to the application.

49 Apart from s. 19(a.1) of the Act and the provisions discussed earlier, can the Board's authority to shut in the Well be found elsewhere? Reliance is placed on ss. 15 and 42 of the Energy Resources Conservation Act. The latter permits the Board to "review, rescind, change, alter or vary an order or direction made by it ...". The former states that "[t]he Board ... may do all things that are necessary for or incidental to the performance of" its duties or functions. Reference is also made to s. 10(3) of the Alberta Energy and Utilities Board Act, S.A. 1994, c. A-19.5, which empowers the Board to "grant partial, further or other relief in addition to, or in substitution for, that applied for ...".

50 While these are broad powers that must be interpreted in the light of the Board's important and complex responsibilities, it is not necessary for the purposes of this case to describe their outer limits. It is enough to observe that, for the reasons already discussed, these provisions cannot justify this Decision. In a properly convened and directed proceeding, with appropriate notice and adequate

evidence, the Board has jurisdiction to shut in a well for a breach. That was not, however, the purpose or focus of this hearing, nor the case Beau was asked to answer.

CONCLUSION

51 Section 44(6) of the Energy Resources Conservation Act authorizes the Court to "confirm, vary or vacate the order appealed from". If the order is vacated, the matter must be referred back to the Board "for further consideration and redetermination." The Board lacked the jurisdiction to shut in the Well on the basis of overproduction created by a recalculation of allowables. Accordingly, that part of the Decision is vacated and the matter returned to the Board for further consideration in light of the above Reasons.

HUNT J.A.
FRUMAN J.A.:-- I concur.
WITTMANN J.A.:-- I concur.

cp/i/qljpn/qlsxs

TAB 14

SUPREME COURT OF CANADA

CITATION: Bell Canada *v.* Bell Aliant Regional Communications, 2009 SCC 40

DATE: 20090918
DOCKET: 32607, 32611

BETWEEN:

Bell Canada
Appellant
v.
Bell Aliant Regional Communications, Limited Partnership, Consumers' Association of Canada, National Anti-Poverty Organization, Public Interest Advocacy Centre, MTS Allstream Inc., Société en commandite Télébec and TELUS Communications Inc.
Respondents
- and -
Canadian Radio-television and Telecommunications Commission
Intervener

AND BETWEEN:

TELUS Communications Inc.
Appellant
v.
Bell Canada, Arch Disability Law Centre, Bell Aliant Regional Communications, Limited Partnership, Canadian Radio-television and Telecommunications Commission, Consumers' Association of Canada, National Anti-Poverty Organization, Public Interest Advocacy Centre, MTS Allstream Inc., Saskatchewan Telecommunications and Société en commandite Télébec
Respondents

AND BETWEEN:

Consumers' Association of Canada and National Anti-Poverty Organization
Appellants
v.
Canadian Radio-television and Telecommunications Commission, Bell Aliant Regional Communications, Limited Partnership, Bell Canada, Arch Disability Law Centre, MTS Allstream Inc., TELUS Communications Inc. and TELUS Communications (Québec) Inc.
Respondents

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 78) Abella J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ. concurring)

Bell Canada *Appellant*

v.

Bell Aliant Regional Communications, Limited Partnership, Consumers' Association of Canada, National Anti-Poverty Organization, Public Interest Advocacy Centre, MTS Allstream Inc., Société en commandite Télébec and TELUS Communications Inc. *Respondents*

and

Canadian Radio-television and Telecommunications Commission *Intervener*

- and -

TELUS Communications Inc. *Appellant*

v.

Bell Canada, Arch Disability Law Centre, Bell Aliant Regional Communications, Limited Partnership, Canadian Radio-television and Telecommunications Commission, Consumers' Association of Canada, National Anti-Poverty Organization, Public Interest Advocacy Centre, MTS

Allstream Inc., Saskatchewan Telecommunications and Société en commandite Télébec *Respondents*

- and -

Consumers' Association of Canada and National Anti-Poverty Organization *Appellants*

v.

Canadian Radio-television and Telecommunications Commission, Bell Aliant Regional Communications, Limited Partnership, Bell Canada, Arch Disability Law Centre, MTS Allstream Inc., TELUS Communications Inc. and TELUS Communications (Québec) Inc. *Respondents*

Indexed as: Bell Canada *v.* Bell Aliant Regional Communications

Neutral citation: 2009 SCC 40.

File Nos.: 32607, 32611.

2009: March 26; 2009: September 18.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Communications law — Telephone — Regulation of rates charged by telecommunications carriers — Canadian Radio-television and Telecommunications Commission ordering carriers to create deferral accounts — Accounts being collected from urban residential telephone service revenues to enhance competition — CRTC directing that accounts be disposed of to increase accessibility of telecommunications services for persons with disabilities and to expand broadband coverage — Remaining amounts, if any, being distributed to subscribers — Whether Telecommunications Act authorizes CRTC to direct disposition of deferral account funds as it did — Telecommunications Act, S.C. 1993, c. 38, ss. 7, 47.

Administrative law — Appeals — Standard of review — Canadian Radio-television and Telecommunications Commission — Standard of review applicable to CRTC's decision to direct disposition of deferral accounts — Telecommunications Act, S.C. 1993, c. 38, ss. 7, 47, 52(1).

In May 2002, the Canadian Radio-television and Telecommunications Commission ("CRTC"), in the exercise of its rate-setting authority, established a formula to regulate the maximum prices to be charged for certain services offered by incumbent local exchange carriers, including for residential telephone services in mainly urban non-high cost serving areas (the "Price Caps Decision"). Under the formula established by the Price Caps Decision, any increase in the price charged for these services in a given year was limited to an inflationary cap, less a productivity offset to reflect the low degree of competition in that particular market. The CRTC ordered the carriers to establish deferral accounts as separate accounting entries in their ledgers to record funds

representing the difference between the rates actually charged and those as otherwise determined by the formula. At the time, the CRTC did not direct how the deferral account funds were to be used.

In December 2003, Bell Canada sought approval from the CRTC to use the balance in its deferral account to expand high-speed broadband internet services in remote and rural communities. The CRTC invited submissions and conducted a public process to determine the appropriate disposition of the deferral accounts. In February 2006, it decided that each deferral account should be used to improve accessibility for individuals with disabilities and for broadband expansion. Any unexpended funds were to be distributed to certain current residential subscribers through a one-time credit or via prospective rate reductions. This was known as the "Deferral Accounts Decision".

Bell Canada appealed the order of one-time credits, while the Consumers' Association of Canada and the National Anti-Poverty Organization appealed the direction that the funds be used for broadband expansion. The Federal Court of Appeal dismissed the appeals, finding that the Price Caps Decision regime always contemplated that the disposition of the deferral accounts would be subject to the CRTC's directions and that the CRTC was at all times acting within its mandate. TELUS Communications Inc. joined Bell Canada as an appellant in this Court.

Held: The appeals should be dismissed.

The CRTC's creation and use of the deferral accounts for broadband expansion and

consumer credits was authorized by the provisions of the *Telecommunications Act* which lays out the basic legislative framework of the Canadian telecommunications industry. In particular, s. 7 of the Act sets out certain broad telecommunications policy objectives and s. 47(*a*) directs the CRTC to implement them when exercising its statutory authority, balancing the interests of consumers, carriers and competitors. A central responsibility of the CRTC is to determine and approve just and reasonable rates to be charged for telecommunications services. Pursuing policy objectives through the exercise of its rate-setting power is precisely what s. 47 requires the CRTC to do in setting just and reasonable rates. [1] [28] [36]

The issues raised in these appeals go to the very heart of the CRTC's specialized expertise. The core of the quarrel in effect is with the methodology for setting rates and the allocation of certain proceeds derived from those rates, a polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake. The standard of review is therefore reasonableness. [38]

In ordering subscriber credits and approving the use of funds for broadband expansion, the CRTC acted reasonably and in accordance with the policy objectives of the *Telecommunications Act*. In the Price Caps Decision, the CRTC indicated that the amounts in the deferral accounts would help achieve the CRTC's objectives. When the CRTC approved the rates derived from the Price Caps Decision, the portion of the revenues that went into the deferral accounts remained subject to the CRTC's further directions. The deferral accounts, and the fact that they were encumbered by the possibility of the CRTC's future directions, were therefore an integral part of the rate-setting exercise. The allocation of deferral account funds to consumers was neither a variation of a final

rate nor, strictly speaking, a rebate. From the Price Caps Decision onwards, it was understood that the disposition of the deferral account funds might include an eventual credit to subscribers once the CRTC determined the appropriate allocation. [64-65] [77]

There was no inappropriate cross-subsidization between residential telephone services and broadband expansion. The *Telecommunications Act* contemplates a comprehensive national telecommunications framework. The policy objectives that the CRTC is always obliged to consider demonstrate that it need not limit itself to considering solely the service at issue in determining whether rates are just and reasonable. It properly treated the statutory objectives as guiding principles in the exercise of its rate-setting authority, and came to a reasonable conclusion. [73] [75] [77]

Cases Cited

Referred to: Telecom Decision CRTC 2002-34; Telecom Decision CRTC 2005-69; Telecom Decision CRTC 2003-15; Telecom Decision CRTC 2003-18; Telecom Public Notice CRTC 2004-1; Telecom Decision CRTC 2006-9; Telecom Decision CRTC 2008-1; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 2 S.C.R. 339; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12; *Canadian National Railways Co. v. Bell Telephone Co. of Canada*, [1939] 1 S.C.R. 308; Telecom Decision

CRTC 97-9; Telecom Decision CRTC 94-19; *Edmonton (City) v. 360Networks Canada Ltd.*, 2007 FCA 106, [2007] 4 F.C.R. 747, leave to appeal refused, [2007] 3 S.C.R. vii; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476; Telecom Decision CRTC 93-9; *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *EPCOR Generation Inc. v. Energy and Utilities Board*, 2003 ABCA 374, 346 A.R. 281; *Reference Re Section 101 of the Public Utilities Act* (1998), 164 Nfld. & P.E.I.R. 60.

Statutes and Regulations Cited

Railway Act, R.S.C. 1985, c. R-3, s. 340(1).

Telecommunications Act, S.C. 1993, c. 38, ss. 7, 24, 25(1), 27, 32(g), 35(1), 37(1), 42(1), 46.5(1), 47, 52(1).

Authors Cited

Ryan, Michael H. *Canadian Telecommunications Law and Regulation*, loose-leaf ed. Scarborough: Carswell, 1993 (updated 2008).

APPEALS from a judgment of the Federal Court of Appeal (Richard C.J. and Noël and Sharlow JJ.A.), 2008 FCA 91, 375 N.R. 124, 80 Admin. L.R. (4th) 159, [2008] F.C.J. No. 397 (QL), 2008 CarswellNat 544, affirming a decision of the Canadian Radio-television and Telecommunications Commission, 2006 LNCRTCE 9 (QL), 2006 CarswellNat 6317. Appeals dismissed.

Neil Finkelstein, *Catherine Beagan Flood* and *Rahat Godil*, for the appellant/respondent Bell Canada.

Michael H. Ryan, *John E. Lowe*, *Stephen R. Schmidt* and *Sonya A. Morgan*, for the appellant/respondent TELUS Communications Inc. and the respondent TELUS Communications (Québec) Inc.

Richard P. Stephenson, *Danny Kastner* and *Michael Janigan*, for the appellants/respondents the Consumers' Association of Canada and the National Anti-Poverty Organization and the respondent the Public Interest Advocacy Centre.

Michael Koch and *Dina F. Graser*, for the respondent MTS Allstream Inc.

John B. Laskin and *Afshan Ali*, for the respondent/intervener the Canadian Radio-television and Telecommunications Commission.

No one appeared for the respondents Société en commandite Télébec, Arch Disability Law Centre, Bell Aliant Regional Communications, Limited Partnership, and Saskatchewan Telecommunications.

The judgment of the Court was delivered by

ABELLA J. —

[1] The *Telecommunications Act*, S.C. 1993, c. 38, sets out certain broad telecommunications policy objectives. It directs the Canadian Radio-television and Telecommunications Commission ("CRTC") to implement them in the exercise of its statutory authority, balancing the interests of consumers, carriers and competitors in the context of the Canadian telecommunications industry. The issue in these appeals is whether this authority was properly exercised.

[2] While distinct questions arise in each of the appeals before us, the common problem is whether the CRTC, in the exercise of its rate-setting authority, appropriately directed the allocation of funds to various purposes. In the Bell Canada and TELUS Communications Inc. appeal, the challenged purpose is the distribution of funds to customers, while in the Consumers' Association of Canada and National Anti-Poverty Organization appeal, the impugned allocation was directed at the expansion of broadband infrastructure. For the reasons that follow, in my view the CRTC's allocations were reasonable based on the Canadian telecommunications policy objectives that it is obliged to consider in the exercise of all of its powers, including its authority to approve just and reasonable rates.

Background

[3] The CRTC issued its landmark "Price Caps Decision"[1] in May 2002. Exercising its rate-setting authority, the CRTC established a formula to regulate the maximum prices charged for certain services offered by incumbent local exchange carriers ("ILECs"), who are primarily well-established telecommunications carriers.

[4] As part of its decision, the CRTC ordered the affected carriers to create separate accounting entries in their ledgers. These were called "deferral accounts". The funds contained in these deferral accounts were derived from residential telephone service revenues in non-high cost serving areas ("non-HCSAs"), which are mainly urban. Under the formula established by the Price Caps Decision, any increase in the price charged for these services in a given year was limited to an inflationary cap, less a productivity offset to reflect the low degree of competition in that particular market.

[5] More specifically, the effect of the inflationary cap was to bar carriers from increasing their prices at a rate greater than inflation. The productivity offset, on the other hand, put downward pressure on the rates to be charged. While market forces would normally serve to encourage carriers to reduce both their costs and their prices, the low level of competition in the non-HCSA market led the CRTC to conclude that an offsetting factor was necessary as a proxy for the effect of competition.

