ALBERTA ENERGY AND UTILITIES BOARD
Calgary, Alberta

Decision 2000-86
TRANSALTA UTILITIES CORPORATION **Application No. RE95081**
1996 Phase II – Constitutional Question **File No. 1204-5**

1 BACKGROUND

On August 10, 1999, the Alberta Energy and Utilities Board (Board) issued Decision U99035 relating to Phase II of TransAlta Utilities Corporation's (TransAlta) 1996 General Tariff Application (1996 GTA). One of the rates for which TransAlta sought the Board's approval in the 1996 GTA was Rate 9100 – Shared Use of Overhead Facilities (Rate 9100).

As noted in Decision U99035, in older residential subdivisions within TransAlta's service area, electricity is distributed through a system of overhead wires. The supporting structure for TransAlta's distribution wires is a network of distribution poles. Those poles are owned by TransAlta. Where space is available on these poles, TransAlta has shared them with telecommunication carriers (carriers) and cable television operators (cable operators). In exchange for access to its distribution pole network, TransAlta levies a charge to recover a portion of pole costs. Previously, this rate was negotiated between TransAlta, the cable operators and TELUS Communications Inc. (TELUS), a carrier. TransAlta did not seek Board approval of these charges. TransAlta now seeks Board approval of Rate 9100 in the context of its 1996 GTA because it has been unable to agree on a rate with the cable operators and TELUS.[1]

Shaw Communications Inc. (Shaw) and the Canadian Cable Television Association (CCTA) (collectively, the Cable Intervenors) opposed TransAlta's application for Rate 9100 on the grounds that the Board lacked constitutional and statutory jurisdiction to approve the Rate pursuant to the terms of the *Electric Utilities Act* (EU Act) and the *Public Utilities Board Act* (PUB Act). TELUS also opposed the application on constitutional grounds. The FIRM Customers supported the Board's statutory and constitutional jurisdiction to set Rate 9100.

In Decision U99035, the Board addressed the Cable Intervenors' argument that the Board lacked statutory jurisdiction to approve Rate 9100. The Board concluded that the EU Act and the PUB Act provide direct statutory authority to approve Rate 9100 as a part of TransAlta's 1996 GTA.[2]

However, the Board deferred consideration of the constitutional question raised by the Cable Intervenors and TELUS in order to give the Cable Intervenors an opportunity to provide notice

[1] In Decision 2000-41 (July 5, 2000), the Board approved the sale of TransAlta's electricity distribution business, including its network of distribution poles, to UtiliCorp Networks Canada (Alberta) Ltd. (UNCA). One of the conditions attached to the Board's order was that the rates and terms and conditions of service applicable to TransAlta's distribution business until the end of 2000 would become the rates and terms and conditions of service of UNCA for the balance of the year. Accordingly, although this Decision refers to TransAlta throughout, it will be binding on UNCA in accordance with Decision 2000-41.

[2] Decision U99035, pp. 124-128

to the Attorneys General of Alberta and Canada pursuant to section 25 of the *Judicature Act*. The Board stated that it would reconvene to entertain additional submissions from the Attorneys General, if any. Otherwise, the Board would make its determination on the basis of the material previously filed.

On August 19, 1999, the Cable Intervenors provided notice of the following constitutional question to the Attorney General of Alberta and the Attorney General of Canada, as well as the Board and the other parties:

> Shaw and CCTA question whether the *Electric Utilities Act,* SA, 1995 c.E-5.5, as amended, and the *Public Utilities Board Act*, RSA, 1980 c.P-37, as amended, are the appropriate legislation for the consideration, approval, disapproval or variance of Rate 9100. Rate 9100 is the rate TransAlta seeks to charge telecommunications companies, including cable television companies, for access to and use of its overhead facilities.[3]

In response to this notice, the Attorney General of Canada indicated that it would not intervene on the constitutional question while the Attorney General of Alberta notified the Board of its intention to intervene. On November 4, 1999, the Board issued a letter to the parties informing them that no further oral hearing would be held, but setting up a process to receive the written submissions of the parties on the constitutional question.

On November 26, 1999, the Board received submissions from the Attorney General of Alberta (Attorney General). Subsequently, the Cable Intervenors filed a response to the submissions of the Attorney General as did TELUS. On December 20, 1999, the Attorney General filed a reply. Neither TransAlta nor the FIRM Customers filed any further submissions on the constitutional question.

This Decision sets out the Board's conclusions with respect to the constitutional question relating to Rate 9100. In reaching its conclusions, the Board has considered the submissions it received in response to its November 26, 1999, letter as well as the submissions on the constitutional question made prior to Decision U99035. Those included submissions not only from the Cable Intervenors and TELUS, but also submissions from the FIRM Customers and TransAlta.

