EB-2007-0905

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 Ontario Power Generation Inc. pursuant to section 78.1 of the *Ontario Energy Board Act, 1998* for an Order or Orders determining payment amounts for the output of certain of its generating facilities.

BRIEF OF MATERIAL RE INTERIM ORDER ARGUMENT

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Solicitors for Ontario Power Generation

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21. (1) The Board may at any time on its own motion and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act. 1998, c. 15, Sched. B, s. 21 (1).

Hearing upon notice

(2) Subject to any provision to the contrary in this or any other Act, the Board shall not make an order under this or any other Act until it has held a hearing after giving notice in such manner and to such persons as the Board may direct. 1998, c. 15, Sched. B, s. 21 (2).

(3) Repealed: 2000, c. 26, Sched. D, s. 2 (2).

No hearing

(4) Despite section 4.1 of the *Statutory Powers Procedure Act*, the Board may, in addition to its power under that section, dispose of a proceeding without a hearing if,

(a) no person requests a hearing within a reasonable time set by the Board after the Board gives notice of the right to request a hearing; or

(b) the Board determines that no person, other than the applicant, appellant or licence holder will be adversely affected in a material way by the outcome of the proceeding and the applicant, appellant or licence holder has consented to disposing of a proceeding without a hearing.

(c) Repealed: 2003, c. 3, s. 20 (1).

1998, c. 15, Sched. B, s. 21 (4); 2002, c. 1, Sched. B, s. 3; 2003, c. 3, s. 20 (1).

Consolidation of proceedings

(5) Despite subsection 9.1 (1) of the *Statutory Powers Procedure Act*, the Board may combine two or more proceedings or any part of them, or hear two or more proceedings at the same time, without the consent of the parties. 2003, c. 3, s. 20 (2).

Non-application

(6) Subsection 9.1 (3) of the *Statutory Powers Procedure Act* does not apply to proceedings before the Board. 1998, c. 15, Sched. B, s. 21 (6).

Use of same evidence

(6.1) Despite subsection 9.1 (5) of the *Statutory Powers Procedure Act*, the Board may treat evidence that is admitted in a proceeding as if it were also admitted in another proceeding that is heard at the same time, without the consent of the parties to the second-named proceeding. 2003, c. 3, s. 20 (3).

Interim orders

(7) The Board may make interim orders pending the final disposition of a matter before it. 1998, c. 15, Sched. B, s. 21 (7).

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78.1 (1) The IESO shall make payments to a generator prescribed by the regulations, or to the OPA on behalf of a generator prescribed by the regulations, with respect to output that is generated by a unit at a generation facility prescribed by the regulations. 2004, c. 23, Sched. B, s. 15.

Payment amount

(2) Each payment referred to in subsection (1) shall be the amount determined,

(a) in accordance with the regulations to the extent the payment relates to a period that is on or after the day this section comes into force and before the later of,

(i) the day prescribed for the purposes of this subsection, and

(ii) the effective date of the Board's first order in respect of the generator; and

(b) in accordance with the order of the Board then in effect to the extent the payment relates to a period that is on or after the later of,

(i) the day prescribed for the purposes of this subsection, and

(ii) the effective date of the Board's first order under this section in respect of the generator. 2004, c. 23, Sched. B, s. 15.

OPA may act as settlement agent

(3) The OPA may act as a settlement agent to settle amounts payable to a generator under this section. 2004, c. 23, Sched. B, s. 15.

Board orders

(4) The Board shall make an order under this section in accordance with the rules prescribed by the regulations and may include in the order conditions, classifications or practices, including rules respecting the calculation of the amount of the payment. 2004, c. 23, Sched. B, s. 15.

Fixing other prices

(5) The Board may fix such other payment amounts as it finds to be just and reasonable,

(a) on an application for an order under this section, if the Board is not satisfied that the amount applied for is just and reasonable; or

(b) at any other time, if the Board is not satisfied that the current payment amount is just and reasonable. 2004, c. 23, Sched. B, s. 15.

Burden of proof

(6) Subject to subsection (7), the burden of proof is on the applicant in an application made under this section. 2004, c. 23, Sched. B, s. 15.

Order

(7) If the Board on its own motion or at the request of the Minister commences a proceeding to determine whether an amount that the Board may approve or fix under this section is just and reasonable,

(a) the burden of establishing that the amount is just and reasonable is on the generator; and

(b) the Board shall make an order approving or fixing an amount that is just and reasonable. 2004, c. 23, Sched. B, s. 15.

Application

(8) Subsections (4), (5) and (7) apply only on and after the day prescribed by the regulations for the purposes of subsection (2). 2004, c. 23, Sched. B, s. 15.

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

ONTARIO REGULATION 53/05

PAYMENTS UNDER SECTION 78.1 OF THE ACT

Consolidation Period: From February 9, 2007 to the e-Laws currency date.

Last amendment: O.Reg. 23/07.

This Regulation is made in English only.

Definition

0.1 In this Regulation,

"approved reference plan" means a reference plan, as defined in the Ontario Nuclear Funds Agreement, that has been approved by Her Majesty the Queen in right of Ontario in accordance with that agreement;

"nuclear decommissioning liability" means the liability of Ontario Power Generation Inc. for decommissioning its nuclear generation facilities and the management of its nuclear waste and used fuel;

"Ontario Nuclear Funds Agreement" means the agreement entered into as of April 1, 1999 by Her Majesty the Queen in right of Ontario, Ontario Power Generation Inc. and certain subsidiaries of Ontario Power Generation Inc., including any amendments to the agreement. O. Reg. 23/07, s. 1.

Prescribed generator

1. Ontario Power Generation Inc. is prescribed as a generator for the purposes of section 78.1 of the Act. O. Reg. 53/05, s. 1.

Prescribed generation facilities

2. The following generation facilities of Ontario Power Generation Inc. are prescribed for the purposes of section 78.1 of the Act:

1. The following hydroelectric generating stations located in The Regional Municipality of Niagara:
   i. Sir Adam Beck I.
   ii. Sir Adam Beck II.
   iii. Sir Adam Beck Pump Generating Station.
   iv. De Cew Falls I.
   v. De Cew Falls II.
2. The R. H. Saunders hydroelectric generating station on the St. Lawrence River.
3. Pickering A Nuclear Generating Station.
4. Pickering B Nuclear Generating Station.
5. Darlington Nuclear Generating Station. O. Reg. 53/05, s. 2; O. Reg. 23/07, s. 2.

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Prescribed date for s. 78.1 (2) of the Act

3. April 1, 2008 is prescribed for the purposes of subsection 78.1 (2) of the Act. O. Reg. 53/05, s. 3.

Payment amounts under s. 78.1 (2) (a) of the Act

4. (1) For the purpose of clause 78.1 (2) (a) of the Act, the amount of a payment that the IESO is required to make with respect to a unit at a generation facility prescribed under section 2 is,

(a) for the hydroelectric generation facilities prescribed in paragraphs 1 and 2 of section 2, $33.00 per megawatt hour with respect to output that is generated during the period from April 1, 2005 to the later of,

(i) March 31, 2008, and

(ii) the day before the effective date of the Board's first order in respect of Ontario Power Generation Inc.; and

(b) for the nuclear generation facilities prescribed in paragraphs 3, 4 and 5 of section 2, $49.50 per megawatt hour with respect to output that is generated during the period from April 1, 2005 to the later of,

(i) March 31, 2008, and

(ii) the day before the effective date of the Board's first order in respect of Ontario Power Generation Inc. O. Reg. 53/05, s. 4 (1).

(2) Despite subsection (1), for the purpose of clause 78.1 (2) (a) of the Act, if the total combined output of the hydroelectric generation facilities prescribed under paragraphs 1 and 2 of section 2 exceeds 1,900 megawatt hours in any hour, the total amount of the payment that the IESO is required to make with respect to the units at those generation facilities is, for that hour, the sum of the following amounts:

1. The total amount determined for those facilities under clause (1) (a), for the first 1,900 megawatt hours of output.

2. The product obtained by multiplying the market price determined under the market rules by the number of megawatt hours of output in excess of 1,900 megawatt hours. O. Reg. 53/05, s. 4 (2).

(2.1) The total amount of the payment under subsection (2) shall be allocated to the hydroelectric generation facilities prescribed under paragraphs 1 and 2 of section 2 on a proportionate basis equal to each facility's percentage share of the total combined output in that hour for those facilities. O. Reg. 269/05, s. 1.

(2.2) Subsection (2.1) applies in respect of amounts payable on and after April 1, 2005. O. Reg. 269/05, s. 1.

(3) For the purpose of this section, the output of a generation facility shall be measured at the facility's delivery points, as determined in accordance with the market rules. O. Reg. 53/05, s. 4 (3).

Deferral and variance accounts

5. (1) Ontario Power Generation Inc. shall establish a variance account in connection with section 78.1 of the Act that records capital and non-capital costs incurred and revenues

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earned or foregone on or after April 1, 2005 due to deviations from the forecasts as set out in the document titled "Forecast Information (as of Q3/2004) for Facilities Prescribed under Ontario Regulation 53/05" posted and available on the Ontario Energy Board website, that are associated with,

(a) differences in hydroelectric electricity production due to differences between forecast and actual water conditions;

(b) unforeseen changes to nuclear regulatory requirements or unforeseen technological changes which directly affect the nuclear generation facilities, excluding revenue requirement impacts described in subsections 5.1 (1) and 5.2 (1);

(c) changes to revenues for ancillary services from the generation facilities prescribed under section 2;

(d) acts of God, including severe weather events; and

(e) transmission outages and transmission restrictions that are not otherwise compensated for through congestion management settlement credits under the market rules. O. Reg. 23/07, s. 3.

(2) The calculation of revenues earned or foregone due to changes in electricity production associated with clauses (1) (a), (b), (d) and (e) shall be based on the following prices:

1. $33.00 per megawatt hour from hydroelectric generation facilities prescribed in paragraphs 1 and 2 of section 2.

2. $49.50 per megawatt hour from nuclear generation facilities prescribed in paragraphs 3, 4 and 5 of section 2. O. Reg. 23/07, s. 3.

(3) Ontario Power Generation Inc. shall record simple interest on the monthly opening balance of the account at an annual rate of 6 per cent applied to the monthly opening balance in the account, compounded annually. O. Reg. 23/07, s. 3.

(4) Ontario Power Generation Inc. shall establish a deferral account in connection with section 78.1 of the Act that records non-capital costs incurred on or after January 1, 2005 that are associated with the planned return to service of all units at the Pickering A Nuclear Generating Station, including those units which the board of directors of Ontario Power Generation Inc. has determined should be placed in safe storage. O. Reg. 23/07, s. 3.

(5) For the purposes of subsection (4), the non-capital costs include, but are not restricted to,

(a) construction costs, assessment costs, pre-engineering costs, project completion costs and demobilization costs; and

(b) interest costs, recorded as simple interest on the monthly opening balance of the account at an annual rate of 6 per cent applied to the monthly opening balance in the account, compounded annually. O. Reg. 23/07, s. 3.

Nuclear liability deferral account, transition

5.1 (1) Ontario Power Generation Inc. shall establish a deferral account in connection with section 78.1 of the Act that records for the period up to the effective date of the Board's first order under section 78.1 of the Act the revenue requirement impact of any change in its nuclear decommissioning liability arising from an approved reference plan, approved after April

1, 2005, as reflected in the audited financial statements approved by the board of directors of Ontario Power Generation Inc.. O. Reg. 23/07, s. 3.

(2) Ontario Power Generation Inc. shall record simple interest on the monthly opening balance of the account at an annual rate of 6 per cent applied to the monthly opening balance in the account, compounded annually. O. Reg. 23/07, s. 3.

Nuclear liability deferral account

5.2 (1) Ontario Power Generation Inc. shall establish a deferral account in connection with section 78.1 of the Act that records, on and after the effective date of the Board's first order under 78.1 of the Act, the revenue requirement impact of changes in its total nuclear decommissioning liability between,

(a) the liability arising from the approved reference plan incorporated into the Board's most recent order under section 78.1 of the Act; and

(b) the liability arising from the current approved reference plan. O. Reg. 23/07, s. 3.

(2) Ontario Power Generation Inc. shall record interest on the balance of the account as the Board may direct. O. Reg. 23/07, s. 3.

Rules governing determination of payment amounts by Board

6. (1) Subject to subsection (2), the Board may establish the form, methodology, assumptions and calculations used in making an order that determines payment amounts for the purpose of section 78.1 of the Act. O. Reg. 53/05, s. 6 (1).