[6] Given the countervailing factors at work in the Price Caps Decision formula, there was the potential for a decrease in the price of residential services in these areas if inflation fell below

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[1] Telecom Decision CRTC 2002-34.

a certain level. Rather than mandating such a decrease, however, the CRTC concluded that lower prices, and therefore the prospect of lower revenues, would constitute a barrier to the entry of new carriers into this particular telecommunications market. It therefore ordered that amounts representing the difference between the rates *actually* charged, not including the decrease mandated by the Price Caps Decision formula, and the rates as *otherwise determined* through the formula, were to be collected from subscribers and recorded in deferral accounts held by each carrier. These accounts were to be reviewed annually by the CRTC. The intent of the Price Caps Decision was, therefore, that prices for these services would remain at a level sufficient to encourage market entry, while at the same time maintaining the pressure on the incumbent carriers to reduce their costs.

[7] The principal objectives the CRTC intended the Price Caps Decision to achieve were the following:

> a) to render reliable and affordable services of high quality, accessible to both urban and rural area customers;
>
> b) to balance the interests of the three main stakeholders in telecommunications markets, i.e., customers, competitors and incumbent telephone companies;
>
> c) to foster facilities-based competition in Canadian telecommunications markets;
>
> d) to provide incumbents with incentives to increase efficiencies and to be more innovative; and
>
> e) to adopt regulatory approaches that impose the minimum regulatory burden compatible with the achievement of the previous four objectives. [para. 99]

[8] The CRTC discussed the future use of the deferral account funds as follows:

> The Commission anticipates that an adjustment to the deferral account would be made whenever the Commission approves rate reductions for residential local services that are proposed by the ILECs as a result of competitive pressures. The Commission

> also anticipates that the deferral account would be drawn down to mitigate rate increases for residential service that could result from the approval of exogenous factors or when inflation exceeds productivity. Other draw downs could occur, for example, through subscriber rebates or the funding of initiatives that would benefit residential customers in other ways. [Emphasis added; para. 412.]

At the time, it did not specifically direct how the deferral account funds were to be used, leaving the issue subject to further submissions. While some participants objected to the creation of the deferral accounts, no one appealed the Price Caps Decision (*Bell Canada v. Canadian Radio-television and Telecommunications Commission*, 2008 FCA 91, 375 N.R. 124, at para. 14).

[9] The Price Caps Decision was to apply to services offered by Bell Canada, TELUS, and other affected carriers for the four-year period from June 1, 2002 to May 31, 2006. In a decision in 2005, the CRTC extended this price regulation regime for another year to May 31, 2007[2]. The CRTC allowed some draw-downs of the deferral accounts following the Price Caps Decision that are not at issue in these appeals.

[10] In March 2003, in two separate decisions, the CRTC approved the rates for Bell Canada and TELUS[3]. In the Bell Canada decision, the CRTC appeared to contemplate the continued operation of the deferral accounts established in the Price Caps Decision. It ordered, for example, that certain tax savings be allocated to the deferral accounts:

> The Commission, in Decision 2002-34, established a deferral account in conjunction with the application of a basket constraint equal to the rate of inflation less a productivity offset to all revenues from residential services in non-HCSAs. The

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[2] Telecom Decision CRTC 2005-69.

[3] Telecom Decision CRTC 2003-15, and Telecom Decision CRTC 2003-18.

> Commission considers that AT&T Canada's proposal to allocate the Ontario GRT and the Quebec TGE tax savings associated with all capped services to the price cap deferral account is inconsistent with that determination. The Commission finds that Bell Canada's proposal to include the Ontario GRT and Quebec TGE tax savings associated with the residential local services in non-HCSAs basket in the price cap deferral account is consistent with that determination. [Emphasis added; para. 32.]

[11] On December 2, 2003, Bell Canada sought the approval of the CRTC to use the balance in its deferral account to expand high-speed broadband internet service to remote and rural communities. In response, on March 24, 2004, the CRTC issued a public notice requesting submissions on the appropriate disposition of the deferral accounts[4]. Pursuant to this notice, the CRTC conducted a public process whereby proposals were invited for the disposition of the affected carriers' deferral accounts. The review was extensive and proposals were received from numerous parties.

[12] This led to the release of the "Deferral Accounts Decision" on February 16, 2006[5]. In this decision, the CRTC directed how the funds in the deferral accounts were to be used. These directions form the foundation of these appeals.

[13] After considering the various policy objectives outlined in the applicable statute, the *Telecommunications Act*, and the purposes set out in the Price Caps Decision, the CRTC concluded that all funds in the deferral accounts should be targeted for disposal by a designated date in 2006:

> The attachment to this Decision provides preliminary estimates of the deferral account balances as of the end of the fourth year of the current price cap period in 2006.

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[4]Telecom Public Notice CRTC 2004-1

[5]Telecom Decision CRTC 2006-9.

> The Commission notes that the deferral account balances are expected to be very large for some ILECs. It also notes the concern that allowing funds to continue to accumulate in the accounts would create inefficiencies and uncertainties.
>
> . . .
>
> Accordingly, the Commission considers it appropriate not only to provide directions on the disposition of all the funds that will have accumulated in the ILECs' deferral accounts by the end of the fourth year of the price cap period in 2006, but also to provide directions to address amounts recurring beyond this period in order to prevent further accumulation of funds in the deferral accounts. The Commission will provide directions and guidelines for disposing of these amounts later in this Decision. [Emphasis added; paras. 58 and 60.]

[14] The CRTC further decided that the deferral accounts should be disbursed primarily for two purposes. As a priority, at least 5 percent of the accounts was to be used for improving accessibility to telecommunications services for individuals with disabilities. The other 95 percent was to be used for broadband expansion in rural and remote communities. Proposals were invited on how the deferral account funds should be applied. If the proposal as approved was for less than the balance of its deferral account, an affected carrier was to distribute the remaining amount to consumers.

[15] In summary, therefore, the CRTC decided that the affected carriers should focus on broadband expansion and accessibility improvement. It also decided that if these two objectives could be fulfilled for an amount less than the full deferral account balances, credits to subscribers would be ordered out of the remainder. It should be noted that customers were not to be compensated in proportion to what they had paid through these credits because of the potential administrative complexity of identifying these individuals and quantifying their respective shares. Instead, the credits were to be provided to certain current subscribers. Prospective rate reductions could also be used to eliminate recurring amounts in the accounts.

[16] At the time, the balance in the deferral accounts established under the Price Caps Decision was considerable. Bell Canada's account was estimated to contain approximately $480.5 million, while the TELUS account was estimated at about $170 million.

[17] It is helpful to set out how the CRTC explained its decision on the allocation of the deferral account funds. Referencing the importance of telecommunications in connecting Canada's "vast geography and relatively dispersed population", it stressed that Canada had fallen behind in the adoption of broadband services (at paras. 73-74). It contrasted the wide availability of broadband service in urban areas with the less developed network in rural and remote communities. Further, it noted that the objectives outlined in the Price Caps Decision and in the *Telecommunications Act* at s. 7(*b*) provided for improving the quality of telecommunications services in those communities, and that their social and economic development would be favoured by an expansion of the national broadband network. In its view, this initiative would also provide a helpful complement to the efforts of both levels of government to expand broadband coverage. It therefore concluded that broadband expansion was an appropriate use of a part of the deferral account funds (at paras. 73-80).

[18] The CRTC also explained that while customer credits would be consistent with the objectives set out in s. 7 of the *Telecommunications Act* and with the Price Caps Decision, these disbursements should not be given priority because broadband expansion and accessibility services provided greater long-term benefits. Nevertheless, credits effectively balanced the interests of the "three main stakeholders in the telecommunications markets" (at para. 115), namely customers,

competitors and carriers. It concluded that credits did not contradict the purpose of the deferral accounts, and contrasted one-time credits with a reduction of rates. In its view, credits, unlike rate reductions, did not have a sustained negative impact on competition in these markets, which was the concern the deferral accounts were set up to address (at paras. 112-16).

[19] A dissenting Commissioner expressed concerns over the disposition of the deferral account funds. In her view, the CRTC had no mandate to direct the expansion of broadband networks across the country. The CRTC's policy had generally been to ensure the provision of a basic level of service, not services like broadband, and she therefore considered the CRTC's reliance on the objectives of the *Telecommunications Act* to be inappropriate.

[20] On January 17, 2008, the CRTC issued another decision dealing with the carriers' proposals to use their deferral account balances for the purposes set out in the Deferral Accounts Decision[6]. Some carriers' plans were approved in part, with the result that only a portion of their deferral account balances was allocated to those projects. Consequently, the CRTC required them to submit, by March 25, 2008, a plan for crediting the balance in their deferral accounts to residential subscribers in non-HCSAs.

[21] Bell Canada, as well as the Consumers' Association of Canada and the National Anti-Poverty Organization, appealed the CRTC's Deferral Accounts Decision to the Federal Court of Appeal. The Deferral Accounts Decision was stayed by Richard C.J. in the Federal Court of Appeal on January 25, 2008. The decision requiring further submissions on plans to distribute the deferral

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[6]Telecom Decision CRTC 2008-1.

account balances was also stayed by Sharlow J.A. pending the filing of an application for leave to appeal to this Court on April 23, 2008. Both stay orders were extended by this Court on September 25, 2008. The stay orders do not apply to the funds allocated for the improvement of accessibility for individuals with disabilities.

[22] In a careful judgment by Sharlow J.A., the court unanimously dismissed the appeals, concluding that the Price Caps Decision regime always contemplated the future disposition of the deferral account funds as the CRTC would direct, and that the CRTC acted within its broad mandate to pursue its regulatory objectives. For the reasons that follow, I agree with the conclusions reached by Sharlow J.A.

Analysis

[23] The parties have staked out diametrically opposite positions on how the balance of the deferral account funds should be allocated.

[24] Bell Canada argued that the CRTC had no statutory authority to order what it claimed amounted to retrospective "rebates" to consumers. In its view, the distributions ordered by the CRTC were in substance a variation of rates that had been declared final. TELUS joined Bell Canada in this Court, and argued that the CRTC's order for "rebates" constituted an unjust confiscation of property.

[25] In response, the CRTC contended that its broad mandate to set rates under the *Telecommunications Act* includes establishing and ordering the disposal of funds from deferral accounts. Because the deferral account funds had always been subject to the possibility of disbursement to customers, there was therefore no variation of a final rate or any impermissible confiscation.

[26] The Consumers' Association of Canada was the only party to oppose the allocation of 5 percent of the deferral account balances to improving accessibility, but abandoned this argument during the hearing before the Federal Court of Appeal. Together with the National Anti-Poverty Organization, it argued before this Court that the rest of the deferral account balances should be distributed to customers in full, and that the CRTC had no authority to allow the use of the funds for broadband expansion.

[27] These arguments bring us directly to the statutory scheme at issue.

[28] The *Telecommunications Act* lays out the basic legislative framework of the Canadian telecommunications industry. In addition to setting out numerous specific powers, the statute's guiding objectives are set out in s. 7. Pursuant to s. 47(*a*), the CRTC must consider these objectives in the exercise of *all* of its powers. These provisions state:

> **7.** It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives
>
> (*a*) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;

(*b*) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;

(*c*) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

(*d*) to promote the ownership and control of Canadian carriers by Canadians;

(*e*) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;

(*f*) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;

(*g*) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;

(*h*) to respond to the economic and social requirements of users of telecommunications services; and

(*i*) to contribute to the protection of the privacy of persons.

. . .

47. The Commission shall exercise its powers and perform its duties under this Act and any special Act

(*a*) with a view to implementing the Canadian telecommunications policy objectives and ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with section 27;

The CRTC relied on these two provisions in arguing that it was required to take into account a broad spectrum of considerations in the exercise of its rate-setting powers, and that the Deferral Accounts Decision was simply an extension of this approach.

[29] The *Telecommunications Act* grants the CRTC the general power to set and regulate rates for telecommunications services in Canada. All tariffs imposed by carriers, including rates for

services, must be submitted to it for approval, and it may decide any matter with respect to rates in the telecommunications services industry, as the following provisions show:

> **24.** The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.
>
> **25.** (1) No Canadian carrier shall provide a telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.
>
> . . .
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> **32.** The Commission may, for the purposes of this Part,
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> . . .
>
> (*g*) in the absence of any applicable provision in this Part, determine any matter and make any order relating to the rates, tariffs or telecommunications services of Canadian carriers.

[30] The guiding rule of rate-setting under the *Telecommunications Act* is that the rates be "just and reasonable", a longstanding regulatory principle. To determine whether rates meet this standard, the CRTC has a wide discretion which is protected by a privative clause:

> **27.** (1) Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.
>
> . . .
>
> (3) The Commission may determine in any case, as a question of fact, whether a Canadian carrier has complied with section 25, this section or section 29, or with any decision made under section 24, 25, 29, 34 or 40.
>
> . . .
>
> (5) In determining whether a rate is just and reasonable, the Commission may adopt any method or technique that it considers appropriate, whether based on a carrier's return on its rate base or otherwise.

. . .

> **52.** (1) The Commission may, in exercising its powers and performing its duties under this Act or any special Act, determine any question of law or of fact, and its determination on a question of fact is binding and conclusive.