2 BOARD CONSIDERATION OF THE CONSTITUTIONAL QUESTION

2.1 Introduction

Under section 10(1) of the *Alberta Energy and Utilities Board Act* (AEUB Act),[4] the Board is granted all of the jurisdiction of the former Public Utilities Board (PUB). Section 10.1 of the AEUB Act also confirms that the Board has the jurisdiction and powers, rights and privileges given to it under any other enactment. Section 30 of the PUB Act provides:

[3] The notice was slightly amended by the Cable Intervenors on August 30, 1999.
[4] S.A. 1994, c. A-19.5, as amended

> **30** The Board may, as to matters within its jurisdiction, hear and determine all questions of law or fact.

Under Part 5 of the EU Act ("Regulation of Electric Utilities and the Transmission System"), pursuant to which the 1996 GTA was made, the jurisdiction of the Board arising under the PUB Act is incorporated into the EU Act:

> **47** The provisions of the *Public Utilities Board Act* relating to hearings, service of notices or orders, regulations, rules and procedure, enforcement of orders and the rights, powers, privileges and immunities of the Public Utilities Board apply to the Alberta Energy and Utilities Board as if they were provisions of this Act.

Accordingly, the Board considers that in relation to TransAlta's 1996 GTA, including Rate 9100, the Board is of the view that it has full jurisdiction to consider the constitutional question in this matter.

The parties essentially raised two arguments in relation to the constitutional question. The Cable Intervenors and TELUS both relied on the doctrine of "interjurisdictional immunity" to argue that the Board's power to approve tariffs for electric distribution systems cannot be exercised so as to affect an essential aspect of a federal undertaking – namely the cables. They said that Board approval of Rate 9100 would affect access to TransAlta's distribution poles and if these undertakings cannot access the poles on acceptable terms to attach the cables, an essential aspect of their undertakings would be affected. TELUS added that even if the power of the Board to approve rates for distribution poles is otherwise a valid exercise of provincial legislative power, the power of the Canadian Radio-Television and Telecommunications Commission (CRTC) under section 43(5) of the federal *Telecommunications Act* invalidates it according to the doctrine of federal "paramountcy".

In the Board's view, the constitutional question cannot be answered without reference to the statutory scheme set out in the EU Act and the PUB Act giving the Board jurisdiction to regulate provincial public utilities, particularly electric utilities. In Decision U99035, the Board closely examined this statutory scheme and will not repeat that examination here. However, the Board does emphasize the following findings from U99035 with respect to the statutory scheme at issue:

> When taken as a whole the provisions set out above from the EU Act and the PUB Act strengthen the Board's interpretation of "electric distribution utility" [*sic*] as they indicate a clear legislative intention to confer significant power in the Board over power utilities and their rates. In particular section 88 of the PUB Act confers upon the board specific authority to order the joint use of poles and declare the terms for such sharing. The statutory scheme promotes the public policy objective of encouraging the sharing of existing support structures and provides a regulatory mechanism for reviewing the appropriateness of the rates charged by the electric utility for use of its poles.[5]

[5] Decision U99035, pp. 126-127

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> Furthermore the Board considers the various provisions of the EU Act and the PUB Act must be interpreted in light of one of the purposes of the Board; the protection of ratepayers against the monopoly power of the utility. Therefore the Board is of the view that the Board's general powers provide it with the ability to regulate the tariff charged by TransAlta to cable or telephone operators, to the extent that there is an impact on ratepayers. To the extent distribution poles, an asset of the utility, are used by any party at a less than appropriate charge, ratepayers are subsidizing that party and the Board has jurisdiction and obligation to set that charge to minimize or eliminate the effect on ratepayers.[6]

Although it referred to section 88 of the PUB Act in Decision U99035, the Board was doing so in the context of interpreting the EU and PUB Acts with a view to determining whether the Board had jurisdiction to approve a just and reasonable rate for the shared use of distribution poles. As will become clear later in this decision, the Board wishes to emphasize that TransAlta's application for approval of Rate 9100 is not made pursuant to section 88 of the PUB Act and the Board does not propose to dispose of the application under that provision. Rather, the Board considers that the 1996 GTA, of which Rate 9100 is one component, was made pursuant to section 49 of the EU Act.

That said, and before moving on to consider the two arguments advanced by the Cable Intervenors and TELUS in light of the Board's findings in Decision U99035, the Board first considers it necessary to determine the pith and substance of the relevant legislation.