(2) The following rules apply to the making of an order by the Board that determines payment amounts for the purpose of section 78.1 of the Act:

1. The Board shall ensure that Ontario Power Generation Inc. recovers the balance recorded in the variance account established under subsection 5 (1) over a period not to exceed three years, to the extent that the Board is satisfied that,

   i. the revenues recorded in the account were earned or foregone and the costs were prudently incurred, and

   ii. the revenues and costs are accurately recorded in the account.

2. In setting payment amounts for the assets prescribed under section 2, the Board shall not adopt any methodologies, assumptions or calculations that are based upon the contracting for all or any portion of the output of those assets.

3. The Board shall ensure that Ontario Power Generation Inc. recovers the balance recorded in the deferral account established under subsection 5 (4). The Board shall authorize recovery of the balance on a straight line basis over a period not to exceed 15 years.

4. The Board shall ensure that Ontario Power Generation Inc. recovers capital and non-capital costs, and firm financial commitments incurred to increase the output of, refurbish or add operating capacity to a generation facility referred to in section 2, including, but not limited to, assessment costs and pre-engineering costs and commitments,

   i. if the costs and financial commitments were within the project budgets approved for that purpose by the board of directors of Ontario Power Generation Inc.

before the making of the Board's first order under section 78.1 of the Act in respect of Ontario Power Generation Inc., or

ii. if the costs and financial commitments were not approved by the board of directors of Ontario Power Generation Inc. before the making of the Board's first order under section 78.1 of the Act in respect of Ontario Power Generation Inc., if the Board is satisfied that the costs were prudently incurred and that the financial commitments were prudently made.

5. In making its first order under section 78.1 of the Act in respect of Ontario Power Generation Inc., the Board shall accept the amounts for the following matters as set out in Ontario Power Generation Inc.'s most recently audited financial statements that were approved by the board of directors of Ontario Power Generation Inc. before the effective date of that order:

i. Ontario Power Generation Inc.'s assets and liabilities, other than the variance account referred to in subsection 5 (1), which shall be determined in accordance with paragraph 1.

ii. Ontario Power Generation Inc.'s revenues earned with respect to any lease of the Bruce Nuclear Generating Stations.

iii. Ontario Power Generation Inc.'s costs with respect to the Bruce Nuclear Generating Stations.

6. Without limiting the generality of paragraph 5, that paragraph applies to values relating to,

i. capital cost allowances,

ii. the revenue requirement impact of accounting and tax policy decisions, and

iii. capital and non-capital costs and firm financial commitments to increase the output of, refurbish or add operating capacity to a generation facility referred to in section 2.

7. The Board shall ensure that the balances recorded in the deferral accounts established under subsections 5.1 (1) and 5.2 (1) are recovered on a straight line basis over a period not to exceed three years, to the extent that the Board is satisfied that revenue requirement impacts are accurately recorded in the accounts, based on the following items, as reflected in the audited financial statements approved by the board of directors of Ontario Power Generation Inc.,

i. return on rate base,

ii. depreciation expense,

iii. income and capital taxes, and

iv. fuel expense.

8. The Board shall ensure that Ontario Power Generation Inc. recovers the revenue requirement impact of its nuclear decommissioning liability arising from the current approved reference plan.

9. The Board shall ensure that Ontario Power Generation Inc. recovers all the costs it

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incurs with respect to the Bruce Nuclear Generating Stations.

10. If Ontario Power Generation Inc.'s revenues earned with respect to any lease of the Bruce Nuclear Generating Stations exceed the costs Ontario Power Generation Inc. incurs with respect to those Stations, the excess shall be applied to reduce the amount of the payments required under subsection 78.1 (1) of the Act with respect to output from the nuclear generation facilities referred to in paragraphs 3, 4 and 5 of section 2. O. Reg. 23/07, s. 4.

7. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 53/05, s. 7.

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March 21, 2006

To: Parties Interested in the Board's Proposed Regulatory Process for Setting Payment Amounts for Ontario Power Generation Inc's Prescribed Generation Assets
Board File No.: EB-2006-0064

The Board has prepared an overview of the process it intends to follow in setting prices for Ontario Power Generation Inc.'s ("OPG") designated generation assets, as set out in this letter.

Under Section 78.1 of the *Ontario Energy Board Act, 1998*, the Board will determine the payments to be made to OPG with respect to the output of its prescribed facilities. The *Payments Under Section 78.1 of the Act Regulation,* O. Reg. 53/05, establishes April 1, 2008 as the date on which the Board's authority to determine those payments commences. The prescribed generation facilities are the nuclear generating stations operated by OPG (Pickering NGS, Darlington NGS) and the base load hydroelectric assets in the Regional Municipality of Niagara (Sir Adam Beck I, Sir Adam Beck II, Sir Adam Beck Pumped Generating Station, De Cew Falls I and De Cew Falls II) and on the St. Lawrence River (R.H. Saunders).

The Board will follow the process set out below for determining the methodology by which prices for the output of the prescribed generation facilities will be established. This could include, for example, consideration of whether a full cost of service approach is required versus an alternate method for determining prices.

Stage 1: Research on Methodology (Spring – Summer 2006)

- Board staff Discussion Paper – Draft 1 (end of April): Board staff will produce a research paper which will discuss various alternative approaches to and recommendations for setting prices for the prescribed facilities. This paper will be based on research and analysis by external specialists as well as the work of Board staff.

The Board will post the draft Discussion Paper on its web site and solicit stakeholder comment on it through informal processes such as one-on-one or small group meetings.

- Board staff Discussion Paper – Draft 2 (early June): Board staff will update the Discussion Paper, incorporating input from stakeholders.
  The Board will post a second draft of the Discussion Paper on its web site and will continue informal consultation with stakeholders on the second draft of the Discussion Paper.

- Final Board staff Discussion Paper – (late June): A final staff report will be submitted to the Board and posted on the Board's web site. **Stakeholders will be invited to submit written comments to the Board on the Discussion Paper and the recommended approach for setting payment amounts for OPG's prescribed assets. An opportunity to make reply or responding submissions will also be provided.**

Stage 2: Board Determination on Methodology (Summer 2006)

- Board Determination: The Board will provide guidance on the methodology by which payment amounts for the output of the prescribed generation facilities will be determined, based on a consideration of Board staff's Discussion Paper and any written comments received on that document.

- Guidelines (August): Based on the Board's determination on the regulatory price-setting methodology, Board staff will issue draft filing guidelines to provide direction to OPG in the preparation of a filing.
  The filing guidelines will be posted on the Board's web site for comment by interested stakeholders. A final version of the filing guidelines, reflecting appropriate stakeholder input, will then be issued by the Board.

Following the above consultation process, the Board would hold an oral or written hearing on the application that would be filed by OPG based on the filing guidelines. Interested parties would be provided with an opportunity to request intervenor status in relation to the hearing or to otherwise participate in the hearing in accordance with the Board's *Rules of Practice and Procedure*. The Board would issue a Decision and Order following the hearing.

The Board encourages participation in this process by interested parties. Those interested in participating in this process should indicate their interest in writing by letter addressed to the Board Secretary at the Board's mailing address set out above by April 3, 2006.

Cost awards will be available to eligible persons in relation to their participation in this process under section 30 of the *Ontario Energy Board Act, 1998*. The costs to be awarded will be recovered from OPG. Appendix A contains further details regarding cost awards for the consultation portions of this process. Any person intending to request an award of costs must file with the Board a written submission to that effect. The submission must be addressed to the Board Secretary at the Board's mailing address set out above with copies sent to:

Andrew Barrett
Vice President, Regulatory Affairs
700 University Avenue
H18 G1
Toronto, Ontario
M5G 1X6
andrew.barrett@opg.com

Copies of all filings to the Board in response to this letter will be posted on the Board's website.

In early April, a detailed timetable for this initiative will be posted on the Board's web site and sent directly to all interested parties that have given notice to the Board of their interest in participating in this process.

All filings to the Board in relation to this matter must quote file number EB-2006-0064 and include your name, address, telephone number and, where available, an e-mail address and fax number. The Board requests that interested parties make every effort to provide electronic copies of their filings in Adobe Acrobat (PDF) or Word, either on diskette or by e-mail to Boardsec@oeb.gov.on.ca.

Yours truly,

Original Signed By

John Zych
Board Secretary

Appendix A –Cost Awards

Eligibility

The Board will determine eligibility for costs in accordance with its *Practice Direction on Cost Awards.* Any person intending to request an award of costs must file with the Board a written submission to that effect, identifying the nature of the person's interest in this process and the grounds on which the person believes that it is eligible for an award of costs, addressing the Board's cost eligibility criteria as set out in section 3 of the Board's *Practice Direction on Cost Awards.* An explanation of any other funding to which the person has access must also be provided, as should the name and credentials of any lawyer, analyst or consultant that the person intends to retain, if known.

Activities Eligible for Cost Awards

a) Consultations with Board Staff

Cost awards will be available in relation to consultations with Board staff on the first and second drafts of Board staff's Discussion Paper. Specifically, costs will be available for attendance at meetings with Board staff and for time spent in preparation for the meeting. Preparation time will be limited to a percentage (yet to be determined) of actual meeting time.

b) Written Submissions

Cost awards will be available in relation to written submissions on the final draft of Board staff's Discussion Paper, up to a maximum of 21 hours or such additional time as the Board may permit. Cost awards will also be available for written submissions on the draft filing guidelines, to a maximum of 14 hours or such additional time as the Board may permit.

Cost Awards

When determining the amount of the cost awards, the Board will apply the principles set out in section 5 of its *Practice Direction on Cost Awards.* The maximum hourly rates set out in the Board's Cost Awards Tariff will also be applied.

The Board expects that groups representing the same interests or class of persons will make every effort to communicate and co-ordinate their participation in this process.

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VIA E-MAIL AND WEB POSTING

March 30, 2007

To: All Participants in Consultation Process EB-2006-0064
All Other Interested Parties

Re: Setting Payment Amounts for the Prescribed Generation Assets of Ontario Power Generation Inc.
Draft Filing Requirements
Board File No.: EB-2006-0064

On March 21, 2006, the Board initiated a consultation process to determine the methodology by which payment amounts for the output of the prescribed generation assets of Ontario Power Generation Inc. ("OPG") would be determined. On November 30, 2006, following consultations with interested parties, the Ontario Energy Board (the "Board") issued its report entitled *A Regulatory Methodology for Setting Payment Amounts for the Prescribed Generation Assets of Ontario Power Generation Inc.* (the "OPG Report").

Both the Board's March 21, 2006 letter and the OPG Report contemplated that the next stage in this consultation process would be the issuance of draft filing requirements to provide direction to OPG in the preparation of a filing. To that end, the Board has today posted on its website draft filing requirements prepared by Board staff. Board staff's draft filing requirements reflect the regulatory methodology detailed in the OPG Report, which recommended a series of limited issues cost of service proceedings. The draft filing requirements also reflect recent amendments to the *Payments Under Section 78.1 of the Act Regulation*, O. Reg. 53/05, which contains rules to be followed as part of the payment-setting process.

Invitation to Comment and Cost Awards

The Board invites interested parties to comment on staff's draft filing requirements. Following consideration of comments received from interested parties, the Board will issue final filing requirements.

Interested parties should file their written comments on the draft filing requirements with the Board by **April 30, 2007** and as set out below.

As contemplated in the Board's March 21, 2006 letter, cost awards will be available to eligible persons under section 30 of the *Ontario Energy Board Act, 1998* in relation to the preparation of written comments on the draft filing requirements, up to a maximum of **20** hours.

Requirements for New Participants

Interested parties that have not previously participated in this consultation process must follow the process set out in Appendix A. **Appendix A contains important information regarding cost awards for new participants, including in relation to eligibility requests and objections.**

Interested parties that are already participants in this consultation process need only file their written comments on the draft filing requirements in accordance with the instructions set out in this letter.

Instructions on Filing Material with the Board

All filings in relation to this consultation process must quote file number **EB-2006-0064** and include your name, address, telephone number and, where available, an e-mail address and fax number. Three paper copies of each filing must be provided. All filings are to be addressed to the Board Secretary at the Board's mailing address set out above. The Board asks that participants make every effort to provide electronic copies of their filings in Adobe Acrobat (PDF) or Word, either on diskette or by e-mail to boardsec@oeb.gov.on.ca.

Filings must be received by **4:30 pm** on the required date.

All materials related to this consultation process will be posted on the "Key Initiatives & Consultations" portion of the Board's web site at www.oeb.gov.on.ca. The material will also be available for public inspection at the office of the Board during normal business hours.