[31] In addition to the power under s. 27(5) to adopt "any method or technique that it considers appropriate" for determining whether a rate is just and reasonable, the CRTC also has the authority under s. 37(1) to order a carrier to adopt "any accounting method or system of accounts" in view of the proper administration of the *Telecommunications Act*. Section 37(1) states:

> **37.** (1) The Commission may require a Canadian carrier
>
> (*a*) to adopt any method of identifying the costs of providing telecommunications services and to adopt any accounting method or system of accounts for the purposes of the administration of this Act;

[32] The CRTC has other broad powers which, while not at issue in this case, nevertheless further demonstrate the comprehensive regulatory powers Parliament intended to grant. These include the ability to order a Canadian carrier to provide any service in certain circumstances (s. 35(1)); to require communications facilities to be provided or constructed (s. 42(1)); and to establish any sort of fund for the purpose of supporting access to basic telecommunications services (s. 46.5(1)).

[33] This statutory overview assists in dealing with the preliminary issue of the applicable standard of review. Although the Federal Court of Appeal accepted the parties' position that the applicable standard of review was correctness, Sharlow J.A. acknowledged that the standard of review could be more deferential in light of this Court's decision in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at paras. 98-100. This was

an invitation, it seems to me, to clarify what the appropriate standard is.

[34] Bell Canada and TELUS concede that the CRTC had the authority to approve disbursements from the deferral accounts for initiatives to improve broadband expansion and accessibility to telecommunications services for persons with disabilities, and that they actually sought such approval. In their view, however, this authority did not extend to what they characterized as retrospective "rebates". Similarly, in the Consumers' appeal the crux of the complaint is with whether the CRTC could direct that the funds be disbursed in certain ways, not with whether it had the authority to direct how the funds ought to be spent generally.

[35] This means that for Bell Canada and TELUS appeal, the dispute is over the CRTC's authority and discretion under the *Telecommunications Act* in connection with ordering credits to customers from the deferral accounts. In the Consumers' appeal, it is over its authority and discretion in ordering that funds from the deferral accounts be used for the expansion of broadband services.

[36] A central responsibility of the CRTC is to determine and approve just and reasonable rates to be charged for telecommunications services. Together with its rate-setting power, the CRTC has the ability to impose *any* condition on the provision of a service, adopt *any* method to determine whether a rate is just and reasonable and require a carrier to adopt *any* accounting method. It is obliged to exercise all of its powers and duties with a view to implementing the Canadian telecommunications policy objectives set out in s. 7.

[37] The CRTC's authority to establish the deferral accounts is found through a combined reading of ss. 27 and 37(1). The authority to establish these accounts necessarily includes the disposition of the funds they contain, a disposition which represents the final step in a process set in motion by the Price Caps Decision. It is self-evident that the CRTC has considerable expertise with respect to this type of question. This observation is reflected in its extensive statutory powers in this regard and in the strong privative clause in s. 52(1) protecting its determinations on questions of fact from appeal, including whether a carrier has adopted a just and reasonable rate.

[38] In my view, therefore, the issues raised in these appeals go to the very heart of the CRTC's specialized expertise. In the appeals before us, the core of the quarrel in effect is with the methodology for setting rates and the allocation of certain proceeds derived from those rates, a polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake. This argues for a more deferential standard of review, which leads us to consider whether the CRTC was reasonable in directing how the funds from the deferral accounts were to be used. (See *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 25; and *VIA Rail Canada Inc.*, at paras. 88-100.)

[39] This brings us to the nature of the CRTC's rate-setting power in the context of this case. The predecessor statute for telecommunications rate-setting, the *Railway Act*, R.S.C. 1985, c. R-3, also stipulated that rates be "just and reasonable" (s. 340(1)). Traditionally, those rates were based on a balancing between a fair rate for the consumer and a fair return on the carrier's investment. (See, e.g., *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186, at pp. 192-93 and

ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 65.)

[40] Even before the expansive language now found in the *Telecommunications Act*, regulatory agencies had enjoyed considerable discretion in determining the factors to be considered and the methodology that could be adopted for assessing whether rates were just and reasonable. For instance, in dismissing a leave application in *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12 (S.C.C.), Taschereau J. wrote:

> [I]f the Board is bound to grant a relief which is just to the public and secures to the railways a fair return, it is not bound to accept for the determination of the rates to be charged, the sole method proposed by the applicant. The obligation to act is a question of law, but the choice of the method to be adopted is a question of discretion with which, under the statute, no Court of law may interfere. [Emphasis added; p. 13.]

In making this determination, he relied on Duff C.J.'s judgment in *Canadian National Railways Co. v. Bell Telephone Co. of Canada*, [1939] S.C.R. 308, for the following proposition in the particular statutory context of that case:

> The law dictates neither the order to be made in a given case nor the considerations by which the Board is to be guided in arriving at the conclusion that an order, or what order, is necessary or proper in a given case. True, it is the duty of all public bodies and others invested with statutory powers to act reasonably in the execution of them, but the policy of the statue [*sic*] is that, subject to the appeal to the Governor in Council under s. 52, in exercising an administrative discretion entrusted to it, the Board itself is to be the final arbiter as to the order to be made. [p. 315]

(See also Michael H. Ryan, *Canadian Telecommunications Law and Regulation* (loose-leaf ed.), at §612.)

[41] The CRTC's already broad discretion in determining whether rates are just and reasonable has been further enhanced by the inclusion of s. 27(5) in the *Telecommunications Act* permitting the CRTC to adopt "any method", language which was absent from the *Railway Act*.

[42] Even more significantly, the *Railway Act* contained nothing analogous to the statutory direction under s. 47 that the CRTC must exercise its rate-setting powers with a view to implementing the Canadian telecommunications objectives set out in s. 7. These statutory additions are significant. Coupled with its rate-setting power, and its ability to use any method for arriving at a just and reasonable rate, these provisions contradict the restrictive interpretation of the CRTC's authority proposed by various parties in these appeals.

[43] This was highlighted by Sharlow J.A. when she stated:

> Because of the combined operation of section 47 and section 7 of the *Telecommunications Act* . . ., the CRTC's rating jurisdiction is not limited to considerations that have traditionally been considered relevant to ensuring a fair price for consumers and a fair rate of return to the provider of telecommunication services. Section 47 of the *Telecommunications Act* expressly requires the CRTC to consider, as well, the policy objectives listed in section 7 of the *Telecommunications Act*. What that means, in my view, is that in rating decisions under the *Telecommunications Act*, the CRTC is entitled to consider any or all of the policy objectives listed in section 7. [para. 35]

[44] It is true that the CRTC had previously used a "rate base rate of return" method, based on a combination of a rate of return for investors in telecommunications carriers and a rate base calculated using the carriers' assets. This resulted in rates charged for the carrier's services that would, on the one hand, provide a fair return for the capital invested in the carrier, and, on the other, be fair to the customers of the carrier.

[45] However, these expansive provisions mean that the rate base rate of return approach is not necessarily the only basis for setting a just and reasonable rate. Furthermore, based on ss. 7, 27(5) and 47, the CRTC is not required to confine itself to balancing only the interests of subscribers and carriers with respect to a particular service. In the Price Caps Decision, for example, the CRTC chose to focus on maximum prices for services, rather than on the rate base rate of return approach. It did so, in part, to foster competition in certain markets, a goal untethered to the direct relationship between the carrier and subscriber in the traditional rate base rate of return approach. A similar pricing approach was adopted by the CRTC in a decision preceding the Price Caps Decision[7].

[46] The CRTC has interpreted these provisions broadly and identified them as responsive to the evolved industry context in which it operates. In its "Review of Regulatory Framework" decision[8], it wrote:

> The Act ... provides the tools necessary to allow the Commission to alter the traditional manner in which it regulates (i.e., to depart from rate base rate of return regulation).
>
> . . .
>
> In brief, telecommunications today transcends traditional boundaries and simple definition. It is an industry, a market and a means of doing business that encompasses a constantly evolving range of voice, data and video products and services.
>
> . . .
>
> In this context, the Commission notes that the Act contemplates the evolution of basic service by setting out as an objective the provision of reliable and affordable telecommunications, rather than merely affordable telephone service. [Emphasis added;

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[7]Telecom Decision CRTC 97-9.

[8]Telecom Decision CRTC 94-19.

pp. 6 and 10.]

[47] In *Edmonton (City) v. 360Networks Canada Ltd.*, 2007 FCA 106, [2007] 4 F.C.R. 747, leave to appeal refused, [2007], 3 S.C.R. vii, the Federal Court of Appeal drew similar conclusions, observing that the *Telecommunications Act* should be interpreted by reference to the policy objectives, and that s. 7 justified in part the view that the "Act should be interpreted as creating a comprehensive regulatory scheme" (at para. 46). A duty to take a more comprehensive approach was also noted by Ryan, who observed:

> Because of the importance of the telecommunications industry to the country as a whole, rate-making issues may sometimes assume a dimension that gives them a significance that extends beyond the immediate interests of the carrier, its shareholders and its customers, and engages the interests of the public at large. It is also part of the duty of the regulator to take these more far-reaching interests into account. [§604]

[48] This leads inevitably, it seems to me, to the conclusion that the CRTC may set rates that are just and reasonable for the purposes of the *Telecommunications Act* through a diverse range of methods, taking into account a variety of different constituencies and interests referred to in s. 7, not simply those it had previously considered when it was operating under the more restrictive provisions of the *Railway Act*. This observation will also be apposite later in these reasons when the question of "final rates" is discussed in connection with the Bell Canada appeal.

[49] I see nothing in this conclusion which contradicts the ratio in *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476. In that case, the issue was whether the CRTC could make an order granting cable companies access to certain utilities' power poles. In that decision, the CRTC had relied on the Canadian telecommunications policy objectives

to inform its interpretation of the relevant provisions. In deciding that the language of the *Telecommunications Act* did not give the CRTC the power to grant access to the power poles, Gonthier J. for the majority concluded that the CRTC had inappropriately interpreted the Canadian telecommunications policy objectives in s. 7 as power-conferring (at para. 42).

[50] The circumstances of *Barrie Public Utilities* are entirely distinct from those at issue before us. Here, we are dealing with the CRTC setting rates that were required to be just and reasonable, an authority fully supported by unambiguous statutory language. In so doing, the CRTC was exercising a broad authority, which, according to s. 47, it was required to do "with a view to implementing the Canadian telecommunications policy objectives . . . ". The policy considerations in s. 7 were factors that the CRTC was required to, and did, take into account.

[51] Nor does this Court's decision in *ATCO* preclude the pursuit of public interest objectives through rate-setting. In that case, Bastarache J. for the majority, took a strict approach to the Alberta Energy and Utilities Board's powers under the applicable statute. The issue was whether the Board had the authority to order the distribution of proceeds by a regulated company to its subscribers from an asset sale it had approved. It was argued that because the Board had the authority to make "further orders" and impose conditions "in the public interest" on any order, it therefore had the ability to order the disposition of the sale proceeds.

[52] In holding that the Board had no such authority, Bastarache J. relied in part on the conclusion that the Board's statutory power to make orders or impose conditions in the public interest was insufficiently precise to grant the ability to distribute sale proceeds to ratepayers (at

para. 46). The ability of the Board to approve an asset sale, and its authority to make any order it wished in the public interest, were necessarily limited by the context of the relevant provisions (at paras. 46-48 and 50). It was obliged too to adopt a rate base rate of return method to determine rates, pursuant to its governing statute (at paras. 65-66).

[53] Unlike *ATCO*, in the case before us the CRTC's rate-setting authority, and its ability to establish deferral accounts for this purpose, are at the very core of its competence. The CRTC is statutorily authorized to adopt *any* method of determining just and reasonable rates. Furthermore, it is required to consider the statutory objectives in the exercise of its authority, in contrast to the permissive, free-floating direction to consider the public interest that existed in *ATCO*. The *Telecommunications Act* displaces many of the traditional restrictions on rate-setting described in *ATCO*, thereby granting the CRTC the ability to balance the interests of carriers, consumers and competitors in the broader context of the Canadian telecommunications industry (Review of Regulatory Framework Decision, at pp. 6 and 10).

[54] The fact that deferral accounts are at issue does nothing to change this framework. No party objected to the CRTC's authority to establish the deferral accounts themselves. These accounts are accepted regulatory tools, available as a part of the Commission's rate-setting powers. As the CRTC has noted, deferral accounts "enabl[e] a regulator to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test year"[9]. They have traditionally protected against future eventualities, particularly the difference between forecasted and actual costs and revenues, allowing a regulator to shift costs and expenses from one

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[9]Telecom Decision CRTC 93-9.

regulatory period to another. While the CRTC's creation and use of the deferral accounts for broadband expansion and consumer credits may have been innovative, it was fully supported by the provisions of the *Telecommunications Act*.

[55] In my view, it follows from the CRTC's broad discretion to determine just and reasonable rates under s. 27, its power to order a carrier to adopt any accounting method under s. 37, and its statutory mandate under s. 47 to implement the wide-ranging Canadian telecommunications policy objectives set out in s. 7, that the *Telecommunications Act* provides the CRTC with considerable scope in establishing and approving the use to be made of deferral accounts. They were created in accordance both with the CRTC's rate-setting authority and with the goal that all rates charged by carriers were and would remain just and reasonable.

[56] A deferral account would not serve its purpose if the CRTC did not also have the power to order the disposition of the funds contained in it. In my view, the CRTC had the authority to order the disposition of the accounts in the exercise of its rate-setting power, provided that this exercise was reasonable.

[57] I therefore agree with the following observation by Sharlow J.A.:

> The Price Caps Decision required Bell Canada to credit a portion of its final rates to a deferral account, which the CRTC had clearly indicated would be disposed of in due course as the CRTC would direct. There is no dispute that the CRTC is entitled to use the device of a mandatory deferral account to impose a contingent obligation on a telecommunication service provider to make expenditures that the CRTC may direct in the future. It necessarily follows that the CRTC is entitled to make an order crystallizing that obligation and directing a particular expenditure, provided the expenditure can reasonably be justified by one or more of the policy objectives listed in section 7 of the Telecommunications Act. [Emphasis added; para. 52.]