2.2 Pith and Substance of the Legislation

The first step in any constitutional analysis is to determine the pith and substance of the law being challenged. If the pith and substance of the law is determined to be within provincial constitutional jurisdiction, it may have incidental affects on areas of federal jurisdiction without necessarily being constitutionally invalid.[7]

Having regard to its analysis in Decision U99035, the Board is of the view that the pith and substance of the statutory scheme set out in the EU Act and the PUB Act is to regulate public utilities in Alberta. In particular, the EU Act sets out a detailed regulatory scheme to govern electric utilities, a matter clearly within provincial jurisdiction. The EU Act requires the owners of electric utilities to periodically prepare tariffs for approval by the Board.[8] "Electric distribution systems" such as TransAlta's are included in the definition of "electric utility" so that TransAlta is required to prepare and submit for approval by the Board its distribution tariff.[9]

The Board notes that in the federal sphere, support structures for telecommunications undertakings are also considered to be part of the "telecommunications service" in respect of

[6] Decision U99035, pp. 127-128
[7] See Hogg, *Constitutional Law of Canada* (Loose–leaf ed.), at §15-8
[8] EU Act, section 49
[9] EU Act, sections 1(1)(d) and 1(1)(f)(iii)

which the CRTC has jurisdiction to set rates and terms and conditions of service.[10] As the Board concluded in Decision U99035, the definition of "electric distribution system" in the EU Act includes the supporting structures for electric distribution wires (distribution poles). Because distribution poles form part of the electric distribution system, the Board concluded that section 49 of the EU Act contemplates Board approval of a tariff that includes a rate for shared use of those poles.[11]

In the context of regulating electric utilities, the Board must conduct a careful balancing of interests between the utility and its customers. On the one hand, it is the Board's duty to ensure that the utility has an opportunity to earn a fair return on its rate base, which in this case includes the distribution poles. On the other hand, the Board must ensure that the rates charged by the utility are just and reasonable and that its service is safe and reliable for customers. In this application, the Board is being asked to set the rate for the shared use by all users of TransAlta's distribution poles. In Decision U99035, the Board determined that if a user of the distribution poles paid a less than "just and reasonable" rate, other customers of TransAlta's distribution system would be subsidizing those users. The Board has an obligation to minimize or eliminate these effects on all of TransAlta's ratepayers in the overall public interest.

The Supreme Court has stated that the Board's jurisdiction to "safeguard the public interest in the nature and quality of the service provided to the community by public utilities" is "of the widest possible proportions."[12] In the Board's view, its duty encompasses approval of a just and reasonable rate for use of distribution poles forming part of an electric distribution system. Therefore, the Board concludes that approval of a tariff for an electric distribution system – including a rate for shared use of distribution poles forming part of that system – is, in pith and substance, a matter within provincial jurisdiction under sections 92(10) ("Local Works and Undertakings") and 92(13) ("Property and Civil Rights in the Province") of the *Constitution Act, 1867*.

In approving a tariff that includes a rate such as Rate 9100, the Board is neither acting in an area of federal jurisdiction, nor is it (as will be discussed more fully below) purporting to "regulate" a federal undertaking such as cable operators and telecommunications carriers. It is TransAlta, as an owner of an electric utility, whose rates and terms and conditions of service are subject to Board regulation under the EU Act. As argued by TransAlta, the FIRM Customers and the Attorney General, the impact that the EU Act and the PUB Act have on the Cable Intervenors and TELUS is, at most, incidental. It is not a colourable attempt by the Board to regulate cable operators or telecommunications carriers.

The Board agrees with the Attorney General that no issue arises in this case as to whether the Cable Intervenors and TELUS are federal undertakings. The Board accepts, as does the Attorney General, that cable operators and telecommunications carriers are federal undertakings and are generally subject to federal jurisdiction. The issue is whether the effect of the EU Act on the Cable Intervenors and TELUS is such as to render the otherwise valid provisions of the EU Act

[10] *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.* (1995) 125 D.LR. (4th) 443, at 456 [para. 35] (S.C.C.) [*BCTel v. Shaw*]

[11] Decision U99035, p.126

[12] *ATCO Ltd. v. Calgary Power Ltd.* [1982] 2 S.C.R. 557, at 576 (per Estey J.)

constitutionally inapplicable to those undertakings. Analysis of that issue requires consideration of the interjurisdictional immunity and paramountcy doctrines raised by the parties in their submissions.