Any questions relating to this consultation process should be directed to Harold Thiessen at 416-440-7637, or by e-mail to Harold.Thiessen@oeb.gov.on.ca. The Board's toll-free number is 1-888-632-6273, and the Market Operations Hotline is 416-440-7604.

Yours truly,

Original Signed By

Peter H. O'Dell
Assistant Board Secretary

Attachment: Appendix A – Requirements for New Participants: Participation and Cost Awards

Appendix A
Requirements for New Participants: Participation and Cost Awards

Notice of Intention to Participate

Interested parties that wish to participate in this consultation process must indicate their interest in writing by letter addressed to the Board Secretary by April 10, 2007. That letter should also include a statement as to whether the participant wishes to request cost eligibility. All requests for cost eligibility must be accompanied by the information identified below under the heading "Cost Award Eligibility".

Cost Award Eligibility

The Board will determine eligibility for costs in accordance with its *Practice Direction on Cost Awards*. Any person requesting cost eligibility must file with the Board a written submission to that effect by **April 10, 2007**, identifying the nature of the person's interest in this process and the grounds on which the person believes that it is eligible for an award of costs (including addressing the Board's cost eligibility criteria as set out in section 3 of the Board's *Practice Direction on Cost Awards*). An explanation of any other funding to which the person has access must also be provided, as should the name and credentials of any lawyer, analyst or consultant that the person intends to retain, if known.

OPG will be provided with an opportunity to object to any of the requests for cost award eligibility. If OPG has any objections to any of the requests for cost eligibility, such objections must be filed with the Board Secretary by **April 17, 2007**. All requests and any objections will be posted on the Board's website. The Board will then make a final determination on the cost eligibility of the requesting parties. In order to facilitate a timely decision on cost eligibility, the deadlines for filing cost eligibility requests and objections will be strictly enforced.

Eligible groups should have flexibility to budget potential cost awards as needed to best assist the Board throughout this process. As such, groups representing the same interests or class of persons are expected to make every effort to communicate and co-ordinate their participation in this process.

Cost Awards

When determining the amount of the cost awards, the Board will apply the principles set out in section 5 of its *Practice Direction on Cost Awards*. The maximum hourly rates set out in the Board's Cost Awards Tariff will also be applied.

For more information on the cost awards process, please see the Board's *Practice Direction on Cost Awards*, available on the Board's website at www.oeb.gov.on.ca.

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998;*

AND IN THE MATTER OF an Application by Ontario Power Generation Inc. for an order or orders approving payment amounts for prescribed generating facilities commencing April 1, 2008.

APPLICATION

1. The applicant, Ontario Power Generation Inc. ("OPG") is a corporation, incorporated under the *Ontario Business Corporations Act*, with its head office in the City of Toronto. The principal business of OPG is the generation and sale of electricity in Ontario.

2. In this Application, OPG applies to the Ontario Energy Board ("OEB") pursuant to section 78.1 of the *Ontario Energy Board Act, 1998*, for an order or orders approving the payment amounts for generating facilities prescribed under Ontario Regulation 53/05 ("O. Reg. 53/05"), as amended, of the Act for the period from April 1, 2008 through December 31, 2009 ("test period"), or for such other period determined to be appropriate by the OEB. For the purposes of section 6 (1) of O. Reg. 53/05, OPG requests that the OEB use a forecast cost of service methodology to approve payment amounts for the test period as established in EB-2006-0064, "A Regulatory Methodology for Setting Payment Amounts for the Prescribed Generation Assets of Ontario Power Generation Inc." and "Filing Guidelines for Ontario Power Generation."

3. OPG also seeks an order of the OEB declaring the current payment amounts interim effective April 1, 2008. OPG seeks an order establishing payment amounts that allow full recovery of the test period revenue requirement over the test period.

4. OPG also seeks an interim order for increased payment amounts effective April 1, 2008 in the amount of $35.35/MWh for the output of Sir Adam Beck I, Sir Adam Beck II, Sir

Adam Beck Pump Generating Station, DeCew Falls I, DeCew Falls II, and R.H. Saunders Generating Stations (together the "regulated hydroelectric facilities") and $53.00/MWh for the output of Pickering A Generating Station, Pickering B Generating Station, and Darlington Generating Station (together the "nuclear facilities"), all subject to adjustment once final payment amounts are determined. These interim payment amounts are calculated based on 50 percent recovery of the test period revenue deficiency on a unit of energy basis. During the period of interim rates, OPG expects to retain the hydroelectric incentive mechanism under O. Reg. 53/05 under which the output from the regulated hydroelectric facilities in excess of 1900 MWh in any hour receives market price.

5. OPG is seeking approval for disposition of the balances in the deferral and variance accounts, using a payment rider for the nuclear accounts and as part of the payment amount for the regulated hydroelectric facilities. OPG is also seeking an order continuing and/or establishing deferral and variance accounts during the test period.

6. To achieve the revenue requirement and disposition of the balances in the deferral and variance accounts, OPG is seeking payment amounts and riders as follows:
   - For the regulated hydroelectric facilities, $37.70/MWh for the average hourly net energy production (MWh) from the regulated facilities in any given month (the "hourly volume") for each hour of that month. Production over the hourly volume will receive the market price from the Independent Electricity System Operator ("IESO") – administered energy market. Where production from the regulated hydroelectric facilities is less than the hourly volume, OPG's revenues will be adjusted by the difference between the hourly volume and the actual net energy production at the market price from the IESO - administered market.
   - For disposition of the regulated hydroelectric variance account, recovery of $0.3M by including this amount in the revenue requirement used to calculate the hydroelectric payment amount.
   - For the nuclear facilities, a payment amount of $57.7M/month plus $41.10/MWh for the output generated from the nuclear facilities.

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- For disposition of the nuclear variance and deferral accounts, recovery of $363M at a rate of $1.63/MWh for the output from the nuclear facilities.

7. The Application will be supported by written and oral evidence. The written evidence filed by OPG may be supplemented or amended from time to time by OPG prior to the OEB's final decision on the Application.

8. OPG further applies to the OEB pursuant to the provisions of the Act and the OEB Rules of Practice and Procedure for such orders and directions as may be necessary in relation to the Application and the proper conduct of this proceeding.

9. The persons affected by this Application are all electricity consumers in Ontario. It is impractical to set out the names and addresses of the consumers because they are too numerous.

10. OPG requests that copies of all documents filed with the OEB by each party to this Application along with copies of all comments filed with the OEB in accordance with Rule 24 of the OEB Rules of Practice and Procedure be served on the applicant and the applicant's counsel as follows:

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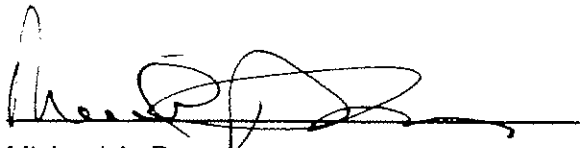
Dated at Toronto, Ontario, this 30th day of November 2007.

Ontario Power Generation Inc.



Michael A. Penny
Torys LLP

APPROVALS

In this Application, OPG is seeking the following specific approvals:

- An order from the OEB declaring OPG's payment amounts interim as of April 1, 2008.

- An order from the OEB establishing interim payment amounts of $35.35/MWh for the output of Sir Adam Beck I, Sir Adam Beck II, Sir Adam Beck Pump Generating Station, DeCew Falls I, DeCew Falls II, and R.H. Saunders Generating Stations (the "regulated hydroelectric facilities") and $53.00/MWh for the output of Pickering A Generating Station, Pickering B Generating Station, and Darlington Generating Station (the "nuclear facilities") effective April 1, 2008. During the period of interim rates, OPG expects to retain the hydroelectric incentive mechanism under O. Reg. 53/05 under which the output from the regulated hydroelectric facilities in excess of 1900 MWh in any hour receives market price.

- The approval of a revenue requirement of $1304M for the regulated hydroelectric facilities and a revenue requirement of $5108M for the nuclear facilities for the period of April 1, 2008 through December 31, 2009 (the "test period") as set out in Ex. K1-T1-S1.

- The approval of a rate base forecast of $3869M and $3836M for the regulated hydroelectric facilities for the years 2008 and 2009, respectively and $3430M and $3385M for the nuclear facilities for the years 2008 and 2009, respectively, as summarized in Ex. B1-T1-S1. OPG's request for this approval is supported by an examination of the asset and liabilities values and other related matters in the 2006 audited financial statements pursuant to paragraph 6 (2) 5 of the Regulation and asset forecast as found in Exhibit B.

- Approval of a capital budget for the regulated hydroelectric facilities for the test period, as presented in Ex. D1-T1-S1 and for the nuclear facilities for the test period, as presented in Ex. D2-T1-S1.

- Approval of a production forecast of 32.9 TWh for the test period for the regulated hydroelectric facilities and 88.3 TWh for the test period for the nuclear facilities. Production forecast is presented in Ex. E.

- Approval of a deemed capital structure of 42.5 percent debt and 57.5 percent equity and a combined rate of return on rate base of 8.51 percent and 8.53 percent for 2008 and 2009, respectively, including a rate of return on equity ("ROE") forecast of 10.5 percent, as presented in Ex. C1-T1-S1 and Ex. C1-T2-S1.

- Approval of the automatic adjustment mechanism to adjust the rate of return on common equity in future periods, as discussed in Exhibit C1-T1-S1.

- Approval of a payment amount for the regulated hydroelectric facilities of $37.70/MWh for the average hourly net energy production (MWh) from the regulated facilities in any given month (the "hourly volume") for each hour of that month. Production over the hourly volume will receive the market price from the Independent Electricity System Operator ("IESO") – administered energy market. Where production from the regulated hydroelectric facilities is less than the hourly volume, OPG's revenues will be adjusted by the difference between the hourly volume and the actual net energy production at the market price from the IESO - administered market. The payment amount for the regulated hydroelectric facilities is set out in Ex. K1-T2-S1 and the design of the regulated hydroelectric payment amount is set out in Ex. I1-T1-S1.

- Approval of a payment amount for the nuclear facilities, of $57.7M/month plus $41.10/MWh, as set out in Ex. K1-T3-S1.

- For the nuclear facilities, approval for recovery of $363M from the variance and deferral accounts using a payment rider of $1.63/MWh, as presented in Ex. J1-T1-S1 and Ex. J1-T2-S1. For the regulated hydroelectric variance account, recovery of $0.3M by adding this amount to the revenue requirement used to calculate the hydroelectric payment amount, as presented in Ex. J1-T2-S1 and Ex. K1-T1-S1.

- Approval to establish, re-establish or continue variance and deferral accounts as follows:
  - A variance account to record the deviation from forecast revenues associated with differences in hydroelectric electricity production due to differences between forecast and actual water conditions.
  - A variance account to record the deviation from forecast revenues for ancillary services from the regulated hydroelectric facilities and the nuclear facilities.
  - A deferral account to record the deviation from forecast non-capital costs associated with work to increase capacity/ output or to refurbish a generation facility. The account would include deviations in costs associated with the potential refurbishment of Pickering B and Darlington Generating Stations as well as new nuclear development at an existing site.
  - A variance account to record the deviation between actual and forecast nuclear fuel costs.
  - A variance account to record the customer's share of revenues from energy sales to Hydro Quebec as a result of segregated mode of operation at R.H. Saunders, and from water transactions at the regulated hydroelectric facilities.
  - A variance account to record the deviation between actual and forecast pension and other post-employment benefit expenses related to changes in the discount rate.
  - A deferral account to record non-capital costs associated with the planned return to service of units at the Pickering A Generating Station.
  - A deferral account to record the revenue requirement impact of the change in the nuclear decommissioning liability arising from the December 2006 approved reference plan as defined in the Ontario Nuclear Funds Agreement.
  - A variance account to capture the tax impact of changes in tax rates, rules and assessments.

Evidence supporting the continuation of existing variance and deferral accounts and the creation of new ones is provided in Ex. J1-T3-S1.

RE COSEKA RESOURCES LTD. AND SARATOGA PROCESSING CO. LTD. et al.
RE PETROGAS PROCESSING LTD. AND PUBLIC UTILITIES BOARD

126 D.L.R. (3d) 705

Alberta Court of Appeal
Clement, Laycraft and Stevenson JJ.A.
July 20, 1981

Oil and gas -- Processing charge -- Retroactivity -- Public Utilities Board using interim order setting rates for processing natural gas -- Board making final order changing rates retroactive to date between interim and final orders -- Whether Board can establish rates retroactively -- Gas Utilities Act, R.S.A. 1970, c. 158, ss. 21, 27 -- Public Utilities Board Act, R.S.A. 1970, c. 302, s. 52.