[58] This general analytical framework brings us to the more specific questions in these appeals. In the first appeal, Bell Canada relied on Gonthier J.'s decision *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 ("*Bell Canada (1989)*"), to argue that "final" rates cannot be changed and that the funds in the deferral accounts could not, therefore, be distributed as "rebates" to customers.

[59] In *Bell Canada (1989)*, the CRTC approved a series of interim rates. It subsequently reviewed them in light of Bell Canada's changed financial situation, and ordered the carrier to credit what it considered to be excess revenues to its current subscribers. Arguing against the CRTC's authority to do so, Bell Canada contended that the CRTC could not order a one-time credit with respect to revenues earned from rates approved by the CRTC, whether the rate order was an interim one or not. Gonthier J. observed that while the *Railway Act* contemplated a positive approval scheme that only allowed for prospective, not retroactive or retrospective rate-setting, the one-time credit at issue was nevertheless permissible because the original rates were interim and therefore inherently subject to change.

[60] In the current case, Bell Canada argued that the rates had been made final, and that the disposition of the deferral accounts for one-time credits was therefore impermissible. More specifically, it argued that the CRTC's order of one-time credits from the deferral accounts amounted to retrospective rate-setting as the term was used in *Bell Canada (1989)*, at p. 1749, namely, that their "purpose is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive" (at p. 1749).

[61] In my view, because this case concerns encumbered revenues in deferral accounts (referred to by Sharlow J.A. as contingent obligations or liabilities), we are not dealing with the variation of final rates. As Sharlow J.A. pointed out, *Bell Canada (1989)* is inapplicable because it was known from the outset in the case before us that Bell Canada would be obliged to use the balance of its deferral account in accordance with the CRTC's subsequent direction (at para. 53).

[62] It would, with respect, be an oversimplification to consider that *Bell Canada (1989)* applies to bar the provision of credits to consumers in this case. *Bell Canada (1989)* was decided under the *Railway Act*, a statutory scheme that, significantly, did not include any of the considerations or mandates set out in ss. 7, 27(5) and 47 of the *Telecommunications Act*. Nor did it involve the disposition of funds contained in deferral accounts.

[63] In my view, the credits ordered out of the deferral accounts in the case before us are neither retroactive nor retrospective. They do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures, since these credits or reductions were contemplated as a possible disposition of the deferral account balances from the beginning. These funds can properly be characterized as encumbered revenues, because the rates *always* remained subject to the deferral accounts mechanism established in the Price Caps Decision. The use of deferral accounts therefore precludes a finding of retroactivity or retrospectivity. Furthermore, using deferral accounts to account for the difference between forecast and actual costs and revenues has traditionally been held not to constitute retroactive rate-setting (*EPCOR Generation Inc. v. Energy and Utilities Board*, 2003 ABCA 374,

346 A.R. 281, at para. 12, and *Reference Re Section 101 of the Public Utilities Act* (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. C.A.), at paras. 97-98 and 175).

[64] The Deferral Accounts Decision was the culmination of a process undertaken in the Price Caps Decision. In the Price Caps Decision, the CRTC indicated that the amounts in the deferral accounts were to be used in a manner contributing to achieving the CRTC's objectives (at paras. 409 and 412). In the Deferral Accounts Decision, the CRTC summarized its earlier findings that draw-downs could occur for various purposes, including through subscriber credits (at para. 6). When the CRTC approved the rates derived from the Price Caps Decision, the portion of the revenues that went into the deferral accounts remained encumbered. The deferral accounts, and the encumbrance to which the funds recorded in them were subject, were therefore an integral part of the rate-setting exercise ensuring that the rates approved were just and reasonable. It follows that nothing in the Deferral Accounts Decision changed either the Price Caps Decision or any other prior CRTC decision on this point. The CRTC's later allocation of deferral account balances for various purposes, therefore, including customer credits, was not a variation of a final rate order.

[65] The allocation of deferral account funds to consumers was not, strictly speaking, a "rebate" in any event. Instead, as in *Bell Canada (1989)*, these allocations were one-time disbursements or rate reductions the carriers were required to make out of the deferral accounts to their *current* subscribers. The possibility of one-time credits was present from the inception of the rate-setting exercise. From the Price Caps Decision onwards, it was understood that the disposition of the deferral account funds might include an eventual credit to subscribers once the CRTC determined the appropriate allocation. It was precisely because the rate-setting mechanism approved

by the CRTC included accumulation in and disposition from the deferral accounts pursuant to further CRTC orders, that the rates were and continued to be just and reasonable.

[66] Therefore, rather than viewing *Bell Canada (1989)* as setting a strict rule that subscriber credits can never be ordered out of revenues derived from final rates, it is important to remember Gonthier J.'s concern that the financial stability of regulated utilities could be undermined if rates were open to indiscriminate variation (at p. 1760). Nothing in the Deferral Accounts Decision undermined the financial stability of the affected carriers. The amounts at issue were always treated differently for accounting purposes, and the regulated carriers were aware of the fact that the portion of their revenues going into the deferral accounts remained encumbered. In fact, the Price Caps Decision formula would have allowed for *lower* rates than the ones ultimately set, were it not for the creation of the deferral accounts. Those lower rates could conceivably have been considered sufficient to maintain the financial stability of the carriers and were increased only in an effort to encourage market entry by new competitors.

[67] TELUS argued additionally that the Deferral Accounts Decision constituted a confiscation of its property. This is an argument I have difficulty accepting. The funds in the accounts never belonged unequivocally to the carriers, and always consisted of encumbered revenues. Had the CRTC intended that these revenues be used for any purposes the affected carriers wanted, it could simply have approved the rates as just and reasonable and ordered the balance of the deferral accounts turned over to them. It chose not to do so.

[68] It is also worth noting that in approving Bell Canada's rates, the CRTC ordered it to

allocate certain tax savings to the deferral accounts[10]. Neither the CRTC, nor Bell Canada, could possibly have expected that the company would be able to keep that portion of its rate revenue representing a past liability for taxes that it was in fact not currently liable to pay or defer.

[69] For the above reasons, I would dismiss the Bell Canada and TELUS appeal.

[70] The premise underlying the Consumers' Association of Canada appeal is that the disposition of some deferral account funds for broadband expansion highlighted the fact that the rates charged by carriers were, in a certain sense, not just and reasonable. Consumers can only succeed if it can demonstrate that the CRTC's decision was unreasonable.

[71] At its core, Consumers' primary argument was that the Deferral Accounts Decision effectively forced users of a certain service (residential subscribers in certain areas) to subsidize users of another service (the future users of broadband services) once the expansion of broadband infrastructure was completed. In its view, this was an indication that the rates charged to residential users were not in fact just and reasonable, and that therefore the balance in the deferral accounts, excluding the disbursements for accessibility services, should be distributed to customers.

[72] As previously noted, the deferral accounts were created and disbursed pursuant to the CRTC's power to approve just and reasonable rates, and were an integral part of such rates. Far from rendering these rates inappropriate, the deferral accounts *ensured* that the rates were just and reasonable. And the policy objectives in s. 7, which the CRTC is always obliged to consider,

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[10]Telecom Decision CRTC 2003-15, at para. 32.

demonstrate that the CRTC need not limit itself to considering solely the service at issue in determining whether rates are just and reasonable. The statute contemplates a comprehensive national telecommunications framework. It does not require the CRTC to atomize individual services. It is for the CRTC to determine a tolerable level of cross-subsidization.

[73] Nor does the traditional approach to telecommunications regulation support Consumers' argument. Long-distance telephone users have long subsidized local telephone users (Price Caps Decision, at para. 2). Therefore, while rates for individual services covered by the *Telecommunications Act* may be evaluated on a just and reasonable basis, rates are not necessarily rendered unreasonable or unjust simply because there is some cross-subsidization between services. (See Ryan, at §604, for the proposition that the CRTC can determine the appropriate extent of cross-subsidization for a given telecommunications carrier.)

[74] In my view, the CRTC properly considered the objectives set out in s. 7 when it ordered expenditures for the expansion of broadband infrastructure and consumer credits. In doing so, it treated the statutory objectives as guiding principles in the exercise of its rate-setting authority. Pursuing policy objectives through the exercise of its rate-setting power is precisely what s. 47 requires the CRTC to do in setting just and reasonable rates.

[75] In deciding to allocate the deferral account funds to improving accessibility services and broadband expansion in rural and remote areas, the CRTC had in mind its statutorily mandated objectives of facilitating "the orderly development throughout Canada of a telecommunications system that serves to . . . strengthen the social and economic fabric of Canada" under s. 7(*a*);

rendering "reliable and affordable telecommunications services . . . to Canadians in both urban and rural areas" under s. 7(*b*); and responding "to the economic and social requirements of users of telecommunications services" pursuant to s. 7(*h*).

[76] The CRTC heard from several parties, considered its statutorily mandated objectives in exercising its powers, and decided on an appropriate course of action. Under the circumstances, I have no hesitation in holding that the CRTC made a reasonable decision in ordering broadband expansion.

[77] I would therefore conclude that the CRTC did exactly what it was mandated to do under the *Telecommunications Act*. It had the statutory authority to set just and reasonable rates, to establish the deferral accounts, and to direct the disposition of the funds in those accounts. It was obliged to do so in accordance with the telecommunications policy objectives set out in the legislation and, as a result, to balance and consider a wide variety of objectives and interests. It did so in these appeals in a reasonable way, both in ordering subscriber credits and in approving the use of the funds for broadband expansion.

[78] I would dismiss the appeals. At the request of all parties, there will be no order for costs.

Appeals dismissed.

Solicitors for the appellant/respondent Bell Canada: Blake, Cassels & Graydon,

Toronto.

Solicitors for the appellant/respondent TELUS Communications Inc. and the respondent TELUS Communications (Québec) Inc.: Burnet, Duckworth & Palmer, Calgary.

Solicitors for the appellants/respondents the Consumers' Association of Canada and the National Anti-Poverty Organization and the respondent the Public Interest Advocacy Centre: Paliare, Roland, Rosenberg, Rothstein, Toronto.

Solicitors for the respondent MTS Allstream Inc.: Goodmans, Toronto.

Solicitors for the respondent/intervener the Canadian Radio-television and Telecommunications Commission: Torys, Toronto.

TAB 15

Case Name:

Epcor Generation Inc. v. Alberta (Energy and Utilities Board)

Between
Epcor Generation Inc., applicant (appellant), and
Alberta Energy and Utilities Board, respondent

[2003] A.J. No. 1573

2003 ABCA 374

346 A.R. 281

128 A.C.W.S. (3d) 832

Docket Nos.: 03-0178-AC; 02-0033-AC

Alberta Court of Appeal
Calgary, Alberta

Fruman J.A.

Heard: December 12, 2003.
Judgment: December 22, 2003.

(32 paras.)

Administrative law -- Judicial Review, statutory appeal -- Final order or decision, what constitutes -- Leave to appeal -- Leave to appeal, when available -- Leave to appeal, question of law or of jurisdiction -- Boards and tribunals - - Jurisdiction of particular Boards and tribunals -- Energy and utility Boards.

Application by Epcor for leave to appeal Alberta's decisions. Alberta was the regulator setting electricity rates charged by Epcor. Because of uncertainty in prices, Alberta authorized Epcor to create a deferral account to record differences between actual prices and forecasted prices. The differences were expected to be small, Alberta ordered 50/50 sharing of the account's surplus or shortfall by Epcor and its customers to avoid windfall gains or unfair burden for losses, and stated the sharing ratio was subject to review and adjustment after year end calculations. The account accrued an unexpected surplus of $70 million, and had not been closed. Alberta varied the sharing ratio to 20/80

in favour of Epcor's customers on grounds of the substantial and unforeseen change in circumstances, and Epcor had not raised a substantial issue of jurisdiction or law or provided evidence or argument which showed the decision was wrong or contrary to the evidence. The Energy and Utilities Alberta Act provided for appeal from Alberta's decisions on questions of jurisdiction or law and the Electric Utilities Act empowered Alberta to review the continuation of unjust rates resulting from unforeseen changes in circumstances and review orders containing errors of law or fact. Epcor contended Alberta lacked jurisdiction to vary the sharing ratio because its 50/50 order was final, variation was retroactive rate making, and it was procedurally unfair. Epcor further contended Alberta erred in assessing the evidence and misapprehended the review test under the Electric Utilities Act.

HELD: Application dismissed. Leave to appeal was denied. Since Alberta's 50/50 decision was subject to review and adjustment after year end and the **account was not closed** it was not a final order, and was not retroactive rate making or procedurally unfair. Alberta had jurisdiction to vary the sharing ratio as a continuing unjust rate because of unforeseen circumstances under the Electric Utilities Act. Epcor's contention Alberta erroneously assessed the evidence was a fact-based argument which did not qualify as a ground for appeal under the Energy and Utilities Alberta Act. Alberta's finding that Epcor had failed to supply evidence that its decision was wrong or contrary to the evidence, correctly applied the review test under the Electric Utilities Act and cured any misstatement of the test.

Statutes, Regulations and Rules Cited:

Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 26.

Energy and Utilities Board Act, Rules of Practice, Reg. 101/2001.

Electric Utilities Act, R.S.A. 2000, c. E-5, s. 57(2)(c).

Counsel:

F.R. Foran, Q.C. and C. Hustwick, for the applicant (appellant).
J.R. McKee and A.E. Domes, for the respondent.

MEMORANDUM OF DECISION

FRUMAN J.A.:--

Introduction

1 The applicant, EPCOR Generation Inc., seeks leave to appeal several decisions of the Alberta Energy and Utilities Board: Decisions 2001-45 and 2001-95 (as amended by 2001-115), which altered the sharing ratio between EPCOR and its customers in relation to a deferral account; and the Board's decision not to review and vary Decision 2001-95 (as amended by 2001-115).