2.3 Interjurisdictional Immunity

According to the interjurisdictional immunity doctrine, otherwise valid provincial legislation cannot constitutionally apply in certain circumstances to undertakings within federal jurisdiction. As explained by Professor Hogg, this doctrine originally meant that provincial law would only be inapplicable if its application could potentially "sterilize" the federal undertaking. However, it was subsequently expanded by the Supreme Court of Canada, which confirmed in *Bell Canada v. Quebec* that a provincial law could not validly apply to a federal undertaking if it "affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralyzing it."[13]

A year after the *Bell Canada* decision, the Supreme Court attached a very important caveat to this principle. In *Irwin Toy Ltd. v. Quebec (Attorney-General)*, the Court said the following about the *Bell Canada* case:

> The federal government has exclusive jurisdiction as regards "essential and vital elements" of a federal undertaking, including the management of such an undertaking, because those matters form the "basic, minimum and unassailable content" of the head of power created by operation of s. 91(29) and the exceptions in s. 92(10) of the *Constitution Act, 1867*. No provincial law touching on those matters can apply to a federal undertaking. ***However, where provincial legislation does not purport to apply to a federal undertaking, its incidental effect, even upon a vital part of the operation of the undertaking, will not normally render the provincial legislation ultra vires.***[14]

As a counter-example of the emphasized statement, the Supreme Court of Canada noted the decision of the Judicial Committee of the Privy Council in *Manitoba (Attorney-General) v. Canada (Attorney-General)*[15] in which a provincial law regulated the sale of securities by brokers to the public, but did not regulate the sale of securities by companies to brokers. Though the law applied to provincial brokers, not federally incorporated companies, the question was whether the law could validly apply in relation to the securities of federally incorporated companies. The Privy Council held that it could not because it could have the effect of sterilizing the company–for example, if the provincial regulator refused permission to brokers to sell the securities to the public.

In *Irwin Toy*, the Supreme Court drew from the Privy Council decision the following statement of principle:

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[13] Hogg, at §15.8(c); *Bell Canada v. Quebec (Commission de santJ et de la securitJ du travail)* [1988] 1 S.C.R. 749, at 859-860 [*Bell Canada*]

[14] [1989] 1 S.C.R. 927, at 955 (emphasis added) [*Irwin Toy*]

[15] [1929] 1 D.L.R. 369 (P.C.)

> As the *Attorney-General for Manitoba* case makes clear, the concept of impairment extends not only to the direct application of provincial legislation but also the indirect effect of that legislation. Thus, where provincial legislation applied to a federal undertaking affects a vital part of that undertaking or, though not applied directly to a federal undertaking, has the effect of impairing its operation, the legislation in question is *ultra vires*.[16]

What the Supreme Court made clear in *Irwin Toy* was that the degree of impairment required in these circumstances to invalidate the provincial legislation is substantial. In these cases, the impairment must be such that the federal undertaking is "sterilized in all its functions and activities".[17]

There are well-known examples where provincial jurisdiction to legislate in such a way as to validly affect federal undertakings has either been acknowledged or actually upheld.

In 1899, the Privy Council held in *C.P.R. Co. v. Parish of Notre-Dame de Bonsecours*[18] that characterization of an undertaking as otherwise federal does not lead to the conclusion that it is exempt from all provincial legislation. In that case, the Privy Council held that municipal regulations relating to the maintenance and cleaning of ditches applied to ditches alongside a federal railway. The regulations would not have applied, however, if they had specified the structure of the ditches, such as their width or depth.

In *Ontario (Attorney-General) v. Winner*,[19] the Privy Council held that provincial law could not require an interprovincial bus transportation undertaking to obtain a provincial licence because that could impair the federal undertaking (i.e. it would be unable to operate on provincial highways if the provincial licence were not granted). However, the Privy Council did acknowledge general provincial jurisdiction over provincial highways and suggested, for example, that provincial law regulating the speed of the vehicles of the federal undertaking and the side of the road on which they must operate were valid exercises of provincial power – they indirectly affected the undertaking, but did not impair its federal character.

Somewhat more to the point, in *Carnation Co. Ltd. v. Quebec (Agricultural Marketing Board)*,[20] the Supreme Court considered whether a provincial marketing board could validly set a price to be paid to milk producers by the owner of an evaporated milk plant that exported most of its product and was, to that extent, engaged in interprovincial trade – a matter of federal jurisdiction. The Court held that even though the provincial board's order setting the milk price could have extra-provincial repercussions as a result, it was nevertheless a valid exercise of provincial power.