Section 52(2) of the *Public Utilities Board Act*, R.S.A. 1970, c. 302, authorizes the Public Utilities Board "to make an interim order and reserve further direction, either for an adjourned hearing of the matter or for further application". That section allows the Board, in setting a "just and reasonable" rate for use of a gas processing facility under s. 27 (am. 1980, c. 21, s. 10) of the *Gas Utilities Act*, R.S.A. 1970, c. 158, to make an interim order and to replace it later with a final order containing different rates, with effect for those rates from any time back to the date of the interim order.

[*Re Northwestern Utilities Ltd. et al. and City of Edmonton* (1978), 89 D.L.R. (3d) 161, [1979] 1 S.C.R. 684, 7 Alta. L.R. (2d) 370, 12 A.R. 449, 23 N.R. 565; *Alberta Gas Trunk Line Co. Ltd. v. Amoco Canada Petroleum Co. Ltd. et al.*, [1980] 3 W.W.R. 1, 20 A.R. 384, consd; *City of Calgary et al. v. Madison Natural Gas Co. Ltd. et al.* (1959), 19 D.L.R. (2d) 655, 28 W.W.R. 353, 80 C.R.T.C. 85; *Re Western Decalta Petroleum Ltd. et al. and Public Utilities Board of Alberta* (1978), 86 D.L.R. (3d) 600, 6 Alta. L.R. (2d) 1, 9 A.R. 175; *City of Edmonton et al. v. Northwestern Utilities Ltd.* (1961), 28 D.L.R. (2d) 125, [1961] S.C.R. 392, 34 W.W.R. 600, refd to]

Oil and gas -- Processing charge -- Just and reasonable price -- Public Utilities Board making interim order setting rates for processing gas in May, 1975 -- Board making final order raising rates in 1980 effective September 1, 1977 -- Board refusing to make rate retroactive to date of interim order because gas utility had received moneys from another source and would receive unearned windfall -- Board acting on wrong principle -- Board must decide

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just and reasonable rates to be paid by customer for service received -- Gas Utilities Act, R.S.A. 1970, c. 158, s. 27.

[*Trans Mountain Pipe Line Co. Ltd. v. National Energy Board et al.*, [1979] 2 F.C. 118, 29 N.R. 44, folld]

APPEAL from the Public Utilities Board of Alberta fixing the charge for processing natural gas.

Donald P. McLaws, Q.C., for Coseka Resources Limited.

John B. Ballem, Q.C., and *L.A. Fryers*, for Saratoga Processing Company Limited and Westcoast Transmission Company Limited.

J.R. Smith, Q.C., for Husky Oil Operations Ltd.

A.L. McLarty, for Petrogas Processing Ltd.

No one for Public Utilities Board.

The judgment of the Court was delivered by

LAYCRAFT J.A.:--The issue raised by these related appeals from the Public Utilities Board of Alberta is the effective date of a Board order fixing the charge by Saratoga Processing Company Limited for processing natural gas produced from the North Coleman gas field. In the Coseka appeal the issue is whether the Public Utilities Board (PUB) exceeded its powers when, in replacing an interim order with a final order, it made the rates in the final order effective on September 1, 1977, a date nearly three years prior to the date of the final order. In the Petrogas appeal the issue is whether the effective date of the final order should have been May 2, 1975, the date of the interim order which it replaced.

These cases have a lengthy and complex history which it is necessary to review in order to follow the dispute which has now arisen. A large number of producers of natural gas in the North Coleman field and in the nearby Savanna Creek gas field are affected by the appeals. Those from the Savanna Creek field are represented by Husky Oil Operations Ltd., and those from the North Coleman field are represented by Coseka Resources Ltd., as the operators of the respective fields. The actions subsequently referred to in this case as being those of Husky or Coseka were on behalf of all the producers represented.

In August, 1957, Westcoast Transmission Company Limited contracted with Husky to purchase raw, unprocessed natural gas at a central point in the Savanna Creek gas field. Such a transaction was relatively rare, if not unique, in Alberta. Producers usually process the gas themselves in a plant before selling it to a

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buyer. In this case Westcoast, having purchased raw gas, required a gas processing plant and incorporated Saratoga Processing Company Limited as a wholly-owned subsidiary to build the plant and operate it.

In September, 1960, Westcoast entered into a gas sales agreement with a United States buyer, El Paso Natural Gas Company, which took delivery of the gas at the international boundary. El Paso undertook to pay a fixed price for the gas plus all processing and transportation charges related to it. The stream of gas sold to El Paso included gas from Savanna Creek as well as gas produced from another gas field by Petrogas Processing Limited. Petrogas sold its gas already processed and so its gas did not go through the Saratoga plant. The Savanna Creek producers provided approximately 10% of Westcoast gas volume in its Southern Alberta system, and Petrogas approximately 90%.

The field volumes of gas from the Savanna Creek field were overestimated. The field never produced the expected volumes of gas, so that the Saratoga plant built in anticipation of that volume, had excess capacity. In October, 1960, Westcoast agreed with its subsidiary, Saratoga, to reimburse it for all costs incurred in the processing plant. Westcoast then recovered all such costs from El Paso which apparently raised no issue as to costs arising from the excess plant capacity.

In 1973 and early 1974 the North Coleman Gas Field was discovered near the Savanna Creek Field. On behalf of the producers of that field on May 2, 1974, Coseka made a complaint in writing to the PUB pursuant to the *Gas Utilities Act*, R.S.A. 1970, c. 158, asking the Board to require Saratoga to process its gas, constructing such plant additions as might be required for that purpose. The PUB at that time found that the Saratoga plant had sufficient excess capacity to enable it to process the gas produced by the Coseka producers without major plant additions. The Board heard considerable evidence on the share of plant costs which should be borne by Coseka. This was a complex matter since the acid gas content and other specifications of the North Coleman gas were expected to differ considerably from the Savanna Creek gas. On May 2, 1975, the Board issued reasons for judgment in some 14 pages. Under the heading "Interim Order" the Board stated:

> As mentioned at the outset of this Decision, the Board was requested to confine its decision to matters stated to be in issue between the parties. Many ancillary questions remain to be resolved either by agreement to be presented to the Board for incorporation in the final Order or by further direction of the

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> Board at the time of granting a final Order. Most of these questions are outlined in the draft agreement presented with Saratoga's submission. Coseka advised that it had not made a detailed review of such agreement at the time of the hearing.
>
> Furthermore, without a reasonable trial period of actual operations, it is impossible to determine with any real precision the myriad factors, such as capital cost of additions, operating expenses, deliverability of Raw Gas, actual operating capacity of the plant to meet the needs for Residue Gas, and the determination of the actual Acid Gas content together with its effect on plant capacity. The answers to these questions, and to others of equal importance, are fundamental to any attempt to make an exact determination of a rate and the terms relating thereto.
>
> The Board will therefore exercise its powers under Section 52 of The Public Utilities Board Act and issue an Interim Order directing that commencing with the first delivery of gas by Coseka for processing, the charges to be paid by Coseka will consist of a fixed unit charge per Mcf of 14.4 cents for each Mcf of gas processed with a minimum annual charge of $245,000 payable as previously described. Failing such agreement, the parties may apply to the Board for further direction.
>
> The Interim Order will remain in effect until further application following an adequate period during which reasonable volumes of gas have been processed for Coseka. Direction on the many matters with respect to which the Board has made no decision and which are the subject of uncertainty between the parties is reserved to such further application.

Prior to the introduction of the North Coleman gas into the plant the average cost of processing gas was 45¢ per Mcf. The initial charge to Coseka of 14.4¢ per Mcf. was later raised to 15.6¢ per Mcf. by agreement between Saratoga and Coseka, though contrary to s. 35 of the *Gas Utilities Act*, the change was not submitted to the Board for approval.

The arrangement whereby El Paso reimbursed Westcoast for all costs of processing and transportation continued until January 1, 1975. On that date Westcoast's licence to export natural gas from Canada was amended by the National Energy Board to require Westcoast to charge El Paso a much higher fixed border price, related to the "commodity value" of natural gas as compared to other fuels in the United States. This border price included all costs of processing and transportation of the gas. In the same year the *Natural Gas Pricing Agreement Act*, 1975 (2nd Sess.) (Alta.), c. 38, was enacted by the Legislative Assembly of Alberta and amendments were also made in 1976 to the *Gas Utilities Act*. I will refer in more detail to some portions of this legislation later.

The general scheme of the new system for sales of natural gas, which was to apply despite contractual provisions to the contrary, was that American buyers of gas paid a price at the United States border fixed by the National Energy Board and computed by

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reference to the "commodity value" of gas in the United States. Original buyers of gas in Alberta were allowed to recover their "cost of service" including costs of processing and transportation attributable to the gas. These costs deducted from the border price became the field price of gas received by producers. Thus the producers of the gas rather than the consumers were, for the first time, in effect paying processing and transportation charges.

The administration of the new system of gas sales was, by the *Natural Gas Pricing Agreement Act*, entrusted to a new administrative board established by that Act, the Alberta Petroleum Marketing Commission (APMC). It was required to determine the cost of service of an original buyer of gas subject to an appeal to the PUB. In May, 1977, Regulations enacted [Alta. Reg. 127/77] under the Act specified an appeal procedure to be followed on such appeals.

A gas processing plant is a "gas utility" as defined by the *Gas Utilities Act*. The PUB is authorized by s. 27 [am. 1980, c. 21, s. 10] of that Act to fix the just and reasonable rates, tolls and charges of a gas processing plant either on its own motion or upon receipt of a complaint. As part of the new scheme of marketing gas, the PUB was forbidden by s. 5.1 added [1976, c. 21, s. 2; am. 1980, c. 21, s. 5], to the *Gas Utilities Act* effective May 19, 1976, to hold hearings under a number of sections of the Act, including s. 27, unless authorized to do so by the Lieutenant-Governor in Council of Alberta. The addition of s. 5.1 meant that the PUB was forbidden to hold a further hearing to fix finally the reasonable rates, tolls and charges for processing the North Coleman gas until some party affected applied for and obtained an order of the Lieutenant-Governor in Council permitting the hearing to be held. Until that order was obtained the interim order of May 2, 1975, would remain in effect.

The APMC administered the Westcoast cost of service as one single all-inclusive item for all of its operations in southern Alberta. The result was that, in effect, Petrogas with 90% of the volume of gas in the Westcoast Southern Alberta system paid 90% of the cost of the Saratoga plant remaining after payments by Coseka were deducted, though none of its gas was processed in that plant. Very large sums of money were involved. For September, 1977, the Westcoast cost of service was determined by the APMC to be $439,298, before adjustments for prior months, of which $206,669 was the processing cost passed on to Westcoast by Saratoga. That charge to Westcoast was simply the total plant cost less the sums recovered from Coseka.

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Not unnaturally Petrogas objected. Soon after the appeal procedure was established under the *Natural Gas Pricing Agreement Act* it filed with the APMC a statement of objection for the month of September, 1977, requesting a separate cost of service determination for Savanna Creek production and a further collective cost of service for all other areas. The APMC allowed this objection and made the order requested, thus relieving Petrogas from paying for the operation of a gas plant it did not use.

While Petrogas indirectly paid a substantial part of the costs of the Saratoga plant, the Savanna Creek producers had, apparently, not concerned themselves with the processing costs attributed to their gas. When that situation ended with the APMC decision for September, 1977, the Savanna Creek producers became concerned that a large portion of the Saratoga processing costs charged to them really related to gas supplied by the Coseka producers. They appealed the APMC ruling as to September, 1977, to the PUB. They also appealed a further APMC determination of Westcoast's cost of service for Savanna Creek gas for the month of December, 1977.

Sitting as an appellate tribunal from the APMC the PUB then needed to determine what portion of the Saratoga costs was attributed to Savanna Creek gas and what portion was attributed to North Coleman gas. In doing so, however, it faced procedural problems. The determination of costs attributed to the Savanna Creek gas arose in its jurisdiction as an appellate tribunal from the APMC. Its jurisdiction to determine the Coseka portion of the equation arose under the *Gas Utilities Act* and it was forbidden by s. 5.1 of the *Gas Utilities Act* to hold that hearing until it received an Order in Council from the Lieutenant-Governor in Council permitting it to do so. It proceeded to try to determine the Coseka portion of the charge only as a means of determining the Savanna Creek portion but was unable to make any order binding upon Coseka incorporating its finding.