Facts

2 In Alberta, utilities are usually regulated using a future test year regulatory framework in which the Board approves a forecast of a utility's revenue requirements that equates to a forecast of its future costs. However, if the Board is unable to determine a just and reasonable forecast, deferral accounts may be established to deal with uncertain items. In this case, due to the inability to accurately forecast pool prices, deferral accounts were created for 1999 and 2000 pursuant to Decisions U99099 and 2000-5. The difference between the actual hourly pool prices and the forecast hourly pool prices would be calculated and recorded in the deferral accounts.

3 The decisions included a sharing formula pursuant to which EPCOR and its customers would share the deferral account balances. The original sharing ratio in Decision U99099 contemplated the customer alone would bear any surplus or shortfall, but the ratio was changed to 50/50 on February 1, 2000, in Decision 2000-5. In making the change, the Board indicated it did not want to "inappropriately dampen the hour by hour incentives" to EPCOR, but also wanted to "safeguard against inappropriate windfall gains or losses that have little to do with generation performance" (at 8).

4 In Decision U99099, the Board directed EPCOR to apply to the Board by April 1 in the following year in order to "collect or refund the balance in all their deferral accounts" (at 204). The Board recognized "that there will be further adjustments due to the disposition of deferral accounts" (at 12).

5 On March 30, 2001, EPCOR applied to the Board for termination of the 2000 pool price deferral account, which contained a surplus of approximately $70 million. On April 10, 2001, the Industrial Power Consumers and Cogenerators Association of Alberta (IPCCAA) applied to have the Board review and vary Decisions U99099 and 2000-5 to change the sharing ratio from 50/50 to 98/2 in favour of the customer. It argued that retention of $35 million by EPCOR would be a windfall gain.

6 In Decision 2001-45 the Board decided IPCCAA had met the threshold to review the sharing ratio, and indicated it would examine the ratio at the hearing initiated by EPCOR to close the 2000 deferral account. In Decision 2001-95 (as amended by 2001-115) the Board found that the test for variation of the sharing ratio had been met. It noted that the variance between actual and forecast pool prices was expected to be small, based on information provided primarily by EPCOR. However, the difference turned out to be anything but small, and the resulting surplus of approximately $70 million represented a substantial and unforseen change in circumstances (Decision 2001-95 at 27). The Board found that the majority of the surplus was due to high pool prices, not improved performance by EPCOR, and concluded the 50/50 sharing ratio resulted in a windfall gain to EPCOR that rendered the sharing formula unjust and unreasonable (at 29). The Board decided it had to distinguish between that portion of the surplus resulting from improved performance that should flow to EPCOR's shareholders, and that portion of the surplus resulting from unanticipated higher pool prices that ought to be returned to its customers (at 28). Based on the Board's consideration of the financial information, it changed the sharing ratio from 50/50 to 80/20 in favour of the customer (at 36).

7 On March 21, 2002, EPCOR submitted a review and variance application to the Board, seeking a review of Decision 2001-95 (as amended by 2001-115). This application was denied by the Board by letter dated May 26, 2003.

Test for Leave

8 Pursuant to s. 26 of the Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, leave to appeal decisions of the Board may be granted on questions of jurisdiction or law. The proposed appeal must raise a serious arguable issue: Nycan Energy Corp. v. Energy and Utilities Board (Alta.) (2001), 277 A.R. 391, [2001] A.J. No. 140, 2001 ABCA 31 at para. 3. In considering whether to grant leave, it may be appropriate to consider the standard of review this Court would apply, should leave to appeal be granted.

Decisions 2001-45 and 2001-95 (as amended by 2001-115)

9 In seeking leave to appeal Decisions 2001-45 and 2001-95 (as amended by 2001-115), EPCOR argues the Board committed a number of errors: first, the Board erred in determining it had jurisdiction to vary the sharing ratio because this was retroactive ratemaking; second, the Board was estopped from varying the sharing ratio or alternatively, it was procedurally unfair for the Board to make the variation after the conclusion of the year 2000; third, the Board erred in failing to provide adequate reasons for its conclusion about the surplus; and fourth, it erred in disregarding or rejecting EPCOR's evidence.

10 With respect to the first ground, EPCOR argues the Board erred in determining it had jurisdiction to vary the 50/50 sharing ratio and, by altering the ratio, engaged in retroactive ratemaking.

11 The Board based it jurisdiction on s. 57(2)(c) of the Electric Utilities Act, R.S.A. 2000, c. E-5, which states:

> 57(2) Any person affected by an order approving a tariff may ask the Board to review the order
>
> [. . .]
>
> (c) if, since the date of the order, circumstances have changed in a substantial and unforeseen manner that renders the continuation of the tariff unjust or unreasonable [. . .]

12 EPCOR argues the word "continuation" indicates a tariff can only be varied on a prospective, not a retroactive, basis. The Board agrees with this interpretation and confirms that it is not permitted to engage in retroactive ratemaking. The parties also agree the Board has jurisdiction to vary interim orders, **deferral accounts are usually interim rather than final orders**, and distribution of deferral accounts does not constitute retroactive ratemaking. See Edmonton (City of) v. Northwestern Utilities Ltd., [1961] S.C.R. 392; Coseka Resources Ltd. v. Saratoga Processing Co. (1981), 31 A.R. 541 (C.A.)., leave to appeal to S.C.C. refused, 126 D.L.R. (3d) 705 n, [1981] 2 S.C.R. vii.

13 However, EPCOR argues its situation is unique and, indeed, the Board acknowledges that most orders creating deferral accounts do not establish sharing ratios. EPCOR submits that because the Board fashioned the sharing ratio in consideration of its particular costs and risks, the ratio was a final order of the Board, and the Board engaged in retroactive ratemaking in varying it. It contends that nothing more than accounting or mathematical corrections were expected at the time it applied to terminate the deferral account.

14 The Board submits the order is not final until the deferral account is closed and the balance is paid in or disbursed. It argues the rule against retroactive ratemaking is based upon a forecast-based approach to tariff setting. Deferral accounts are not forecast-based. They are established when a cost

item is not subject to reasonable forecast and consist of actual gains or losses realized during the applicable period. These gains or losses are addressed through payments into, or out of, the deferral account, as directed by the Board after the deferral period. The Board contends the order establishing the deferral account and sharing ratio is interim in nature and **adjustments to either do not contravene the rule against retroactive ratemaking.**

15 EPCOR's retroactive ratemaking argument hinges on the **characterization of the original order as interim or final, which in turn depends largely on the facts.** EPCOR contends that because of unique factual circumstances, the sharing ratio was neither an interim order nor a standard deferral account provision, but a final order.

16 The Board viewed the circumstances differently. In deciding to vary, the Board relied on the fact Decision U99099 contemplated Board review of the deferral account balances, and recognized that adjustments might be required as a result of that review. The Board decided the deferral accounts were therefore "left open" and "continued" within the meaning of s. 57(2)(c) of the Electric Utilities Act, supra and, because the deferral accounts had not been reconciled or the moneys disbursed, a decision to review the sharing ratio and the ultimate collection and disbursement of funds would be prospective in nature (Decision 2001-45 at 23). These findings are within the Board's jurisdiction and expertise and, on judicial review, this Court would defer to the Board on such matters.

17 Other facts are also important, including previous changes to the sharing ratio. EPCOR contends that to avoid retroactive ratemaking, any change to the sharing ratio had to be made during the 2000 calendar year and would only affect accruals to the deferral account on a going-forward basis, that is, after the sharing ratio was altered, but not before. However, the sharing ratio was changed on February 1, 2000, at EPCOR's request, from 100/0 in favour of the customer to 50/50. That change was retroactive to January 1, 2000, which is inconsistent with EPCOR's present position.

18 Moreover, EPCOR's argument that changes to the sharing ratio had to be made during the 2000 calender year poses a number of practical difficulties. Deferral accounts are created in response to uncertainty, which may result from rapidly changing circumstances. In theory, significant price swings could justify variations to the sharing ratio on a daily or even hourly basis, which would be unworkable given the time and cost of hearings. While EPCOR might have some idea of the running balance in the deferral account, **a customer would have to request and wait for the results of an audit**, then assemble and submit an application. During the intervening time period, further changes in circumstances could make the application moot. These problems support the Board's position that the sharing ratio was an interim and not a final order, and that adjustments to the sharing ratio should be handled the same way as other adjustments to the deferral account.

19 Given the strong factual component that underlies this ground of appeal, the inconsistency and logistical difficulties associated with EPCOR's position, and the applicable standard of review, the first ground does not meet the test for leave.

20 With respect to the second ground, EPCOR argues the Board was estopped from varying the ratio or, alternatively, it was procedurally unfair for the Board to vary it after the year-end. The estoppel argument fails to establish a basis on which to grant leave. EPCOR concedes public estoppel may not apply. See Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services), [2001] 2 S.C.R. 281. Private estoppel depends on a proper factual foundation, including a promise intended to be acted upon and detrimental reliance. Estoppel of any kind was not raised be-

fore the Board, evidence was not led to address these factors and the Board did not make fact findings about them. An application for judicial review is not the appropriate forum in which to raise this issue.

21 Nor can it be said that it was procedurally unfair for the hearing to be held after the year 2000. The status of the deferral accounts could only be properly assessed when all the accrued amounts had been calculated, which could only occur after year-end. EPCOR applied for termination of the accounts, the variation application was heard at the same time, and EPCOR participated fully in the proceedings. Accordingly, the second ground also fails.

22 The third ground, that the Board did not provide adequate reasons, does not raise a serious arguable legal issue.

23 EPCOR's submission that the Board erred in disregarding or rejecting evidence raises issues of fact, not law or jurisdiction. The Board is free to accept or reject evidence presented by the parties and, as an expert tribunal, it is entitled to use its expertise to arrive at different conclusions than the parties. Indeed, the highly technical nature of the disputed evidence demonstrates why evaluation of such evidence properly falls within the Board's purview.

24 EPCOR argues the Board's rejection of evidence is patently unreasonable and amounts to a jurisdictional error or an error of law: Blanchard v. Control Data Canada Ltd., [1984] 2 S.C.R. 476. However, this standard is very difficult to meet and will only be satisfied when the evidence is incapable of supporting the tribunal's findings: Canadian Union of Public Employees, Local 301 v. Montreal (City), [1997] 1 S.C.R. 793.

25 Here the Board rejected EPCOR's submission that the increased surplus was entirely attributable to improved performance, and therefore did not accept EPCOR's calculations. The Board had the raw data before it. It identified the components of the increased surplus that reflected improved performance and those that reflected windfall, then used its expertise to calculate each of them. While EPCOR may disagree with the results, it cannot be said that the evidence was incapable of supporting the Board's conclusions. Nor can it be said that it was procedurally unfair for the Board to proceed in this fashion.

26 Accordingly, leave to appeal Decisions 2001-45 and 2001-95 (as amended by 2001-115) is dismissed.

Review and Variance Application

27 EPCOR seeks leave to appeal the Board's decision not to review and vary Decision 2001-95 (as amended by 2001-115). Pursuant to s. 57(2)(d) of the Electric Utilities Act, a person may ask the Board to review an order if, in the Board's opinion, the order contains an error of law or fact. Section 46(5)(i) of the Alberta Energy and Utilities Board Rules of Practice, Alta. Reg. 101/2001, provides that a review application is to be dismissed if an applicant fails to raise a substantial doubt as to the correctness of the Board's order when an error of law, jurisdiction or fact is alleged.

28 EPCOR argues the Board misapprehended the test for review. The Board dismissed the review application and referred to EPCOR's failure to "raise a substantial issue as to [an] error of law or jurisdiction." EPCOR points out that this wording omits an error of fact, which is part of the statutory test.

29 The evidence and argument submitted by EPCOR in the review application were fact-based and technical. In its decision, the Board noted EPCOR "failed to bring any evidence or argument

which shows that these decisions were wrong or contrary to the evidence." This indicates that although the Board may have misstated the test for review, it applied the test correctly.

30 The Board found no basis for further review. Because the test for variation in s. 57(2)(d) of the Electric Utilities Act invokes the Board's discretion, its conclusions on matters within its jurisdiction and expertise would attract considerable deference on appeal. Here, the major challenge was EPCOR's disagreement with the Board's allocation and calculation of the surplus, which fits comfortably within the Board's jurisdiction and expertise. No question that meets the test for leave has been demonstrated.

31 EPCOR also complains about the adequacy of the Board's reasons and its dismissal of EPCOR's evidence. These grounds do not meet the test for leave to appeal.

32 The applications are therefore dismissed.

FRUMAN J.A.

cp/e/qw/qlmmm/qlcas

---- End of Request ----
Print Request: Current Document: 3
Time Of Request: Wednesday, November 04, 2009 09:55:41

TAB 16

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2007-0744

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

AND IN THE MATTER OF an application by Great Lakes Power Limited for an Order or Orders approving just and reasonable rates and other service charges for the distribution of electricity, effective September 1, 2007.

BEFORE: Paul Sommerville
Presiding Member

Bill Rupert
Member

Cathy Spoel
Member

DECISION AND ORDER

THE APPLICATION

Great Lakes Power Limited ("GLPL", the "Applicant" or the "Company") filed an application under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Schedule B) with the Ontario Energy Board (the "Board"), received on August 31, 2007, seeking approval for changes to the rates that GLPL charges for electricity distribution, to be made effective September 1, 2007. In addition, GLPL requested the Board to make the current distribution rates interim as of September 1, 2007 and to authorize the establishment of a deferral account to record revenue requirement deficiencies incurred from September 1, 2007 until new distribution rates are implemented.