Carnation involved an alleged provincial intrusion into the federal Trade and Commerce power rather than an alleged effect on a federal undertaking. However, in *Quebec (Attorney-General) v.*

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[16] *Irwin Toy*, at 957
[17] *Irwin Toy*, at 958
[18] [1899] A.C. 367 [*Bonsecours*]
[19] [1954] 4 D.L.R. 657, at 674 [*Winner*].
[20] [1968] S.C.R. 238 [*Carnation*]

Kellog's Co. of Canada – a case raising a question similar to the one before the Board – Martland J. of the Supreme Court relied on the *Carnation* case, holding that an incidental effect on the revenues of a federal undertaking did not amount to regulation of a vital or essential aspect of that undertaking.[21]

The Board finds most compelling, however, the decision of the Supreme Court of Canada in *Irwin Toy*. That case involved two sections of Quebec's *Consumer Protection Act* which prohibited the use of advertising directed at children. The prohibition applied to all forms of advertising, although the legislation did provide for certain exemptions and set out criteria for determining whether advertising was, in fact, directed at children. A toy manufacturer broadcast television advertisements which the Office de la protection du consommateur found to contravene the prohibitions in the *Act*. The manufacturer sought a declaration that the prohibitions were outside the province's jurisdiction as effectively being regulation of broadcasting undertakings.

The Supreme Court, as already noted, explained and clarified the Court's earlier ruling in *Bell Canada* on the extent of the interjurisdictional immunity doctrine as applied to federal undertakings. The Court held that, even where a provincial law indirectly affects a vital aspect of a federal undertaking but without impairing it, it will nevertheless be valid.[22] The Supreme Court concluded that the impugned sections of the *Consumer Protection Act* passed the first branch of the test – i.e. they did not directly affect a vital aspect of a federal undertaking and, therefore, did not trench on exclusive federal jurisdiction – because the prohibitions were not aimed at television undertakings and were not limited to television advertising. Rather, they were general prohibitions aimed at the advertisers themselves, who were ordinarily subject to provincial jurisdiction.[23]

The Supreme Court then asked whether the provincial prohibitions would impair the functioning of federal broadcast undertakings. The Supreme Court considered the evidence establishing the importance of advertising revenue to broadcast undertakings and demonstrating that prohibiting advertising aimed at children affected the capacity to provide children's television programming. But the Court concluded that these impacts, while perhaps even material, did not "impair" the broadcast undertaking beyond having the potential effect of reducing some of its advertising revenue. The Court specifically held that to "impair" the undertaking in this sense, it would be necessary to establish that the undertaking was "sterilized in all its functions and activities."[24] The Supreme Court also did not accept as a potential impairment the possibility that the prohibition would prevent the production of programming aimed at children. The Supreme Court held that, at most, the legislation "constrains business decisions both for those who produce advertisements and for those who carry them."[25]

As in *Irwin Toy*, the EU Act is not aimed at and does not apply to the Cable Intervenors, TELUS or any other federal undertaking. Section 49 requires a provincial undertaking – an electric utility

[21] [1978] 1 S.C.R. 211, at 225 [*Kellog's*]
[22] *Irwin Toy*, at 955
[23] *Irwin Toy*, at 957-958
[24] *Irwin Toy*, at 958
[25] *Irwin Toy*, at 958-959

– to prepare a tariff for approval by the Board. The utility cannot put the tariff into effect unless the Board has approved it.[26] The Board must determine a tariff application and is bound to consider the factors set out in section 51 of the EU Act:

> **51(1)** When considering whether to approve a tariff that is to have effect after December 31, 1995, the Board shall ensure
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> (a) that the tariff is just and reasonable,
>
> (b) that the tariff provides for incentives for efficiencies that result in cost savings or other benefits that can be shared in an equitable manner between the electric utility and customers, and
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> (c) that the tariff is not unduly preferential, arbitrarily or unjustly discriminatory or inconsistent with or in contravention of this or any other enactment or any law.
>
> **(2)** Tariffs that provide incentives for efficiency are not unjust and unreasonable simply because they provide those incentives.
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> **(3)** The burden of proof to show that a tariff is just and reasonable is on the owner of the electric utility seeking approval of the tariff.

Section 52 of the EU Act goes on to impose a duty on the Board in approving a tariff to have regard to the principle that the owner of an electric utility must have a reasonable opportunity of recovering prudent costs, including "costs associated with capital related to the owner's investment in the electric utility."[27] In the Board's view, these costs include costs associated with a network of distribution poles forming part of an electric distribution system such as TransAlta's.