In October, 1978, as the appeal from the APMC got under way, Coseka stated its contention that the Board lacked jurisdiction to fix the costs of processing its gas. Though the Board requested Coseka to assist it by remaining in the hearing while the Board fixed the costs of processing Savanna Creek gas, Coseka declined to do so and withdrew. The Board for its own reasons chose not to rely upon its general powers to subpoena witnesses and documents. After a lengthy hearing, the Board in June, 1979, issued a decision allowing Husky's appeal from the APMC and

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fixing the cost of processing the Savanna Creek Gas. In the result the costs attributed to Savanna Creek gas under that decision and the 15.6¢ per Mcf. for processing paid by Coseka fell (as estimated by counsel) approximately $100,000 per month short of the cost of operating the Saratoga plant. Under its contract with Saratoga, Westcoast bore the burden of this shortfall. Westcoast appealed the PUB decision to this Court. The appeal was dismissed (Prowse J.A. dissenting) (*Re Westcoast Transmission Ltd. and Husky Oil Ltd. et al.* (1980), 109 D.L.R. (3d) 698, [1980] 3 W.W.R. 313, 22 A.R. 25).

Meanwhile Saratoga was attempting to bring Coseka before the PUB. Application was made to the Lieutenant-Governor in Council for an order permitting the PUB to hear evidence on the cost of processing the North Coleman gas. An Order in Council was promulgated in February, 1979, but was attacked in the Courts by Coseka as being defective. That Order in Council was replaced by a further Order in Council, dated October 10, 1979, on the authority of which the Board, upon its own motion, convened a hearing and issued the decision which is the subject of these appeals. The Order in Council specifically authorized the Board to proceed by review of the interim order of May 2, 1975, or otherwise.

At the opening of the "Pre-Hearing Conference" on November 2, 1979, the Board made it clear that it was proceeding "to finish the job we started back in 1975". At the hearing the Board heard evidence for five days and issued a decision some 80 pages in length. It determined the Saratoga cost of service and allocated it between the Savanna Creek gas and the North Coleman gas. The result was a determination that the rates, tolls and charges to be paid by Coseka and fixed by the interim order of May 2, 1975, were not just and reasonable; indeed they had not been since a time "at or shortly after the issuance of the interim order". The proper rates, tolls and charges to Coseka as determined by the Board would require a substantial increase in payments by it, presumably approximating the $100,000 per month shortfall in plant costs which then existed.

In its decision the Board discussed the proper effective date for the imposition of the "just and reasonable rates, joint rates, tolls or charges" which it had determined. After reviewing the arguments presented to it by the parties the Board said:

> The Board considers that the "charges" to be paid by Coseka fixed in its Interim Order No. C75127 ceased to be just and reasonable at the time of the changes in circumstances that occurred as mentioned in Section 2 hereof. That

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> time was at or shortly after the issuance of Interim Order No. C75127. It is logical that the effective date of this Decision should be at that time as argued by Petrogas. However, as stated by Petrogas, an increase in the charge paid by Coseka up to September, 1977 would result in an unearned windfall to Saratoga unless the Board ordered such windfall amount to be paid to Petrogas and Husky.
>
> The Board considers that it does not have the authority under Section 29 of The Public Utilities Board Act or any other section of that Act or of The Gas Utilities Act to order such a payment, either directly to Petrogas and Husky or through Saratoga. With respect to the subject proceedings the provisions of those two Acts authorize the Board to fix and approve of rates, tolls or charges for services provided by Saratoga to the users or customers of Saratoga. Petrogas is not a customer of Saratoga and never has been. Should Petrogas consider it has a claim against Saratoga and/or Coseka, then it can prosecute such claim before the courts.
>
> The Board considers that it will be just and reasonable to Saratoga and its customers if the effective date of this decision is September 1, 1977, which is the effective date of Interim Order No. E79083.

The narrow issue raised by these appeals is whether the final order of the Board dated August 12, 1980, must be effective on the date it was issued or whether at some earlier date. If an earlier date is chosen, should it be September 1, 1977 (the effective date of the relief given Petrogas by the APMC), or the date of the interim order itself, May 2, 1975.

During the argument there was repeated mention by the parties of "windfall profits" which would accrue to some other of them depending on which of the dates is adopted as the effective date, assuming, of course, that this result remains unaffected by subsequent legal action, a point which is not before us. With the premise, as found by the Board, that the rates charged Coseka for processing its gas ceased to be just and reasonable at or about the time of their imposition, the following results would follow the choice of each date:

1. If the date adopted is the date of the final order, August 12, 1980, as urged by Coseka then:

   (a) From May 2, 1975 until August, 1980, Coseka would pay approximately $100,000 per month less than the just and reasonable rates.

   (b) From May 2, 1975 until September 1, 1977, Petrogas would pay 90% and Husky 10% of the plant costs after deducting the Coseka payments, though Petrogas did not use the plant. The material before us does not disclose whether the payment by Husky would be more or less than the just and reasonable rate for processing Savanna Creek gas.

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(c) From September 1, 1977 to August 12, 1980, Coseka would still pay approximately $100,000 per month less than the just and reasonable rates. The payment by Petrogas would be stopped. Husky would pay the just and reasonable rates fixed by the Board on Husky's appeal from the APMC. The shortfall in plant costs of $100,000 per month would be borne by Westcoast.

2. If the effective date is September 1, 1977, as fixed by the Board, then after that date all parties would be paying or receiving their proper share of costs. For the period between May 2, 1975 and September 1, 1977, however, the discrepancies would be as set forth in 1(a) and (b) above.

3. If the interim order is simply replaced by the final order as of May 2, 1975:

   (a) Coseka would pay the just and reasonable rates for processing its gas throughout.

   (b) The just and reasonable rates for Husky would be determined for the whole period, but there would be no proceeding before the Board in which Husky would either be ordered to pay or entitled to receive moneys for the period between May 2, 1975 and September 1, 1977. The material before us does not disclose whether Husky paid more or less than the proper amount during that period.

   (c) Saratoga would still have the sums paid by Petrogas from May 2, 1975 to September 1, 1977, which would be in excess of plant costs subject to whatever advantage or disadvantage Husky gained during that period.

It is urged on behalf of Coseka that to prescribe any effective date, other than the date the order issued, is to offend the well-established principle that the PUB may not establish rates retroactively. Authorities cited are *City of Calgary et al. v. Madison Natural Gas Co. Ltd. et al.* (1959), 19 D.L.R. (2d) 655, 28 W.W.R. 353, 80 C.R.T.C. 85 (Alta. C.A.); *Re Western Decalta Petroleum Ltd. et al. and Public Utilities Board of Alberta* (1978), 86 D.L.R. (3d) 600, 6 Alta. L.R. (2d) 1, 9 A.R. 175 (Alta. C.A.); *City of Edmonton et al. v. Northwestern Utilities Ltd.* (1961), 28 D.L.R. (2d) 125, [1961] S.C.R. 392, 34 W.W.R. 600; *Re Northwestern Utilities et al. and City of Edmonton* (1978), 89 D.L.R. (3d) 161, [1979] 1 S.C.R. 684, 7 Alta. L.R. (2d) 370; *Alberta Gas Trunk Line Co. Ltd. v. Amoco Canada Petroleum Co. Ltd. et al.*, [1980] 3 W.W.R. 1, 20 A.R. 384 (Alta. C.A.). The respondents, Saratoga

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and Petrogas, contend that to replace an interim order with a final order would not in fact be fixing rates retroactively; rather it would be a mere finalization of the interim order and the exercise of a jurisdiction reserved by the interim order.

The Board's original jurisdiction to regulate a gas scrubbing plant is contained in the *Gas Utilities Act* as amended. By s. 2(*f*)(iii) [am. 1974, c. 44, s. 10(2)] a gas scrubbing plant is a gas utility. By s. 21 the Board is given a general power of supervision of gas utilities. This section provides:

> 21(1) The Board shall exercise a general supervision over all gas utilities, and the owners thereof, and may make such orders regarding equipment, appliances, extension of works or systems, reporting and other matters, as are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.
>
> (2) The Board shall conduct all inquiries necessary for the obtaining of complete information as to the manner in which owners of gas utilities comply with the law, or as to any other matter or thing within the jurisdiction of the Board under this Act.

By s. 24 [am. 1980, c. 21, s. 9] a number of prohibitions are imposed on gas utilities, among them a provision that no utility shall "make, impose, or extract" any unjust unreasonable or discriminatory rate. By s. 27 it is provided:

> 27. The Board, either upon its own initiative or upon complaint in writing, may by order in writing, which shall be made after giving notice to and hearing the parties interested,
>
> (*a*) fix just and reasonable individual rates, joint rates, tolls or charges or schedules thereof, as well as commutation and other special rates, which shall be imposed, observed and followed thereafter by the owner of the gas utility.

The only power expressly given in the *Gas Utilities Act* to make orders effective prior to the date of them is contained in s. 31. That section, as it read prior to amendments in 1977 [1977, c. 9, s. 5], which are not applicable to this case, provided:

> 31. It is hereby declared that, in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by an owner of a gas utility after an application has been made to the Board for the fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of the application.

The *Gas Utilities Act* does not itself contain a provision enabling the Board to issue an interim order. By s. 49, however, many of the provisions of the *Public Utilities Board Act*, R.S.A. 1970, c. 302, are imported into the powers of the Board when it functions under the *Gas Utilities Act*. This section provides:

49. All the provisions of *The Public Utilities Board Act* relating to the juris-

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> diction of the Board, hearings, service of notices or orders, regulations, rules and procedure, enforcement of orders, appeals, rights, privileges and immunities of the Board, and applicable in the case of a public utility under that Act, if not provided for expressly in this Act, apply and have effect as if this Act formed a part of *The Public Utilities Board Act*.

The power to make interim orders is contained in s. 52 of the *Public Utilities Board Act*. This section provides:

> 52(1) The Board may direct in any order that the order, or any portion or provision thereof, come into force at a future fixed time, or upon the happening of any contingency, event or condition specified in the order, or upon the performance, to the satisfaction of the Board or a person named by it for the purpose, of any terms that the Board imposes upon any party interested, and the Board may direct that the whole or any portion of the order have force for a limited time or until the happening of any specific event.
>
> (2) The Board may, instead of making an order final in the first instance, make an interim order and reserve further direction, either for an adjourned hearing of the matter or for further application.

There can, in my view, be no doubt that apart from the powers given in s. 31 of the *Gas Utilities Act* and s. 52 of the *Public Utilities Board Act* (with a further power in s. 54 for *ex parte* interim orders not applicable here) all rates fixed by the Board must be prospective. Each of the authorities cited above, except *Alberta Gas Trunk Line Co. Ltd. v. Amoco Canada Petroleum Co. Ltd., supra*, deal with final orders or with the power to predate orders where there has been "undue delay". These authorities uniformly hold that a final order fixing rates must be prospective but none of them deal with the problem raised here: whether a final order may affect the past by varying rates specified in an interim order.

In *City of Calgary et al., supra*, the Board made a number of interim orders while the hearing was in progress but in 1947 issued a final order which purported to reserve a right of review. The precise rates approved were put into effect for the sale of gas to the City of Calgary. Due to the city's rapid growth, however, the rates produced a higher than expected rate of return. When the Board came to fix new rates in 1958 it was urged to fix rates lower than then required to take into account the amount by which the previous earnings exceeded the rate of return. It was held the Board had no power to reserve a right of review in a final order; its rate-fixing power is prospective only and it cannot make rates retroactively. Similarly this Court held in *Western Decalta Petroleum Ltd. et al. v. Public Utilities Board, supra*, where a final order issued, that it was required to be prospective. The 1961 decision of *City of Edmonton v. Northwestern Utilities Ltd., supra*, dealt with the question whether there had been "undue delay" and the effect to be given that delay in a final order.

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The 1978 decision of the Supreme Court of Canada in *Northwestern Utilities Ltd. v. Edmonton, supra*, covers the same point. The company applied in 1974 for a rate increase. Before the final order was issued in that application the company made another application in 1975. In the second application the Board issued an interim order increasing rates. It was held that the only losses suffered by the company which could be taken into consideration were those arising after the date of the last application. At pp. 163-4 D.L.R., p. 690 S.C.R., Estey J. said:

> While the statute does not precisely so state, the general pattern of its directing and empowering provisions is phrased in prospective terms. Apart from s. 31 there is nothing in the Act to indicate any power in the Board to establish rates retrospectively in the sense of enabling the utility to recover a loss of any kind which crystallized prior to the date of the application: *vide City of Edmonton et al. v. Northwestern Utilities Ltd.* (1961), 28 D.L.R. (2d) 125 at pp. 132-3, [1961] S.C.R. 392 at pp. 401-2, 34 W.W.R. 600, *per* Locke, J.
>
> The rate-fixing process was described before this Court by the Board as follows:
>
> > "The PUB approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money which has been invested by the company in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to provide the utility service. The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the estimates of "forecast revenue requirement". These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered."
>
> The statutory pattern is founded upon the concept of the establishment of rates *in futuro* for the recovery of the total forecast revenue requirement of the utility as determined by the Board. The establishment of the rates is thus a matching process whereby forecast revenues under the proposed rates will match the total revenue requirement of the utility. It is clear from 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 under rates established for past periods.