GLPL initially requested a revenue requirement of $17,576,700 to be recovered in new rates effective September 1, 2007. The application indicated that the existing rates would produce a revenue deficiency of $8,089,200 for 2007. The Company subsequently revised the requested revenue requirement to $17,513,100 as detailed in the Table 1 below. The resulting impact of the Company's requested rate application was estimated at +1.6% on the electricity bill for a residential customer consuming 1,000 kWh per month. This rather modest effect is attributable in large part to the role of the RRRP. This does not include the effect of the Company's proposals with respect to the disposal of variance and deferral accounts, which would add an additional 0.9%.

The Board assigned the application file number EB-2007-0744 and issued a Notice of Application and Hearing dated October 18, 2007. The Board approved four interventions: the Vulnerable Energy Consumers Coalition ("VECC"), the Algoma Coalition, Hydro One Networks Inc. and Dubreuil Forest Products Limited ("Dubreuil"). All intervenors and Board staff were active in the proceeding.

As noted above, as part of its application GLPL requested that the Board make its current rates interim commencing on September 1, 2007. In its decision on this request the Board found that GLPL's current rates should be made interim commencing on January 1, 2008.

On January 11, 2008, the Applicant filed a Notice of Motion for a review of the Board's Decision and Order on Interim Rates (EB-2007-0744) dated December 20, 2007, and for the Board to calculate the average of any rate adjustment for other distributors in accordance with O. Reg. 442/01. The Board assigned file number EB-2008-0016 for the Motion to Review. In Procedural Order No. 2 (EB-2007-0744, EB-2008-0016) dated January 29, 2008, the Board stated that it would consider the calculation of the adjustment to rates for other distributors when it considered the Applicant's request for just and reasonable rates. On March 20, 2008, the Board issued a Decision on the Motion To Review (EB-2008-0016) and declared GLPL's current rates interim as of September 1, 2007.

A Technical Conference was held on April 4, 2008 and an Oral Hearing on May 9, 2008. GLPL's Reply Submissions were filed on June 2, 2008.

The full record is available at the Board's offices. In this decision, the record is summarized to the extent necessary to provide context to the Board's findings.

BACKGROUND

GLPL presents a unique challenge for the Board. In reviewing the record for this case and examining the history of this applicant before the Board it has become clear that conventional ratemaking practice cannot address the issues presented by this applicant.

Conventional ratemaking cannot result in a rate that will cover the Company's costs, provide for a reasonable return on investment, while being reasonable from a ratepayer's point of view.

This circumstance arises directly out of the characteristics of the Applicant's service area. The Applicant's service area is more than twice the area of the greater Toronto area. It has less than 12,000 customers and has the lowest customer/kilometer ratio in Ontario with only 6.7 customers per kilometer on average. 99.9% of its service area is rugged and sparsely populated wilderness. Its service area is characterized by long runs of distribution wire between customers.

This is a high cost, low revenue service area.

For a number of years Great Lakes Power Limited operated an integrated generation, transmission and distribution company. It is apparent that when these businesses were operated together, the distribution business was significantly subsidized by the other relatively more lucrative undertakings. When the Company reorganized its operations to meet market restructuring rules, so as to operate the businesses separately, the inability of the distribution business to be compensatory came into high relief.

It is clear that the provincial government has come to the same conclusion.

The adoption of Regulation 445/07 (the "Reclassification Regulation")[1] and the amendment of Regulation 442/01 (the "RRRP Regulation")[2] were an effective response to the circumstances presented by Great Lakes Power Limited. In essence, these regulatory instruments extend rural and remote rate protection to virtually all of the

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[1] Ontario Regulation 445/07, *Reclassifying Certain Classes of Consumers as Residential-Rate Class Customers: Section 78 of the Act*, filed August 2, 2007.
[2] Ontario Regulation 442/01, *Rural or Remote Electricity Rate Protection*, filed November 30, 2001, as amended by Ontario Regulation 335/07, filed July 5, 2007.

Company's customers, by deeming them to be residential customers for the purposes of access to significant additional funding through the rural and remote rate protection mechanism. By this device, the significant gap between what the Company needs by way of revenue requirement and a reasonable prospect of recovery through rates can be bridged. These Regulations are attached as Appendix A of this decision.

This entire application has been affected by these unique circumstances. The Board has reviewed the Applicant's revenue requirement conventionally. That is, the Board has established in the course of this decision the basis for a revenue requirement that is supported by the evidence filed by the Applicant. However, the Board's consideration of every aspect of the recovery of the revenue requirement through rates has been affected by these regulations, either through their specific requirements or their intent.

THE ISSUES

Table 1 summarizes the elements of GLPL's proposed revenue requirement.

Table 1: Proposed Revenue Requirement

2007 Costs per Revised Application	*000s*
OM&A expenses	$ 7,996
Depreciation and amortization	3,623
Property taxes	164
Ontario capital tax	124
Income tax	1,573
Cost of debt	1,810
Return on equity	2,606
Less: Other revenue	(383)
Base revenue requirement	**17,513**
Add: Transformer credit	34
Less: RRRP	(8,868)
Revenue to be collected in rates	**$ 8,680**

Source: Derived from Table 10-1 in GLPL's Argument-In-Chief

In addition to the proposed revenue requirement set out in Table 1, GLPL applied for approval to clear the balances in several deferral and variance accounts. One of those

accounts, Account 1574, Deferred Rate Impact, Sub Account Rate Mitigation, includes approximately $14.9 million that has been accumulated since 2002. The Board's findings on that account affect the Board's findings on other aspects of GLPL's application. Therefore, this decision first addresses that issue. The balance of the decision deals with the following issues:

- OM&A expenses
- Cost of capital
- Rate base and capital expenditures
- Load forecasting
- Line losses
- Change in customer classifications
- 2007 Test Year Income Tax
- Deferral and variance accounts in addition to account 1574.

ACCOUNT 1574 – DEFERRED RATE IMPACT

As a result of separating the distribution business from its other businesses in 2002, GLPL began using Deferral Account 1574 to accumulate distribution costs that it believed were not being recovered through the rates then in effect. The Company has continued to use this account until the present and now seeks approval to clear the balance in that account, which has been identified as approximately $15.2 million.

Account 1574 has two sub-accounts; namely Sub Account Boniferro and Sub Account Rate Mitigation

Account 1574 Deferred Rate Impact – Sub Account Boniferro

GLPL is requesting clearance of balances in this sub-account (approximately $0.3 million) related to the revenue deficiency that was a consequence of the Board's finding in RP-2005-0031/EB-2005-0013. The company proposed that the amounts recovered in this account be recovered in a separate rate rider, distinct from other regulatory accounts.

No parties made any submissions on this matter.

Board Findings

The Board approves disposal of the balance in this sub account as of the effective date of this decision. Since the company will have to calculate lost revenue for the period from the effective date to the implementation date, there will be no deferred revenue to accrue to the Boniferro sub-account after the effective date. Also, clearance of this sub-account is subject to the Implementation of Clearance of Deferral and Variance Accounts section in this decision. This sub-account shall be closed as of the effective date of this decision.

Account 1574 Deferred Rate Impact – Sub Account Rate Mitigation

GLPL is seeking Board approval to recover the August 31, 2007 balance in this sub account of $14,890,315 over approximately 11 years.[3]

From May 1, 2002 to August 31, 2007, GLPL deferred approximately $2.8 million per year in Account 1574, being the pre-tax return on equity and the grossed-up tax proxy that GLPL contends that it has foregone as a result of its voluntary 2002 rate mitigation plan. The account also includes carrying charges.

Most of the evidence and arguments on this issue dealt with the question of whether the Board ever approved the accumulation of these amounts in a deferral account for future recovery from ratepayers.

Background

GLPL began to use Account 1574 in 2002, when its distribution rates first became subject to regulation by the Board. Before May 2002, GLPL's distribution business was part of an integrated generation, transmission and distribution utility that was not regulated by the Board. In March 2002, GLPL applied for Board approval of distribution rates, effective May 1, 2002. That application included a 2002 revenue requirement of $12.7 million. GLPL did not propose, however, that 2002 distribution rates be set to recover that amount. Instead, GLPL proposed a rate mitigation plan that would result in the 2002 rates being set to recover only $9.8 million. GLPL proposed that the un-

[3] GLPL's pre-filed evidence showed a balance in Account 1574 of $15,635,952. The Company subsequently reduced the amounts of income taxes and carrying charges included in the account.

recovered revenue requirement in 2002 (and also 2003) would be deferred and recovered in rates over four years beginning in 2005.

On May 13, 2002, the Board approved, on an interim basis, the rates proposed by GLPL.[4] That is, the Board approved rates which were calculated to recover $9.8 million annually. The Decision and Order noted that "GLPL sought to have the new rate schedules take effect upon the date that subsection 26 (1) of the *Electricity Act, 1998* comes into force [May 1, 2002]." The Decision and Order also notes that the "the Board finds it expedient" to approve the rate schedules on an interim basis effective May 1, 2002.

The Board never subsequently considered GLPL's 2002 application.

In December 2002, the Ontario Legislature passed Bill 210, which in addition to other matters, introduced a new section 79.3 of the *Ontario Energy Board Act, 1998.* Subsection 2 of that section stated "If an interim order under section 78 was in effect on November 11, 2002, the order shall be deemed to be a final order and applies to electricity used on or after December 1, 2002." As a result, the Board's interim order on GLPL's 2002 rates was, by operation of the statutory amendment, made a final order. The new section 79.3 also prohibited the Board from adjusting the rates charged by distributors unless approval for such an adjustment was received from the Minister of Energy. That prohibition was lifted on January 1, 2005.

In 2003, the Ontario government extended the Rural or Remote Electricity Rate Protection (RRRP) plan to GLPL. The Minister of Energy directed the Board to reduce distribution rates for residential and other customers to recognize the availability of RRRP. The Minister's June 27, 2003 letter to the Board indicated that the new rates were "based on a total revenue requirement, including Rural and Remote Rate Protection of $9.8 million. This reflects the revenue requirement on which current rates are based." The proposed rate schedule attached to the Minister's letter showed Revenue to be Recovered in Rates of $7,492,989, being Total Revenue Requirement of $9,826,797 less Rural and Remote Rate Protection of $2,333,808.

The Board approved the new rates in July 2003, with an effective date of May 1, 2002.[5]

[4] EB-2002-0249/EB-2002-0277/RP-2002-0109, Interim Decision and Order, May 13, 2002.

[5] RP-2003-0149, Rate Order, July 11, 2003.

In January 2004, GLPL applied for recovery of the first instalment (25%) of the December 31, 2002 balances of certain regulatory asset accounts. It should be noted that the Regulatory Assets Account was intended to capture costs incurred by distributors in readying themselves for market opening. Such costs often included computer system upgrades, and other like disbursements associated with the transition to the new market. It was not intended to capture the effects of rate mitigation efforts. In its filing guidelines for this process, the Board noted that distributors would not be required to provide evidence justifying the balances. In any event, the balance in Account 1574 was not included in GLPL's regulatory asset application[6].

In its application for recovery of the second instalment of regulatory asset balances, GLPL included the balance in Account 1574. The Board approved, on an interim basis, recovery of 80% of the amount sought by GLPL.[7] As with the 2004 proceedings on regulatory assets, distributors were not required to provide evidence justifying regulatory asset amounts.

Submissions of the parties

GLPL's principal argument in support of recovery of Account 1574 is that, by approving GLPL's "mitigated" 2002 rates on an interim basis, the Board implicitly approved GLPL's proposed revenue requirement of $12.7 million and the company's proposed rate mitigation plan.

GLPL submitted that the Board had to have been aware that the "mitigated" 2002 rates proposed by GLPL, and approved by the Board on an interim basis, would result in GLPL not being able to collect its proposed revenue requirement of $12.7 million. GLPL noted that the $12.7 million revenue requirement was based on a return on equity of 9.88%, a return used by the Board to set rates of other distributors. GLPL argued that

[6] In March 2004, the Board granted interim approval to GLPL for a recovery of 25% of regulatory asset balances (see RP-2004-0119/EB-2004-0423, Decision and Order, March 16, 2004). GLPL subsequently filed a Notice of Motion requesting the Board to vary its decision and to permit GLPL to recover a portion of the balance in account 1574. The material supporting the motion included an amended application that incorporated the balance in Account 1574. The Board denied GLPL's request to amend the interim order. The Board's decision (RP-2004-0119/EB-2004-0243, Decision and Order, April 16, 2004) stated: "The Board cannot be expected to vary its previous decision because an applicant might have thought that, after the fact, it could have included in its original application the recovery of this amount." The Board also noted that GLPL could seek inclusion of the deferred amount as part of the second phase of the Regulatory Assets Proceeding.

[7] RP-2005-0013/EB-2005-0031, Decision and Interim Order, March 30, 2005.

because the Board (a) would have been aware of its statutory obligation to set just and reasonable rates, even on an interim basis, and (b) would have known that the "mitigated" 2002 rates would not result in a return on equity of 9.88%, a return that GLPL concluded was fair, the Board must have accepted the full $12.7 million revenue requirement and the company's rate mitigation plan before it could approve the "mitigated" 2002 rates on an interim basis.

GLPL submitted that all rate orders, whether interim or final, issued by the Board under section 78 (3) of the *OEB Act* must set rates that are just and reasonable and cited case law in support of this position. GLPL also submitted that it is a well established regulatory principle that "just and reasonable rates" must be set at levels to allow a utility the opportunity to earn a fair return on invested capital. It argued that it would be wrong to view the Board's May 13, 2002 interim order as a stop-gap measure that was intended to facilitate the prompt unbundling of GLPL's electricity businesses in time for the opening of the Ontario electricity market on May 1, 2002. It argued that, although the Board might not have decided on all of the components of GLPL's 2002 application before issuing the interim order, it was required to turn its mind to the rates it approved and those rates would have to be just and reasonable. In order to find in GLPL's favour the Board should be presumed to have accepted GLPL's rate mitigation proposal and to have found that the interim rates set to collect $9.8 million could not be considered just and reasonable unless the $12.7 million revenue requirement and the rate mitigation plan were also approved.