Consideration of these and related provisions of the EU Act make it clear to the Board that the EU Act in no way purports to regulate any federal undertaking, including the Cable Intervenors and TELUS, and clearly does not purport to regulate them in a vital or essential aspect. Therefore, the Board does not find of assistance the cases cited by the Cable Intervenors and TELUS respecting federal jurisdiction over broadcasting and telecommunications.[28] In those cases, the legislation in question purported to apply directly to vital or essential aspects of federal undertakings.[29]

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[26] EU Act, section 55

[27] EU Act, section 52(1)(a)

[28] *Capital Cities Communications Inc. v. Canada (CRTC)* [1978] 2 S.C.R. 141; *Dionne v. Quebec (Public Services Board)* [1978] 2 S.C.R. 191; *Mission Paving Services Co. Ltd. v. British Columbia Telephone Co.* [1982] 6 W.W.R. 85 (B.C.S.C.); *Re Public Utilities Commission and Victoria Cablevision Ltd.* (1965) 51 D.L.R. (2d) 716 (B.C.C.A.)

[29] As the Board noted above, TransAlta's 1996 GTA is not made pursuant to section 88 of the PUB Act. The Board does not decide in this case whether section 88 could validly apply to a federal undertaking.

Applying *Irwin Toy*, if the EU Act does not apply directly to federal undertakings, does it nevertheless apply indirectly so as to impair the undertaking in a vital or essential aspect? In the Board's view, its jurisdiction to set just and reasonable rates for electric utilities does not affect a vital or essential aspect of the management and operation of a federal undertaking or the specifically federal nature of the undertaking. If the Board's regulation of utility rates does indirectly affect an essential aspect of federal undertakings, it does not impair those undertakings in the sense of sterilizing them in all their functions and activities.

The Board assumes, without deciding, that the cables over which television and telecommunications signals are carried can be characterized as "vital or essential" aspects of those undertakings. The Board's power to approve Rate 9100 in no way affects these cables. In approving such a rate, the Board is concerned with the prudence of TransAlta's investment in the capital asset (distribution poles) and related costs and with the justness and reasonableness of the rate based on the cost to TransAlta of providing access to its distribution poles. The Board does not purport to direct either the Cable Intervenors or TELUS where to put their cables, what may be transmitted over them or to whom. If municipal regulations can validly require a federal railway to clean its ditches to municipal standards (*Bonsecours*), then the Board is of the view that it can approve Rate 9100 even though, in a sense, it relates to the cables of federal undertakings.

What the Cable Intervenors and TELUS seem to argue is not so much that Rate 9100 affects the cables, but that their access to support structures – which they say is essential to their ability to conduct their undertakings – is impaired. They argue that the question of rates is inseparable from the question of access. They go further to argue that the setting of a rate dictates a condition of their access to TransAlta's distribution poles. Without access, the Cable Intervenors and TELUS say that they cannot attach their cables to TransAlta's poles and if they cannot do that, their undertakings are impaired.

The Board agrees with the Attorney General that there is no evidence of any dispute in this case about access to TransAlta's distribution poles. There is no question that the Cable Intervenors and TELUS will continue to enjoy access to those poles. The only issue here is the rate TransAlta is authorized to charge to these entities having regard to the principles set out in the EU Act.

The Board also agrees with the Attorney General that access to distribution poles is, in any event, not a vital or essential aspect of these federal undertakings. Access to TransAlta's distribution poles by the Cable Intervenors and TELUS depends entirely on poles existing in the service area of these federal undertakings. If no poles are present, TransAlta cannot be compelled to erect them – either by the Board or by the CRTC. If the ability of these undertakings to access poles in the first place depends on a decision of TransAlta which is quite beyond their control, the Board concludes that support structure access cannot be considered vital or essential. It may be important or desirable to these federal undertakings, but that is not what is required for the purposes of the constitutional argument advanced by the Cable Intervenors and TELUS.

The fact that the Cable Intervenors and TELUS currently enjoy shared use of TransAlta's poles does not, in the Board's view, elevate that use to the status of a vital or essential aspect of the

undertaking. Therefore, even if the Board's power to set a rate for shared use of TransAlta's poles could be said to affect access to those poles by these federal undertakings, the Board concludes, based on the Supreme Court's decision in *Irwin Toy*, that these undertakings would not be impaired in the sense of being sterilized in all their functions. The rate set by the Board may constrain the business decisions to be made by these undertakings and may affect their net revenues, but this is not enough to render the Board's power to approve TransAlta's 1996 GTA constitutionally inapplicable.[30]

In making their argument, the Cable Intervenors and TELUS rely on the decisions of the CRTC in *UMG Cable Telecommunications Inc. v. Ontario Hydro*[31] and *CCTA v. MEA*.[32] At the outset, the Board wishes to note that the CRTC's decision in *CCTA v. MEA* is now the subject of an appeal to the Federal Court of Appeal pursuant to leave granted by that Court.[33] Nevertheless, the Board feels it is necessary to deal with these CRTC decisions since they deal directly with the constitutional question raised in this case, albeit from the federal perspective.