(Emphasis added.)

The Board's rate-making powers are prospective; nothing permits retrospective operation of rates *prior to the date of the application.* In the last sentence of the quotation which Estey J. took from the Board's description of its rate-fixing process, it is recognized that an interim rate already charged and paid may be

[p. 717]

varied by a final order. He does not dissent from that proposition but the point was not before the Court in that case. In my view it is not authority for either view. In the present case, no party seeks to charge rates before the date of the application; indeed none of Coseka's gas was processed prior to that date. One purpose of the application was to require Saratoga to process the gas.

The decision of this Court in *Alberta Gas Trunk Line Co. Ltd. v. Amoco Canada Petroleum Co. Ltd., supra*, turned for the most part on the specific terms of the statute involved, the *Alberta Gas Trunk Line Company Act*. While casting no doubt on the general proposition that the Board may not make retroactive orders, Clement J.A., for the majority of the Court, held that nothing in that Act prevented the 12-month period for which rates were to be fixed from being applied either retrospectively or prospectively. Clement J.A. referred to the interim order and its effect but did so in the context of the 12-month period specially provided by the applicable statute. Prowse J.A., concurring in the result, held that s. 52 of the *Public Utilities Board Act* applied. He therefore had to consider whether an interim order made under s. 52 is subject to adjustment by the final order. He concluded that it is. He said (p. 46): "it is open to the board in its final order to fix rates that apply to the period covered by both orders and to direct the necessary adjustment to give effect thereto".

I respectfully agree with that statement. It is not necessary to consider in this case the validity of his characterization of the variation of an interim order as "an administrative matter". I would leave that point for the case in which it arises. In my view, s. 52(2), empowering the Board to "make an interim order and *reserve further* direction, either for an adjourned hearing of the matter or for further application" (emphasis added) contemplates the very situation which arose in this case. It was virtually impossible to fix just and reasonable rates for the processing of Coseka's gas and even an approximation of them would have been speculative. So instead of making a final order, the Board made an interim order and reserved the matter for a "further direction" which it has now made.

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

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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.

It was also urged on behalf of Coseka that great injustice will result if interim rates once paid may subsequently be varied. There is no doubt that the Board must take careful account of this factor in its determination of what is just and reasonable and the problem becomes the more serious the longer is the delay. Some purchasers of the utility service for whom it is a cost of doing business may be unable to incorporate a changed rate in the price of the goods or services they themselves sell. Other purchasers who made economic decisions on the premise that the utility service had a given cost, may find those decisions invalidated. Nevertheless all consumers of a utility service must be aware that the rates in an interim order are subject to change and determine their course of action upon the basis of that knowledge. The time involved will usually be relatively short and the Board will do its best to minimize the impact of the change. In this case, through no fault of the Board, a very long time elapsed before the interim order could be finalized. When the parties to a hearing realize that the rates set in an interim order are subject to variation, they will perceive that there is no advantage to be gained by delay.

I am constrained to observe that protestations by Coseka of injustice arising from long delay have a hollow ring in this case. Coseka refused to come before the Board or to assist it on Husky's appeal from the APMC decision when the Board sought to determine the position of Saratoga's costs attributed to Savanna Creek gas. It sought by legal action to prevent the Board from acting on the first Order in Council to finalize the interim order. It

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gave every appearance of being reluctant to find itself before the Board. An officer of the company was frank to explain the reason for this attitude in answer to questions from a Board member who pointed out that Coseka had refused to assist the Board and had withdrawn from the hearings. The following then appears in the transcript of the hearing:

> Q. I see, and that's what concerns me. I'm sure you're a very astute businessman, Mr. Kutney, and since you were being so badly treated, you knew this Board may be of some assistance, you knew you were a party to these proceedings yet you didn't wish to give it. What happened to your practical considerations then?
>
> A. I guess there was some more that entered into that judgment possibly the business considerations, *the longer we stayed away from this Board, maybe the longer the favourable rate would stay in effect.*

(Emphasis added.)

In my view the Board was empowered by the provisions of s. 52 of the *Public Utilities Board Act* to replace the rates in the interim order with different rates with effect from any time back to the date of the interim order.

Having rejected Coseka's contention that the order cannot affect rates charged prior to the date it was issued, I turn now to a consideration of the appropriate effective date. That determination is, of course, a function of the Board under the terms of the statute. This Court may interfere only if the determination was made upon wrong principles. In *Trans Mountain Pipe Line Co. Ltd. v. National Energy Board et al.*, [1979] 2 F.C. 118, 29 N.R. 44, Pratte J., speaking for the Federal Court of Appeal, said at p. 121:

> What makes difficulty is the method to be used by the Board and the factors to be considered by it in assessing the justness and reasonableness of tolls. The statute is silent on these questions. In my view, they must be left to the discretion of the Board which possesses in that field an expertise that judges do not normally have. If, as it was clearly done in this case, the Board addresses its mind to the right question, namely, the justness and reasonableness of the tolls, and does not base its decision on clearly irrelevant considerations, it does not commit an error of law merely because it assesses the justness and reasonableness of the tolls in a manner different from that which the Court would have adopted.

In my view this language is equally applicable to a review of the decisions of the Public Utilities Board by this Court. I must therefore consider whether the Board reached its conclusion acting on wrong principles.

Having observed that the rates charged Coseka ceased to be just and reasonable "at or shortly after" their imposition, the Board characterized as "logical" the Petrogas submission that the

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effective date should be at the commencement of the interim order. It then declined to reach that conclusion on the ground that if Coseka made the payment, Saratoga would have an unearned windfall and on the further ground that the Board has no authority to order payment "to Petrogas or Husky or through Saratoga".

At this stage in a complex unfolding story it is desirable to analyze the result of the various hearings and the course open under the statutes to the Board and to the parties. With the Board's order effective September 1, 1977, Saratoga, the utility being regulated, has received its full cost of service. In the period prior to September 1, 1977, a large portion of this money came indirectly from Petrogas. Coseka paid less than the proper amount since the rates charged to it were not just and reasonable. Nothing before this Court establishes whether the sums charged Husky before September 1, 1977, were proper or not. It must also be realized that sums paid by Petrogas are the result of orders, not by the PUB, but by the APMC made at a time when no appeal procedures had been established. The Board has no jurisdiction at all to overrule those orders.

The further complication is that there is no proceeding before the Board in which it can fix by order binding on Husky, the just and reasonable rates for Husky for the period prior to September 1, 1977. There is no interim order in existence affecting Husky to which a final order can relate. Any application made now by one of the parties or any proceeding commenced by the Board on its own motion will produce rates applicable only to the period after the date of the application or proceeding. The Board could not correct past deficiencies or overpayments by means of rate adjustments: *Re City of Calgary et al., supra.*

In my view what the Board has done is to decline its jurisdiction to fix just and reasonable rates for Coseka for the period from May 2, 1975 until September 1, 1977. It has done so not because the utility would not receive its proper cost of service from those rates, but because from another source completely outside the Board's jurisdiction, the utility has received other moneys. That, in my view, is not a proper ground on which the Board may decline to exercise its jurisdiction. Either voluntarily or after legal action the utility may repay that money. That is not before the Board or before this Court. The Board must, in any event, accept its jurisdiction to consider and to rule on the just and reasonable rates which each customer of the utility which it regulates must pay for the service received. I would quash the portion of the

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Board order dealing with its effective date and refer the matter back to the Board for determination in accordance with these reasons. Costs may be spoken to.

Appeal allowed.

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

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*

indexed as: bell canada *v.* canada (canadian radio-television and telecommunications commission)

File No.: 20525.

1989: February 21; 1989: June 22.

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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

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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.

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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.

//Gonthier J.//

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The judgment of the Court was delivered by

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.

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

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

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> 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 applications 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.

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

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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.

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):

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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.

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

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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.

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.

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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.

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 radio-telephone 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

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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.

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

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 subquestions:

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.

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.

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.

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.

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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

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.

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.

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.

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.

In many respects, ss. 47 *et seq.* of the *National Transportation Act* have been designed to

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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.

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.

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:

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> **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.

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.

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

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.

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 reimburse revenues

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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".

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.

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*

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*").

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.

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 further 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.

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.

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.

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*

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.

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.

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

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

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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.

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

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.

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*.

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

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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.]

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 *National 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.

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. 35*a*(3) of the *Natural Gas Utilities Act*, which read as follows:

> **35*a*** -- ...
>
> (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

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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.

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.

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.

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

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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.

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.

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.

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.

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.

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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.

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

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.

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.

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.

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

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.

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.

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

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.

I would allow the appeal and confirm the appellant's decision, with costs in all courts.

Appeal allowed with costs.

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.

Driedger on the Construction of Statutes

Third Edition

by

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free to terminate only for a cause that would be recognized as reasonable within the meaning of the Human Rights Code. The conflict was thus avoided in a way that acknowledged the paramountcy of the human rights legislation.

Since 1982, the principle that fundamental law is paramount has been applied on numerous occasions to give priority to federal and provincial human rights legislation.[109] It has also been applied to other public and fundamental legislation, most notably language guarantees.[110]

Statutes are paramount over regulations. The presumption of coherence applies to regulations as well as to statutes. It is presumed that regulatory provisions are meant to work together, not only with their own enabling legislation but with other Acts and other regulations as well. In so far as possible the courts seek to avoid conflict between statutory and regulatory provisions and to give effect to both. Where conflict is unavoidable, however, the statutory provision prevails.

These points were made by La Forest J. in *Friends of Oldman River Society v. Canada (Minister of Transport)*:[111]

> Just as subordinate legislation cannot conflict with its parent legislation,...[112] so too it cannot conflict with other Acts of Parliament,...[113] unless a statute so authorizes....[114] Ordinarily, then, an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation. However, as a matter of construction a court will, where possible, prefer an interpretation that permits reconciliation of the two.[115]

It had been argued that the Environmental Assessment and Review Process Guidelines Order enacted under the Department of the Environment Act was inconsistent with s. 5 of the Navigable Waters Protection Act. Under the Guidelines Order any Minister with decision-making authority over a proposed undertaking or activity was required to carry out an environmental assessment if the undertaking or activity might have an adverse environmental impact. Under s. 5 of the Navigable Waters Protection Act the Minister of Transport had discretion to approve the building of works in or across navigable water "on such terms and conditions as the Minister deems fit". The

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[109] See, for example, *Berg v. University of British Columbia*, [1993] 2 S.C.R. 353, at 370-71; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, at 153-56; *Canada (A.G.) v. Druken*, *supra* note 106, at 31.

[110] See *R. v. Mercure* (1988), 48 D.L.R. (4th) 1, at 57 (S.C.C.), *per* La Forest J.: "... language is profoundly anchored in the human condition. Not surprisingly, language rights are a well-known species of human rights and should be approached accordingly."

[111] [1992] 1 S.C.R. 3.

[112] *Belanger v. The King* (1916), 54 S.C.R. 265.

[113] *R. & W. Paul, Ltd. v. Wheat Commission*, [1937] A.C. 139 (H.L.).

[114] *Re Gray* (1918), 57 S.C.R. 150.

[115] *Supra* note 111, at 38; see also at 48-49.

EB-2007-0606

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

AND IN THE MATTER OF an Application by Union Gas Limited for an Order or Orders approving a multi-year incentive rate mechanism to determine rates for the regulated distribution, transmission and storage of natural gas, effective January 1, 2008.

Hearing held at 2300 Yonge Street, 25th Floor, Toronto, Ontario, on Tuesday, November 6, 2007, commencing at 9:30 a.m.

Motion Hearing

BEFORE:

GORDON KAISER	PRESIDING MEMBER AND VICE CHAIR
PAUL SOMMERVILLE	MEMBER
CYNTHIA CHAPLIN	MEMBER

So those are my submissions in reply, subject to any further questions of the Board.

MR. KAISER: Thank you.

[Board Panel confers]

MR. KAISER: We will come back in half an hour.

--- Recess taken at 11:56 a.m.

--- On resuming at 12:05 p.m.

MR. KAISER: Please be seated.