The June 27, 2003 letter from the Minister of Energy, referenced above, which directed the Board to reduce GLPL's residential rates stated: "The amended rate schedule is based on a total revenue requirement of $9.8 million including Rural and Remote Rate Protection." GLPL submitted that this statement does not suggest that the Board approved a revenue requirement of only $9.8 million for 2002. GLPL relies on the second paragraph of the Minister's letter, which states:

> *This support [RRRP] will result in significant reductions to overall electricity bills for these customers. In addition, when combined with the company's own mitigation efforts, industrial and large commercial customers will also enjoy reduced electricity distribution rates." [emphasis added by applicant in its submission]*

GLPL takes the position that the reference to the "company's own mitigation efforts" should be interpreted as the Minister acknowledging that the revenue requirement for 2002 was $9.8 million plus the mitigation amount of $2.9 million.

VECC argued that there is no evidence that either the Board or the Minister of Energy implicitly approved GLPL's rate mitigation plan. VECC does not dispute that interim rate orders must have an evidentiary basis, and that they must be just and reasonable. But VECC argued that those requirements do not detract from their fundamental nature as orders which are interim pending a final determination by the Board. VECC submitted that the facts are that the Board never made a final order on the appropriateness of GLPL's 2002 rate application.

Board staff submitted that the 2002 rates approved on an interim basis were not based on GLPL's rate mitigation proposal. Staff argued that:

> *GLPL rates were set on recovery [of] expenses, such as depreciation and OM&A. Rates would likely have changed if the application was subject to a full review (e.g.,OM&A expense allowed for recovery in rates may have been reduced as has occurred in other applications).*

GLPL argued that Board staff provided no evidence that the 2002 rates were expense-based. GLPL also urged the Board to disregard Board staff's statement that 2002 rates would likely have changed had a full hearing taken place. The 2002 revenue requirement cannot be revisited in this proceeding and the Board should not be guessing about what might or might not have transpired in the event of a full hearing.

Both VECC and Board staff also argued that the Board's Accounting Procedures Handbook ("APH") prohibits use of Account 1574 without explicit Board approval. GLPL acknowledged that it did not seek Board approval to use Account 1574 and argued that it was not required to do so. GLPL argued that VECC and Board staff had misinterpreted the provisions of the APH concerning Account 1574.

The Algoma Coalition objected to approval of recovery of Account 1574 over the next 11 years, especially in light of the lack of revenue and cost projections for that period. The Coalition also expressed concern about what it describes as GLPL's failure to notify customers or act on the account prior to incurring significant carrying costs. The

Coalition supported staff's submission about GLPL's lack of authority to establish Account 1574.

Board Findings

The following facts touching on this issue are not in dispute:

- The GLPL distribution rates approved by the Board and attached as Appendix A to its May 13, 2002 Interim Decision and Order did not reflect a revenue requirement of $12.7 million.
- Neither the Board's May 13, 2002 interim decision and order nor any subsequent Board decision or order in respect of GLPL's distribution business approve, or even mention, a $12.7 million revenue requirement for 2002 or a rate mitigation plan.
- GLPL did not receive any explicit authorization from the Board to accumulate amounts in Account 1574 for future recovery from ratepayers.

Notwithstanding the lack of even a single reference in any Board document to a $12.7 million revenue requirement for 2002 or a rate mitigation plan, the Board is being asked by GLPL to find that those items were carefully considered by the Board and implicitly approved in the May 13, 2002 interim rates decision.

The Board does not accept GLPL's argument.

Firstly, GLPL is speculating about what the Board did or did not consider before issuing its interim decision. It provides no evidence that the $12.7 million proposed revenue requirement and rate mitigation plan were approved. If the May 13, 2002 decision, which is completely silent on those issues, can be interpreted as "implicit approval" of GLPL's proposal, then it can as easily be interpreted as "implicit disapproval" of the proposal. The silence of the Board on this issue cannot be reasonably used as evidence of its endorsement of what was at the time a material proposition affecting present and future rates.

Secondly, GLPL's position ignores the context for the Board's May 13, 2002 interim decision. GLPL's distribution business was not regulated by the Board until 2002. The May 13, 2002 interim decision and order was the first Board order setting rates for

GLPL's distribution business. It is inconceivable that the panel that rendered the May 13, 2002 decision would have approved a $12.7 million revenue requirement (and the rate mitigation plan) without any input from the interested parties. To have done so would have been totally inconsistent with the Board's longstanding practice of ensuring that affected parties have a fair opportunity to be heard.

Thirdly, GLPL is attaching much more significance to an interim order than is warranted. Section 21 (7) of the OEB Act states: "The Board may make interim orders pending the final disposition of a matter before it." The evidentiary basis for interim rate decisions is almost always less complete than it is for a final decision and the applicant's pre-filed evidence is generally untested. In a 1989 decision (which is quoted in part in the GLPL argument), the Supreme Court described the distinction between interim and final orders:

> *A consideration of the nature of interim orders and the circumstances under which they are granted further explains and justifies their being, unlike final decisions, subject to retrospective review and remedial orders. The appellant [CRTC] may make a wide variety of interim orders dealing with hearings, notices and, in general, all matters concerning the administration of proceedings before the appellant. Such orders are obviously interim in nature. However, this is less obvious when an interim order deals with a matter which is to be dealt with in the final decision, as was the case with the interim rate increase ordered in Decision 84-28. If interim rate increases are awarded on the basis of the same criteria as those applied in the final decision, the interim decision would serve as a preliminary decision on the merits as far as the rate increase is concerned. This, however, is not the purpose of interim rate orders.*
>
> *Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of*

the duration of the proceedings are essential characteristics of an interim rate order.[8]

In summary, GLPL's position is without foundation. There is simply no basis upon which the Board can conclude that the accumulation in this account was ever explicitly or implicitly approved by the Board, either as to the amounts added to it over the years, or the more basic question as to the appropriateness of the use made of the account by the Applicant at all. Permitting GLPL to dispose of the account as it has requested would not be consistent with reasonable regulatory practice or common sense, and the GLPL's proposal is denied.

OM&A EXPENSES

The following table is derived from Board staff's submission and sets out amounts contained in GLPL's evidence and confirmed by GLPL to be accurate:

Table 2: Controllable OM&A Expenses

	2005 Actual	2006 Actual	2007 Forecast
Operations	$ 1,438,000	$ 1,582,700	$ 1,695,200
Maintenance	2,968,000	2,873,600	2,865,800
Billing and Collection	1,045,300	1,076,100	1,144,400
Administration	1,908,300	2,067,600	2,290,300
Total Controllable OM&A	**$ 7,359,600**	**$ 7,600,000**	**$ 7,995,700**
Increase over prior year		**3.3%**	**5.2%**

Board staff noted that while the overall increase in GLPL's controllable OM&A from 2005 to 2007 is forecast to be 8.6%, there were a number of components of the increase that were considerably larger. Board staff sought additional clarification from the Applicant related to increases in some of these areas. Neither VECC nor the Algoma Coalition had any submissions related to GLPL's OM&A expenses. In its Reply Submissions, GLPL responded to the concerns raised by Board staff.

[8] Bell Canada v. The Canadian Radio-Television and Telecommunications Commission [1989] 1 S.C.R. 1722, p. 34.

Outside Services Employed

The amount in this account has increased from $644,200 in 2005 to $855,500 in 2007, an increase of 33%. GLPL identified that "the net increase in the account is primarily due to an increase in expenses associated with regulatory issues." Board staff noted that GLPL did not explain which regulatory issues were driving the increase, or provide a breakdown of the increase between these issues. In its Reply Submissions, GLPL argued that a significant point related to this account that Board staff's submission had failed to highlight was that GLPL had proposed a $62,700 decrease in this account from 2006 to 2007.

Bad Debt Expense

Board staff noted the Applicant's statement that the proposed 2007 recovery for bad debt expense, which increased by 54% from 2006 to 2007, was based on a historical average from 2003 to 2006. Staff expressed the concern that both 2005 and 2006 actual bad debt expenses were much lower than 2003 and 2004 expenses, and stated that it was unclear why, under such circumstances, a four-year average provides an appropriate forecast of bad debt expense. In its Reply Submissions, GLPL stated that the four-year average normalized the history and provided a forecast that GLPL felt was neither too high nor too low. Furthermore, GLPL stated that it had no reason to believe that the lower bad debt expenses in 2005 and 2006 were indicative of a trend that would continue to 2007 and beyond.

Station Buildings and Fixtures Expense

Board staff noted that GLPL had listed eight factors influencing the 50% increase ($181,000) in this expense from 2005 to 2007, but had not provided a breakdown of the amount of the increase between these factors. In its Reply Submissions, GLPL listed the four largest contributing factors and their amounts.

Meter Expense

GLPL stated that there was a $114,700 (52%) increase in this expense between 2006 and 2007. GLPL provided an explanation of the components of the increase, but staff expressed the concern that it was unclear as to why these costs increased so much in

TAB 17

Case Name:

Great Lakes Power Ltd. v. Ontario Energy Board

Between
Great Lakes Power Limited, Appellant, and
Ontario Energy Board, Respondent

[2009] O.J. No. 3146

253 O.A.C. 1

Court File No. 610/08

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

J.M. Wilson, S.N. Lederman and K.E. Swinton JJ.

Heard: June 2, 2009.
Judgment: July 21, 2009.

(44 paras.)

Natural resources law -- Public utilities -- Operation of utility -- Toll methodology -- Rates -- Regulatory tribunals -- Appeals -- Appeal by Great Lakes Power Ltd (GLPL) from a decision of the Ontario Energy Board (OEB) dismissed -- GPLP was a licensed distributor, transmitter and generator of electricity -- The OEB decision refused GLPL's request for authorization to recover $14,890,315 through electricity distribution rates as GLPL's costs first had to be reviewed for reasonableness -- The OEB was obliged to protect the interests of ratepayers by ensuring the reasonableness of a distributor's revenue requirement -- Therefore, the OEB's conclusions were reasonable and it made no error of law or jurisdiction.

Statutes, Regulations and Rules Cited:

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Schedule B, s. 33, s. 78(3)

O.Reg. 339/02,

Counsel:

Alan H. Mark and Christine Kilby, for the Appellant.

Glenn Zacher and Patrick G. Duffy, for the Respondent.

The judgment of the Court was delivered by

S.N. LEDERMAN J.:--

Nature of the Proceeding

1 The Appellant, Great Lakes Power Limited ("GLPL"), appeals from the Decision and Order of the Ontario Energy Board (the "OEB"), dated October 30, 2008 (the "Decision"). The Decision was the OEB's ruling on a rate application by GLPL. GLPL contends that the Decision had the effect of denying GLPL recovery of all of its costs of service, including a return on its invested capital, of its electricity distribution business since 2002.

Background

2 GLPL is a private company that is a licensed distributor, transmitter and generator of electricity. It provides services to a small customer population in an expansive area of Northern Ontario. The OEB is the regulator of the Ontario electricity sector and has extremely broad authority under s. 78(3) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Sched. B) ("*OEBA*") to make orders approving or fixing "just and reasonable rates" for the distribution of electricity. As a privately owned utility, GLPL has always been allowed a return on equity ("ROE") and such return is recovered by way of rate treatment.

3 Prior to May 1, 2002, GLPL's rates were "bundled rates" for transmission, distribution and costs of power. As a result of the legislated restructuring of Ontario's electricity industry in May, 2002, GLPL was no longer able to maintain bundled rates for its distribution customers. As a result, it could no longer pass a portion of distribution costs on to non-distribution customers.

4 On March 28, 2002, GLPL filed a distribution rate application with the OEB (the "2002 Application") wherein it sought approval of a revenue requirement of $12.7 million. Included in this amount was a ROE of $2,891,600.

5 The restructuring of the electricity industry then underway in Ontario was going to result in a substantial rate increase for GLPL's distribution customers, if unmitigated.

6 To avoid the impact of "rate shock" on customers, GLPL voluntarily proposed a rate mitigation plan, which would result in 2002 and 2003 rates being set at levels which would recover revenues of only $9.8 million and defer the recovery of the remainder of the $12.7 million revenue requirement over four years beginning in 2005 (the "Deferral Plan").

7 To ensure that GLPL would have unbundled distribution rates in place for the electricity market opening on May 1, 2002, as required by legislation, the OEB issued an interim order (the "2002 Interim Order"). The OEB approved the rate proposed by GLPL's 2002 Application necessary to recover $9.8 million annually for its costs, which, according to GLPL, was calculated on the basis of approval and implementation of the Deferral Plan.

8 Commencing on May 1, 2002, GLPL charged the rates authorized by the 2002 Interim Order and began deferring approximately $2.8 million per year that it alleges that it has foregone as a re-

sult of its voluntary rate mitigation plan. It accumulated those amounts in its books in Account 1574 (a deferral account authorized by the *Accounting Procedures Handbook* issued by the OEB) to be collected at some future period.

9 Prior to the OEB conducting a full hearing in GLPL's 2002 Application, the Ontario Legislature, in December 2002, enacted Bill 210 to implement a "rate freeze" that prohibited the OEB from adjusting distribution rates without approval of the provincial Minister of Energy. Included in the legislation was a provision that deemed all outstanding interim rate orders to be final rate orders, such that the OEB's 2002 Interim Order was made a final Order. Bill 210 also created "Regulatory Assets" in the form of amounts recorded in prescribed accounts to be recovered at a prescribed point in the future. The Regulatory Asset accounts were intended to capture costs incurred by distributors in readying themselves for market opening. By regulation O.Reg. 339/02, Account 1574 was included in such Regulatory Assets.