The Board acknowledges the specialized expertise of the CRTC in matters relating to broadcasting and telecommunications, to which, generally speaking, the Board would defer. However, the Board does not consider the constitutional question raised in the CRTC decisions to fall within its specialized expertise. The Board considers itself free to reach a conclusion different than the CRTC's.

In both of these decisions, the CRTC considered whether section 43(5) of the federal *Telecommunications Act* could validly apply to utility poles owned by municipal or provincially-regulated public utilities. In each case, cable operators could not reach agreements with the utilities over access to their poles, including the rates for that access.[34] The cable operators applied to the CRTC pursuant to section 43(5) of the *Telecommunications Act*, which reads as follows:

> (5) Where a person who provides services to the public cannot, on terms acceptable to that person, gain access to the supporting structure of a transmission line constructed on a highway or other public place, that person may apply to the Commission for a right of access to the supporting structure for the purpose of providing such services and the Commission may grant the permission subject to any conditions that the Commission determines.

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[30] *Irwin Toy*, at 958-959

[31] *Part VII Application – Access to Supporting Structures of Power Utilities – UMG Cable Telecommunications Inc. v. Ontario Hydro – Commission Decision on Application for Interim Relief,* CRTC Letter Decision, March 27, 1997 [*UMG v. Ontario Hydro*]

[32] *Part VII Application – Access to Supporting Structures of Municipal Power Utilities – CCTA v. MEA et al. – Final Decision*, Telecom Decision CRTC 99-13, September 28, 1999 [*CCTA v. MEA*]

[33] Court File No. A-117-00 (Notice of Appeal filed February 29, 2000). A judicial review application and application for leave to appeal were dismissed by the Federal Court of Appeal on May 29, 1998, in relation to the CRTC's decision in *UMG v. Ontario Hydro*–the former on procedural grounds (see *Ontario Hydro v. UMG Cable Telecommunications Inc.* [1998] F.C.J. No. 746), the latter for unspecified reasons (see Court File No. 97-A-44).

[34] These cases involved actual refusal of the utilities to grant access to their poles to the federal undertakings. As already noted by the Board, those facts do not occur in the case of TransAlta's 1996 GTA.

The CRTC decided, both as a matter of statutory and constitutional interpretation, that section 43(5) confers jurisdiction on the CRTC to determine rates and other terms of access to the supporting structures of provincially-regulated utilities. The Cable Intervenors and TELUS argue that if the CRTC has that jurisdiction under section 43(5), the Board cannot have that jurisdiction under the EU and PUB Acts. This argument and the conclusions of the CRTC have implications both in relation to the interjurisdictional immunity doctrine and the paramountcy doctrine (discussed below).

The Board disagrees that, as a matter of statutory interpretation, section 43(5) of the *Telecommunications Act* applies to municipal or provincially-regulated utilities. The Board notes that section 43(5) is the last in a series of subsections dealing with access by cable operators ("distribution undertakings") and telecommunications carriers ("Canadian carriers") for the purpose of laying their "transmission lines". Section 43(2) authorizes these entities to enter on and break up any highway or other public place for this purpose, subject to their not unduly interfering with the public use and enjoyment of those places. Section 43(3) prohibits a distribution undertaking or Canadian carrier from constructing a transmission line on, over, under or along a highway or other public place without the consent of the municipality or other responsible public authority. Section 43(4) provides that distribution undertakings and Canadian carriers may apply to the CRTC when they cannot obtain the consent of the municipality or other authority under section 43(3) on terms acceptable to them. In these provisions, it is clear that the "transmission lines" being referred to are those of the distribution undertakings or Canadian carriers.

"Transmission line" is not defined in the *Telecommunications Act*, but "transmission facility" is defined with reference to the transmission of intelligence. Transmission of electricity does not, in the Board's opinion, fall within the contemplation of the federal definition of "transmission facility". On that basis alone, the Board would not conclude that "transmission line" as it is used in section 43(5), encompasses electric distribution wires.

Section 43(5) does not purport to apply to distribution undertakings or Canadian carriers. It does, however, apply to a person who provides services to the public who cannot gain access to the supporting structure of a "transmission line" on acceptable terms. "Transmission line" is not qualified in any way. The CRTC concluded that, because distribution undertakings and Canadian carriers are referred to elsewhere in section 43 and in other related provisions of the Act (e.g. sections 44 and 45) in relation to transmission lines, their omission in section 43(5) must be material.