DECISION

MR. KAISER: The Board this morning heard a motion by Union Gas filed on September 21st seeking two Board Orders. First, an order declaring that Union's rates for the distribution, transmission and storage of natural gas would become interim effective January 1st, 2008. Secondly, an order implementing new interim rates effective January 1st, 2008 in accordance with Exhibit D, tab 2 of Union's prefiled evidence in this proceeding.

The rate increase at issue is approximately $15 a year on the average consumer bill for a M1 customer which is currently $350. That would rise to $365 on an annualized basis.

Union concedes that this is not a hardship case and it is not seeking an interim rate increase due to financial distress. The company argues that the sole issue at play here is the avoidance of having to collect significant retroactive charges later in the year.

There are six consumer groups represented in this proceeding and all oppose Union in this application to

varying degrees. The intervenors all agree that retroactive charges are to be avoided. However, they all argue that this goal must be balanced against the interests of ensuring that all rates receive full and fair consideration of the arguments and evidence of all of the parties.

The intervenors argue that in order to strike an appropriate balance, the Board should approve by way of interim rates only those matters that have been previously approved by the Board or are uncontested. There are differences between them, however and I will come to those in a moment.

VECC points out, as others do, that the choice is between under-collecting or over-collecting, and that under-collecting, in their view, is to be preferred. In part because the Board can take steps later in this proceeding to mitigate those amounts, i.e., spreading those amounts over longer periods, should that become necessary.

Kitchener supports this as does SEC. Kitchener says that the Board should apply the balance of convenience test and in applying that test the Board should move towards under-collecting as opposed to over-collecting. As Mr. Ryder says, a bird in the hand is something not to be dismissed lightly.

The amounts at issue are set out in Schedule A of Mr. Thompson's factum which reflects Exhibit D, tab 3, schedule 3. The total amount of the change, if Union's application were granted in full, adds up to $21.9 million. That is

made up of five components; the storage premium is $3.7 million. The price cap is $8.7 million. Weather normalization is $6.2 million. Incremental DSM is $1.7 million. And GDAR is $1.6 million.

IGUA and others would allow an interim increase totalling some $7 million, which reflects amounts for the storage premium, incremental DSM and the GDAR.

Kitchener agrees with the GDAR and incremental DSM, but does not believe the storage premium should be granted by way of interim rate increase at this time. That's because there is a petition filed by Kitchener and others to the provincial Cabinet which has yet to be ruled on.

The DSM and GDAR amounts alone would yield an interim rate increase of approximately $3.3 million.

There have been various arguments regarding the degree of analysis and fact finding the Board should engage in at this point. At one end of the spectrum, Mr. Penny says that the Board is not expected to make any fact finding or decision on the merits at this point, it being understood this is an interim decision which is all subject to change ultimately when the final decision is made.

However, Mr. Penny also concedes that he should establish a prima facie case. He says a prima facie case simply means that if his evidence is accepted, it would yield the interim rate increase he is requesting.

Mr. Thompson has taken that a step further. With respect to the price cap and weather normalization, he argued that a prima facie case is not made out on the

evidence. He refers to the evidence of Dr. Loube, that there is untested evidence with respect to the components of the PCI adjustment factor for Union, and it is capable of supporting findings that the sum of all components of the X factor will be more than sufficient to offset the currently forecasted rate of inflation.

The Board is not of the view that we need to engage in a detailed fact-finding analysis at this point. The evidence is untested. Everyone recognizes that. We are mindful of the real issue here. It is not an issue of hardship. It is an issue of what is in the best interests of the consumers, or the customers. The customers are represented here by six different groups. And to a man, they all argue that under-collection is the preferred route.

VECC has raised a concern as have others, that any decision at this point would prejudge the outcome of the settlement process or prejudge the Board's ultimate decision. We do not agree with that. We do not think this decision, in any way, prejudges the Board's position on any of these matters.

But weighing all of the interests, we have come to the conclusion that we should accept the position outlined by Mr. Thompson. That is to say, the interim rate increase should be allowed to the extent of the $7 million, as set out in Schedule A of his factum.

Any questions?

MR. POCH: Mr. Chairman, just a point. I believe --

and correct me if I'm wrong, Mr. Thompson -- that would -- of necessity right now doesn't include LRAM adjustment, because I presume it is not calculated yet. I will perhaps wait for my friends at Union. And the Board may simply want to word the -- to accommodate that, once known.

MR. KAISER: Is that in there, Mr. Thompson?

MR. POCH: I was observing, I believe the seven of necessity doesn't include the LRAM amount because it's not yet specified. Is that correct? I'm not sure.

MR. KAISER: Mr. Thompson.

MR. THOMPSON: The application was based on the Exhibit D, tab 3, schedule 3. [inaudible]

MS. CHAPLIN: Microphone.

MR. THOMPSON: Sorry. I don't know if LRAM is in or out, or what my friend is even talking about, quite frankly. But I don't know if Union was asking any special relief with respect to that.

MR. PENNY: From our perspective is it is immaterial in the LRAM. It doesn't matter to us. Some of it is up. Some of it is down.

MR. KAISER: Ms. Chaplin has asked me to point out that we are accepting the implementation of the new M1 and new M2 rate classes.

MR. PENNY: Thank you.

MR. KAISER: Any further questions? Thank you, gentlemen.

MR. PENNY: Thank you.

--- Whereupon the hearing adjourned at 12:15 p.m.

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2007-0522

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 EnWin Utilities Ltd. for an order or orders approving or fixing just and reasonable distribution rates and other charges, effective August 1, 2007.

BEFORE: Paul Vlahos
Presiding Member

Paul Sommerville
Member

INTERIM RATE ORDER

EnWin Utilities Ltd. ("EnWin") is a licensed distributor providing electrical service to consumers within its defined service area. EnWin filed an application (the "Application") with the Ontario Energy Board (the "Board") for an order or orders approving or fixing just and reasonable rates for the distribution of electricity for the period August 1, 2007 to April 30, 2008. In the application, EnWin asked that its current rates be made interim commencing August 1, 2007.

The processing of EnWin's Application is not yet concluded. Pending the issuance of final rates for 2007, the Board finds that current rates shall be declared interim.

In granting the Company's request to have its rates declared interim, the Board wishes to emphasize that this action should in no way be construed as predictive, in any degree, of the final determination of this application.

THE BOARD ORDERS THAT:

1. The approved rates of EnWin Utilities Ltd., effective on July 31, 2007, are declared interim as of August 1, 2007 and until such time as a final rate order is issued by the Board.

DATED at Toronto, September 14, 2007.

ONTARIO ENERGY BOARD

Original signed by

Peter H. O'Dell
Assistant Board Secretary

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2007-0816

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

AND IN THE MATTER OF the Independent Electricity System Operator Fiscal 2008 Fees Submission for Review.

INTERIM FEES ORDER

On November 2, 2007, the Independent Electricity System Operator (the "IESO") filed its proposed Fiscal 2008 Fees Submission for Review with the Ontario Energy Board for review in accordance with sections 18 and 19 of the *Electricity Act, 1998*. The Board assigned file number EB-2007-0816 to this matter.

The Board issued a Notice of Application dated December 12, 2007 with respect to this matter.

The IESO has requested that the Board consider an expedited process that would:

(i) avoid or limit the time and expense of an oral hearing; and

(ii) allow the IESO's revenue requirements and fees to be approved for implementation on the first invoices issued for the fiscal 2008 year.

The Board will decide whether to proceed with this application by way of a written hearing or by way of an oral hearing at a later date.

With respect to item (ii) above, the Board has decided to issue an interim fees order at this time that would allow the IESO to implement the proposed reduced fee starting January 1, 2008, pending a final decision in this proceeding.

THE BOARD THEREFORE ORDERS THAT:

The IESO's proposed usage fee for 2008 of $0.799 / MWh is approved on an interim basis, effective January 1, 2008, pending a final decision in this proceeding. Should the Board approve a fee in its final decision that differs from the interim fee, the Board may determine that the new final fee be applied effective January 1, 2008.

ISSUED at Toronto, December 17, 2007

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2007-0791

IN THE MATTER OF sections 25.20 and 25.21 of the *Electricity Act, 1998*;

AND IN THE MATTER OF a Submission by the Ontario Power Authority to the Ontario Energy Board for the review of its proposed expenditure and revenue requirements and the fees which it proposes to charge for the year 2008.

BEFORE: Pamela Nowina
Presiding Member and Vice Chair

Paul Vlahos
Member

INTERIM FEES ORDER

The Ontario Power Authority (the "OPA") has filed its proposed expenditures and revenue requirement for the 2008 fiscal year and the fees it proposes to charge, for review by the Ontario Energy Board (the "Board") in accordance with subsections 25.21 (1) and 25.21 (2) of the *Electricity Act, 1998*. The OPA's statutory objectives include ensuring an adequate, reliable and secure supply of electricity in Ontario.

The OPA is seeking the following, among other, approvals from the Board:

1) approval of an overall Operating Revenue Requirement of $58.616 million;
2) approval of proposed 2008 capital expenditures of $2.6 million;
3) approval to establish a usage fee of $0.391/MWh;
4) approval of an Interim Fees Order effective January 1, 2008 in the absence of a final Order.

The Board has assigned File No. EB-2007-0791 to this application.

The Board issued a Notice of Application dated December 6, 2007 with respect to this proceeding. As the proceeding will not be completed to allow for a final order regarding revenue requirement and fees to be implemented on January 1, 2008, the Board approves, by this Interim Order, the OPA's applied for fees effective January 1, 2008.

THE BOARD ORDERS THAT:

1. The Board approves, on an interim basis, a usage fee of $0.391/MWh, effective January 1, 2008, pending a final decision in this proceeding, at which time a final revenue requirement and the fees based on that final revenue requirement may be applied retroactively from January 1, 2008.

ISSUED at Toronto, December 20, 2007.

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2006-0501

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. for an Order or Orders approving or fixing just and reasonable rates and other charges for the transmission of electricity commencing January 1, 2007.

PARTIAL DECISION AND ORDER

Hydro One Networks Inc. ("Hydro One" or the "Company") filed an Application, dated September 12, 2006, with the Ontario Energy Board under section 78 of the *Ontario Energy Board Act 1998, S.O. 1998*, c.15, Schedule B. The Board assigned file number EB-2006-0501 to the Application and issued a Notice of Application dated October 17, 2006.

By letter dated February 14, 2007 and in the February 23, 2007 update to its application, Hydro One requested that a 2007 revenue deficiency deferral account be established beginning January 1, 2007 to record the revenue deficiency between the approved revenue for 2007 and forecast revenues at currently approved transmission rates. Hydro One requested a decision from the Board on this issue by March 31, 2007.

On March 12, 2007 the Board issued Procedural Order #4 requesting that Hydro One make further submissions addressing the following issues:

- The need for the revenue deficiency deferral account;
- Why the issue of the account must be dealt with on an expedited basis;

- What will be booked into the account, and the accounting entries that are proposed to be made;
- The date upon which Hydro One proposes to start booking entries into the account; and
- What, if any, consequences follow if the account is not established at all, or is not established prior to March 31, 2007 as requested.

The procedural order also invited intervenors to respond to Hydro One's submissions and then provided for Hydro One's subsequent reply submissions.

Hydro One Submissions:

Hydro One, in its March 13, 2007 submissions, stated that the EB-2005-0501 transmission earnings sharing mechanism (ESM) was intended to end once new transmission rates were implemented. The establishment of the 2007 revenue deficiency deferral account (RDDA) beginning January 1, 2007, would replace and end the ESM.

Hydro One claimed that the proposed RDDA was more transparent than the ESM, and would be easier to justify and implement for a portion of a year (as un-audited financial results would be used.) In contrast, the part-year RDDA calculations would be based upon approved data consistent with Hydro One Transmission 2007 rate filing. A rates decision in late 2007 would lead to regulatory lag and uncertainty regarding Hydro One in financial markets. An RDDA was also consistent with the Great Lakes Power Limited (GLPL) deferral account (EB-2005-0241) granted in 2005. A decision by March 31, 2007 was requested due to first quarter financial reporting requirements to external investors.

Under the proposed plan, Hydro One submitted that no amounts would be recorded for the ESM in 2007; however, on a monthly basis, the deficiency between the proposed revenue 2007 requirement (per the Hydro One Transmission rate filing) and revenue calculated using current approved rates (by applying a weather normal monthly load forecast consistent with the 2007

load forecast) would be reflected in the deferral account. Monthly carrying costs would be applied to this entry using the short-term interest rate included in the 2007 revenue requirement. Disposition of the account would be subject to future OEB review and approval. Entries would be booked immediately upon receiving a favourable decision from the OEB reflecting the commencement date of January 1, 2007.