10 On December 9, 2004, electricity rates were "unfrozen" by the enactment of Bill 100. As a result, GLPL was permitted to apply to the OEB for the approval of new rates. On January 17, 2005, GLPL applied to the OEB to recover a portion of outstanding balances in its Regulatory Asset accounts. GLPL's application expressly included the recovery of a portion of the outstanding balance in Account 1574. On March 30, 2005, the OEB approved, on an interim basis, recovery of 80% of the amount sought by GLPL. It thereby allowed GLPL to recover $1,265,541 of its Regulatory Asset account balances (including amounts from Account 1574), and adjusted GLPL's rates accordingly, effective April 1, 2005 (the "Recovery Order"). From and after April 1, 2005 until the Decision became effective, GLPL recovered, under the express authorization of the OEB, some of the deferred amounts accumulated in Account 1574.

11 On August 31, 2007, GLPL applied to the OEB to set new rates. Among other things, the application sought authorization to recover the balance of its Account 1574 in the amount of $14,890,315 and to recover that balance over 11 years through electricity distribution rates.

The OEB Decision

12 The OEB refused GLPL's request to recover the balance in Account 1574.

13 In the portion of its Decision addressing the recovery of the Account 1574 balance, the OEB focused on whether it had authorized GLPL's use of Account 1574 and whether such authorization was required. Because the 2002 Interim Order did not explicitly mention the Deferral Plan or the $12.7 million revenue requirement, the OEB found that there was insufficient evidence to demonstrate that the OEB had considered the Deferral Plan in setting rates in the 2002 Interim Order. The OEB concluded that the 2002 Interim Order could not be taken even implicitly as having in any way approved the revenue requirement or the accumulation of the deferred amounts in Account 1574.

14 The OEB found that the purpose of its 2002 Interim Order was to provide GLPL on an expedient basis with distribution rates in time for the opening of the new electricity market on May 1, 2002, and that the OEB had not considered the merits of, or approved the proposed rate Deferral Plan.

Jurisdiction and Standard of Review

15 The Divisional Court has jurisdiction to hear this appeal pursuant to section 33 of the *OEBA* which provides that an appeal may be made only on a question of law or jurisdiction.

16 On a question of law, the courts must consider a number of relevant factors before determining the relevant standard of review:

> (i) the presence of absence of a privative clause;
> (ii) the purpose of the Tribunal;
> (iii) the nature of the question at issue; and
> (iv) the expertise of the Tribunal
>
> (See *Dunsmuir v. New Brunswick* (2008), 291 D.L.R. (4th) 577 (S.C.C.) at para. 64.)

17 GLPL submits that having regard to these factors and in particular, the nature of the question at issue, the standard of review that applies is one of correctness.

18 The role of the OEB set out in section 78(3) of the *OEBA* is the setting of rates that are "just and reasonable". GLPL contends that it is settled law in Canada that a rate regulated enterprise must be permitted by the regulator to recover its reasonably incurred costs and a reasonable return on invested capital. Any rate order which does not do so is, by definition, not "just and reasonable". Accordingly, GLPL submits that the OEB erred in law in its decision by setting rates for GLPL which denied it any recovery of the amounts deferred under the Deferral Plan and, as a result, was not "just and reasonable" contrary to section 78(3) of the *OEBA*.

19 GLPL submits that while the OEB has the discretion to determine what costs are reasonable and what ROE is reasonable, and in what manner those costs should be collected from rate payers, the OEB cannot deny recovery altogether. Thus, GLPL submits that the question at issue is purely one of law, that is, can the OEB deny recovery of a utility's reasonable costs and ROE? It submits that this is a discrete question of law independent of the facts. Thus, it argues that the standard of review is correctness.

20 The OEB is an expert tribunal, given broad authority under the *OEBA* to protect the interests of consumers by, amongst other things, setting "just and reasonable" distribution rates. Moreover, the decision at issue - the fixing of just and reasonable rates - is the OEB's primary function. It has significant expertise and discretion in setting rates and its decisions have been accorded substantial deference in past jurisprudence (see *Graywood Investments Ltd. v. Toronto Hydro Electric System Ltd.* [2006] O.J. No. 2030, at para. 24 (C.A.)).

21 Counsel for the OEB does not contest the proposition advanced by GLPL that it is settled law that a utility is entitled to recover by way of just and reasonable rates its costs and ROE. That is not the issue. Rather, OEB counsel submits that the issue in this case is whether approximately $15 million in costs that were never subject to scrutiny or review, were properly denied by the OEB pursuant to its rate making authority under section 78(3) of the *OEBA*.

22 We are of the view that the issue in question is not simply a denial by the OEB of any right of recovery of costs by GLPL. Rather, in issue is the basis upon which such denial was made. In setting "just and reasonable" distribution rates, the OEB was engaged in an exercise of fact finding and, as well, applying law and policy considerations. It was performing its core function. Moreover, the OEB was interpreting the meaning and effect of its own 2002 Interim Order and its own review process. Given these matters, the standard of review is reasonableness.

GLPL's Position

23 In its Decision, the OEB focused on whether the 2002 Interim Order could be taken to establish that it had approved the Deferral Plan or that it approved the accumulation of $2.8 million per year in Account 1574 for future recovery from rate payers. It concluded that it did not, and stated at page 13 of its Decision as follows:

> In summary, GLPL's position is without foundation. There is simply no basis upon which the Board can conclude that the accumulation in this account was ever explicitly or implicitly approved by the Board, either as to the amounts added to it over the years, or the more basic question as to the appropriateness of the use made of the account by the Applicant at all. Permitting GLPL to dispose of the account as it has requested would not be consistent with reasonable regulatory practice or common sense, and the GLPL's proposal is denied.

24 GLPL argued that the OEB's conclusion that the 2002 Interim Order and subsequent orders did not implicitly or explicitly approve the establishment of the deferral account is wrong or alternatively unreasonable and contrary to the evidence.

25 The OEB seized upon the fact that the 2002 Interim Order did not explicitly mention the Deferral Plan or the $12.7 million revenue requirement. As such, the OEB found that there was insufficient evidence to demonstrate that the OEB had considered the Deferral Plan in setting rates in the 2002 Interim Order. The OEB concluded that the 2002 Interim Order could not be taken as having in any way approved the revenue requirement or the accumulation of the deferred amounts in Account 1574.

26 GLPL submitted that prior OEB approval of the use of Account 1574 was not required for the following reasons:

a) Bill 210 expressly made Account 1574 a Regulatory Asset that would be eligible for recovery through rates at a later date. The Board's approval of the accrual therein of deferred amounts was not required;
b) Pursuant to the description of Account 1574 in the Board's own *Accounting Procedures Handbook,* it is within the discretion of the utility, without Board approval, to defer and record in the Account, amounts equal to rate impacts associated with market-based rate of return or transition costs, or extraordinary costs which the utility has decided to defer to future periods. The decision to defer and accrue amounts in Account 1574 did not require Board approval;
c) GLPL was permitted to make an independent decision to use Account 1574. Another example of a Regulatory Asset account is Account 1508. It was also available to GLPL for recording the deferred portion of its full revenue requirement without Board approval and from which the Board is obliged to allow recovery as long as the amounts sought to be recovered are reasonable. Account 1508 does not require Board authorization.

27 In summary, it is GLPL's position that although it may have been within the scope of the OEB's authority to consider the reasonableness of the costs in the proposed Deferral Plan, the OEB's prior approval to accrue costs in Account 1574 was not required.

28 GLPL submits that in any event, the 2002 Interim Order permitted accrual and recovery of Account 1574 amounts. It submits that by approving the rates proposed in GLPL's 2002 Application, the OEB necessarily authorized the accrual of the deferred amounts in Account 1574. It submits that the very making of the 2002 Interim Order had to allow for a fair return on GLPL's invested capital. The only way for GLPL to have earned a fair return on capital was if the OEB's 2002 Interim Order approved the Deferral Plan and GLPL's revenue requirement of $12.7 million - that is, $9.8 million received in rates, and $2.9 million per year deferred and subsequently to be recorded in Account 1574.

29 Moreover, GLPL pointed to the fact that on January 17, 2005, GLPL applied to the OEB to recover a portion of the outstanding balances in its Regulatory Asset accounts. GLPL's application expressly included the recovery of a portion of the outstanding balance in Account 1574 which was in the list of Regulatory Assets for which recovery was sought. Over 80% of the rate increase granted by the OEB in its order dated March 30, 2005 related specifically to Account 1574. In that order, the OEB allowed GLPL to recover $1,265,541 of its Regulatory Asset account balances (including amounts from Account 1574) and adjusted GLPL's rates accordingly, effective April 1, 2005. Although this was an interim order, the decision later issued by the OEB did not change the terms of the order as they related to Account 1574. Therefore, GLPL was allowed to recover under the express authorization of the OEB, some of the deferred amounts accumulated in Account 1574.

Analysis

30 Whether express OEB prior authorization was required for the opening or establishment of Account 1574, or whether such authorization was implicit in the 2002 Interim Order, or was granted retroactively by the 2005 interim Recovery Order, misses the main point in issue, which is whether the OEB would have approved a revenue requirement of $12.7 million without an appropriate review.

31 The OEB's Decision denying recovery was a response to the argument advanced by GLPL that the OEB approved the Deferral Plan and that the 2002 Interim Order when made final (by reason of Bill 210) established GLPL's unconditional right to access the deferred amounts in Account 1574. GLPL's position is that once the 2002 Interim Order was finalized by the operation of Bill 210, the OEB could not deny recovery. GLPL argued that its only discretion was to determine how recovery was to be effected in the manner of setting rates over a future period of time.

32 GLPL acknowledges that had Bill 210 not intervened, there would have been in the normal course, a prudency review that would have taken place after the 2002 Interim Order and before a final order was issued. GLPL, however, takes the position that a prudency review was foreclosed because of Bill 210 converting interim orders into final orders.

33 The OEB held that its 2002 Interim Order neither authorized nor approved the Deferral Plan and it would not do so without GLPL's costs being subject to scrutiny by a prudency review.

34 Although deferral plans may be allowed as an exception to the policy against retroactive rate setting, the OEB concluded that to accept GLPL's argument would deprive the OEB of any opportunity to have a review of GLPL's costs. The heart of its Decision in this regard is found at pages 11-12 of its reasons as follows:

> Secondly, GLPL's position ignores the context for the Board's May 13, 2002 interim decision. GLPL's distribution business was not regulated by the Board until

> 2002. The May 13, 2002 interim decision and order was the first Board order setting rates for GLPL's distribution business. *It is inconceivable that the panel that rendered the May 13, 2002 decision would have approved a $12.7 million revenue requirement (and the rate mitigation plan) without any input from the interested parties. To have done so would have been totally inconsistent with the Board's longstanding practice of ensuring that affected parties have a fair opportunity to be heard.* (Emphasis added)

35 It was reasonable for the OEB to conclude that before there can be recovery of the amounts in Account 1574, GLPL would be obliged to have its costs undergo a review by the OEB for a reasonableness assessment. The *OEBA* requires that the OEB protect the interests of ratepayers and this includes reviewing a distributor's revenue requirement and ensuring that it is reasonable before passing these costs off to customers through rates. If this is not done, electricity customers are put at risk.

36 The mere happenstance of Bill 210, that froze rates by deeming interim orders to be final orders, did not relieve GLPL of having its costs undergo appropriate scrutiny for reasonableness before recovery of those costs would be allowed.

37 It is of significance that the 2002 order was interim in nature and approved the rates proposed by GLPL necessary to recover $9.8 million. The Supreme Court of Canada commented on the nature of interim rate orders in *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)* (1989), 60 D.L.R. (4th) 682 at pg. 705 as follows:

> Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. *Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order.* [Emphasis added.]

38 And while acknowledging that rates must be just and reasonable whether approved by interim or final order, the Supreme Court went on to say at page 706:

> However, interim rates must be just and reasonable on the basis of the evidence filed by the applicant at the hearing or otherwise available for interim decision. It would be useless to order a final hearing if the [Board] was bound by the evidence filed at the interim hearing.

39 The fact remains that the GLPL's full revenue requirement of $12.7 million did not undergo the review process which, in the normal course, would have required notice to interested parties and an opportunity for them to present submissions at a hearing. To this day no prudency review has taken place, nor has one been sought by GLPL.

40 The costs upon which GLPL's rate Deferral Plan is premised were never reviewed by the OEB and it would violate the OEB's statutory obligation to ratepayers and the "regulatory compact" (as

coined by the Supreme Court of Canada in *Atco Gas & Pipelines Ltd. v. Alberta (Energy Utilities Board)* (2006), 263 D.L.R. (4th) 193 at para. 63 (S.C.C.), requiring a balancing of rights and interests of utilities against those of ratepayers) to permit recovery of those costs without this necessary review.

41 In its Decision, the OEB was engaged in an interpretation of its own 2002 Interim Order and knew full well the limited review of GLPL's costs that had been undertaken at the time that the 2002 Application was made. At p. 13 of its Decision, the OEB stated:

> Thirdly, GLPL is attaching much more significance to an interim order than is warranted. Section 21(7) of the *OEB Act* states: "The Board may make interim orders pending the final disposition of a matter before it." The evidentiary basis for interim rate decisions is almost always less complete than it is for a final decision and the applicant's pre-filed evidence is generally untested.

42 The OEB should be afforded due deference when it stated that to read its 2002 Interim Order as approving a revenue requirement of $12.7 million was "inconceivable" and " totally inconsistent with the OEB's longstanding practice of ensuring that affected parties have a fair opportunity to be heard".

43 When viewed in this context, it is clear that the OEB's conclusions regarding the 2002 Interim Order were reasonable. It made no error of law or jurisdiction.

Conclusion

44 Accordingly, the appeal is dismissed. As agreed by counsel there will be no costs of the appeal.

S.N. LEDERMAN J.
J.M. WILSON J.
K.E. SWINTON J.

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