Intervenors' Submissions:

Four intervenors responded to the Hydro One submission. The Vulnerable Energy Consumers Coalition (VECC) and Schools Energy Coalition (SEC) argued against granting the account. The Association of Major Power Consumers (AMPCO) and the Power Workers Union (PWU) were supportive of the request.

VECC argued that approval of this account was retroactive ratemaking and should not be approved by the Board. The GLPL case should not be considered as a precedent in this application as the deferral account granted to GLPL was only one aspect of a comprehensive settlement agreement. In addition, the GLPL account only applied to deficiencies starting on April 1, 2005, not January 1. VECC also argued that if the account was granted, no interest should be collected in the account.

SEC argued that the Board does not have the authority to revisit rates. SEC noted that in the EB-2005-0501 ESM decision, the Board stated that it was reluctant to have existing rates declared interim and if the Board had meant the mechanism to last only until January 1, 2007, it would have said so. SEC indicated that it would be unfair to ratepayers to allow Hydro One to revisit rates during a period where it anticipates a revenue deficiency but not do so during a period of over-earning. SEC also mentioned the fact that the GLPL deferral account was part of a comprehensive settlement agreement. SEC also noted that recent decisions of the Board have refused to implement rates retroactively on basis that the applicant had not demonstrated that the delay in arriving at just

and reasonable rates by the beginning of the test year was not due to factors within the applicant's control, citing the January 2, 2007 Erie Thames Powerlines Corporation rate order.

AMPCO did not object to the establishment of the RDDA as this action would reassure investors that regulatory risk is minimal. AMPCO stressed that this approval should not pre-empt the Board's hearing process or be misconstrued as prior approval of Hydro One's revenue requirement. AMPCO submitted that any revenue deficiency calculation should be based on actual, non-weather corrected revenue under current rates and that the RDDA should be based only on continuance of program expenditures at the level Hydro One executed in 2006 and not on the increased levels being requested for 2007.

The PWU also supported the approval of the RDDA citing the need for utilities to have sufficient financial certainty so that they can carry out existing and new transmission work programs. The PWU also agreed with Hydro One that the RDDA was consistent with the GLPL decision and stated that the extended application of ESM for 2007 was inappropriate.

Hydro One Reply Submissions:

In its March 21, 2007 reply, Hydro One indicated that it was not requesting prior approval of its proposed 2007 programs or revenue requirements. Hydro One also submitted that SEC's assertions regarding "retroactive rate increases" are not supported as the OEB is not retroactively setting rates and that it is not revisiting rates for a period during which final rates were in place. Hydro One also noted that the settlement agreement in the GLPL case was the basis for the final order issued November 14, 2005, while the deferral account was granted much earlier on March 22, 2005.

Hydro One also stated that it believes that by requiring the use of audited financial statements for the ESM calculations, the Board intended full year application of the ESM, not part year application.

Hydro One submitted that AMPCO's suggestions that the revenue deficiency be calculated on the basis of non-weather corrected actual 2007 revenue and to use 2006 actual program costs is inconsistent with typical regulatory practice and the GLPL decision. Hydro One also pointed out that the GLPL decision included carrying costs in the approved deferral account.

Findings

It often happens that rate proceedings occur within timeframes that do not coincide with the conventional rate period. This can occur for a variety of reasons. In such situations an issue arises as to when the rates approved by the Board will become effective. Determining the effective date for rates is an important aspect of the Board's jurisdiction, and it can have significance for Applicants and ratepayers.

It is clear that such a situation will arise this year with respect to the revenue requirement for Hydro One. It is likely that the final determination of its revenue requirement for 2007 will not be made until the latter half of 2007.

Deferral accounts, such as the one applied for by Hydro One in this proceeding, are accounting devices intended to allow an entity to capture and record in an identifiable location an aspect of operations, the final quantum and disposition of which is dependent on some future unknown event.

In the case of the deferral account applied for by Hydro One, the unknown future event is the Board's final determination of the 2007 revenue requirement, the effective date governing that revenue requirement, and the terms and conditions

imposed by the Board on the disposition, if any, of the amounts recorded in the deferral account.

Parties commenting on Hydro One's request for the Revenue Deficiency Deferral Account have raised issues respecting rate retroactivity, and have attempted to define with great particularity the terms and conditions that should govern the creation of the account, if the Board sees fit to approve its creation.

In the Board's view, the time to make these arguments is in the course of the revenue requirement proceeding per se, and, if necessary, at the time Hydro One seeks to have the amounts recorded in the account disposed of, so as to effect its revenue requirement or the resulting rates derived from it. Parties will be free to make whatever submissions they see fit as to the appropriateness of any disposition option.

At this stage, the Board is simply concerned with ensuring that the account meets the objective of administrative and accounting utility.

Accordingly, the Board approves the creation of a deferral account, effective January 1, 2007, to be referred to as the Revenue Difference Deferral Account. This account will record the sufficiency or deficiency arising from the difference between the 2006 Transmission rates, that is, rates that are currently in force, and the rates that would result from the new revenue requirement as determined by the Board in this proceeding. Parties will note that the Board has made the deferral account symmetrical to account for the possibility that the new revenue requirement as found by the Board may be lower than that which underpinned the 2006 rates.

In its materials, the Applicant referenced the Earnings Sharing Mechanism (ESM), which was instituted by a previous Board panel. In the Board's view, the creation of the deferral account as approved by the Board in this proceeding has the effect of terminating the ESM as of December 31, 2006. That is so because the Revenue Difference Deferral Account now accommodates the tracking of

sufficiency as well as deficiency and this fact makes the continuation of the ESM unnecessary. If the new revenue requirement is higher than that underpinning the 2006 rates, the account will represent a credit to the utility to the extent of the difference. On the other hand, if the new revenue requirement is lower than that upon which the 2006 rates are based, the entire amount reflected in the account will be to the credit of ratepayers.

The final balance in the account will reflect a series of decisions made by the Board in its determination of the revenue requirement for 2007.

The Board's approval of the creation of this deferral account should not be construed in any degree as predictive of the quantum of, the terms of or the timing of the disposition, if any, of the contents of this account.

THE BOARD THEREFORE ORDERS THAT:

1. Hydro One shall establish a deferral account in which to record the differences in revenue between 2006 Transmission rates currently in force, and the rates that would result from the new revenue requirement as determined by the Board in this proceeding, beginning January 1, 2007. Hydro One is directed to prepare and submit a draft accounting order to the Board reflecting this order.

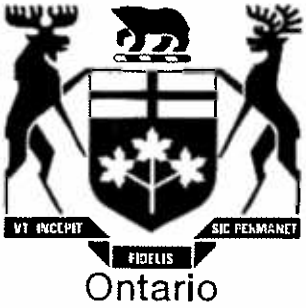
DATED at Toronto, March 30, 2007.

ONTARIO ENERGY BOARD

Original signed by

Peter H. O'Dell
Assistant Board Secretary

Ontario Energy Board | Commission de l'Énergie de l'Ontario



EB-2006-0501

IN THE MATTER OF AN APPLICATION BY

HYDRO ONE NETWORKS INC.

FOR 2007 AND 2008 ELECTRICITY TRANSMISSION REVENUE REQUIREMENTS

DECISION WITH REASONS

August 16, 2007

so clear on how the calculation is to be done that there is no need to seek guidance from any other source. In addition, as noted by SEC, the 2004 Enbridge decision concerned the write-off of a regulatory balance that apparently had been determined to be uncollectible from ratepayers, so it would make little sense to require ratepayers to absorb some of that amount thorough an ESM.

The Board will require Hydro One to recalculate the amount of excess 2006 earnings without exclusion of the two income items. As noted in section 8.1 on the OEB cost account, the Board will also permit Hydro One to deduct the growth in that account in 2006 in determining excess earnings.

The Board does not accept the capital contribution approach proposed by Hydro One. In the Board's view, it is important that overearnings be returned to customers as soon as possible; the capital contribution approach results in an inappropriately long "refund" period. That is true even if the excess earnings were to be credited against a capital project with a shorter life than a transmission station. The Board finds that the balance in the ESM account should reduce Hydro One's revenue requirement at the first available opportunity, which is the revenue requirement for the years 2007 and 2008.

8.3 2007 REVENUE DIFFERENCE DEFERRAL ACCOUNT

This account was approved by the Board in a March 30, 2007 Partial Decision and Order. It is intended to capture the difference (positive or negative) between (a) revenue determined using the rates resulting from this proceeding, and (b) revenue determined using currently approved transmission rates. The revenue difference is to be calculated for the period from the effective date of Hydro One's new revenue requirement to the date on which new uniform transmission rates are implemented. The Board did not make a decision on either the effective date or the implementation date in its March 30, 2007 Partial Decision and Order. The Board also did not decide whether the revenue amounts should be based on actual or forecast load.

During the hearing, Hydro One witnesses presented the Company's proposal on the calculation of the balance in the Revenue Difference Deferral Account ("RDDA") and the manner in which new rates should be implemented (Exhibit L.7.1). Hydro One proposed that:

- The new revenue requirement resulting from this proceeding should be effective January 1, 2007;
- New uniform transmission rates should be implemented November 1, 2007; and
- The RDDA balance for the 10 months to October 31, 2007 should be calculated based on forecast load, not actual load.

Hydro One set out two options for making the rate change. The first option, and Hydro One's preference, is to implement a single rate change on November 1, 2007 to collect the approved 2007-2008 revenue requirement for the next 14 months and the balance in the RDDA. The second option would be to have two rate changes – one on November 1, 2007 and a second on January 1, 2008.

Three intervenors (CCC, SEC, and VECC) argued that the effective date of the new revenue requirement should depend on whether it is higher or lower than the revenue Hydro One would earn at current rates. If the new approved revenue requirement is lower, all three supported an effective date of January 1, 2007. If the new requirement is higher, all three advocated a later effective date. CCC and VECC supported May 1, 2007, the date Hydro One requested in its initial application. SEC submitted that a higher revenue requirement should only become effective when new uniform transmission rates are implemented. The intervenors acknowledged the assymetrical nature of their recommendations but submitted that the result would be fair given that Hydro One filed its application less than four months before the beginning of 2007. SEC explained its position this way:

> SEC understands that at first blush that position may seem contradictory or even unfair to the Company. However, it is the applicant that controls the timing of rate applications. Accordingly, the Applicant should be at risk of not recovering its revenue deficiency in the event it does not file in time to have its rates in place at the beginning of the test year. It is not acceptable, however, for the Applicant to risk the ratepayers' money by filing in such a way as to ensure that a portion of a rate reduction is not paid to ratepayers as a result of the timing of the application.[36]

With respect to the calculation of the balance in the RDDA, AMPCO supported using actual load while CCC supported using forecast load. Both intervenors supported the first rate implementation option, a single rate change on November 1, 2007. VECC argued that Hydro One should be directed to come forward with a detailed implementation plan once the 2007-2008 revenue requirement is approved.

In reply, Hydro One stated that a January 1, 2007 effective date is simple to implement. It submitted that it was not possible for the Company to file an application any earlier than September 2006. It also said that the intervenors' request for different effective dates depending on the amount of the new revenue requirement was not fair and balanced.

Board Findings

This is the first application by Hydro One Transmission in many years and there is no well established practice for determining the effective date of a new revenue requirement for this business.

The Board acknowledges the intervenor comments that there was no prospect of new transmission rates being implemented on January 1, 2007 given that the application was filed in mid-September 2006. The Board notes that the pooled uniform rates used for electricity transmission in Ontario necessarily will result in a longer period between the application date and the implementation of new rates than is the case in gas and

[36] SEC Final Argument, p. 39.

electricity distribution. For this reason, the Board is not as concerned as some of the intervenors about the relatively short period between the timing of Hydro One's application and its request for a January 1, 2007 effective date.

The Board has determined that Hydro One's new revenue requirement should be effective January 1, 2007. This approach aligns the start date of the new revenue requirement with the beginning of the 2007 test year for which Hydro One filed considerable evidence and analysis. A later date would effectively result in three different revenue calculations for the 2006-2007 period (2006 – revenue based on current rates, adjusted for the ESM; 2007 up to effective date – revenue based on current rates; 2007 after effective date – revenue base on new rates).

The Board is also not supportive of selecting an effective date that is always to the disadvantage of the Applicant, which is what several intervenors advocated (that is, an early date if the revenue requirement falls but a later date if the revenue requirement is increasing). The Board agrees with Hydro One that this would not be fair and balanced.

The Board accepts the use of forecast load to calculate the RDDA balance since that is consistent with the way new rates will determined. The Board also agrees with the first option to rate implementation (a single rate change targeted for November 1), which is a relatively simple approach.