In the Board's view, the absence of reference to distribution undertakings and Canadian carriers in section 43(5) is material, but for the opposite reason. The Board considers that the reason for the lack of reference to distribution undertakings and Canadian carriers in section 43(5) is because that provision is not intended to confer on these undertakings any rights, unlike the other subsections of section 43, which clearly do confer rights or obligations on these entities in respect of their transmission lines. In the Board's view, section 43(5) confers rights on other public service providers to access the supporting structures of the transmission lines of distribution undertakings and Canadian carriers. Although in reaching this interpretation the

Board does not rely on the marginal note of section 43(5) – "Access by Others" – the Board believes its interpretation to be consistent with that note.

The Board also believes that its interpretation is consistent with the legislative history of section 43(5) referred to by the CRTC. The Board has carefully considered the history of section 43(5) reviewed in *CCTA v. MEA* and cannot conclude from that review that section 43(5) was intended by Parliament to have the meaning given it by the CRTC. The legislative history reflects the concern of federal carriers to be able to access highways and public places, which is dealt with in other subsections of the *Telecommunications Act*. To the extent that the legislative history touches on the question of avoiding duplication of support structures, the Board is of the view that Parliament had in mind to reduce duplication by setting up a mechanism for municipal and provincially-regulated utilities to seek access to the supporting structures of federal undertakings.[35]

If section 43(5) were to have the meaning given to it by the CRTC, the Board agrees with the Attorney General that it would be far too wide and would, itself, be constitutionally suspect. The Board agrees, in particular, that the interpretation placed on section 43(5) would authorize the CRTC to consider, for example, a dispute between two provincially-regulated utilities over access to one another's poles. Although the CRTC stated that section 43(5) would apply only where a federal undertaking were the applicant, respondent or both, the broad interpretation it has given to the language of section 43(5) is inconsistent with that limitation. The Board believes that such an interpretation should be avoided if possible.

The Board does not otherwise find compelling the CRTC's justification for its intrusion into the regulation of assets owned by municipal or provincially-regulated utilities. The CRTC holds that section 43(5) has only an "incidental" effect on provincial jurisdiction which is essential to the attainment of the policy objectives of the *Telecommunications Act*. Without questioning the importance of those policy objectives, the Board disagrees for two reasons.

First, if section 43(5) has the meaning attributed to it by the CRTC, the effect on provincial jurisdiction is not incidental – it is direct and substantial. It would authorize a federal regulatory body to compel a provincially-regulated entity to make its assets available to a federal undertaking at a rate set by the federal regulator. In the Board's view, section 43(5) could not stand on that basis alone.

Second, the Board agrees with the Attorney General that it is inconsistent for the CRTC to characterize access to support structures by distribution undertakings and Canadian carriers to be vital or essential aspects of those undertakings, but effectively to deny that utility distribution poles and access to them are equally vital and essential to provincially-regulated utilities. For example, in a decision involving rates to be charged by BCTel for access to its telephone poles by cable operators, the CRTC concluded that access to telephone poles is a "telecommunications service" within the meaning of the *Telecommunications Act*. As such, access by cable operators to those poles and the rates to be charged by BCTel were not governed by section 43(5). Instead,

[35] The Board does not agree that, by virtue of the attachment to it of the cable of a federal undertaking that an electric distribution pole becomes a "supporting structure of a transmission line" within the meaning of section 43(5). In the Board's view, such a conclusion begs the constitutional question in issue.

they were governed by the rate-setting mechanism elsewhere established in the *Act* in respect of telecommunications carriers.[36] The Supreme Court of Canada has acknowledged that access to telephone poles is part of the "telecommunications service" required to be made available to other users "on a regulated basis".[37]

In the Board's view, it is inconsistent to conclude, on the one hand, that access to telephone poles is a "telecommunications service" that must be publicly available on a regulated basis at the federal level but conclude, on the other hand, that access to electric distribution poles is not similarly a service that must be made publicly available on a regulated basis at the provincial level. In the Board's view access to federal telephone poles and access to provincial distribution poles stand in equal stead in relation to the regulated undertakings of which they form a part. On that basis, the Board cannot agree with the CRTC's view that if section 43(5) authorizes it to make orders directing the terms of access to provincial utility poles and set the rates for that access, it is, nonetheless, only an "incidental" effect on provincial jurisdiction. If the province cannot, as the CRTC concludes, legislate so as to authorize a provincial utility regulator to set rates for access by federal undertakings to provincial utility assets because that would authorize interference with a vital or essential aspect of the federal undertaking, then likewise the federal government cannot be said only to "incidentally" affect a provincial utility if it exercises a similar power.

As noted in Decision U99035 and earlier in this Decision, the Board considers distribution poles to be part of the electric distribution system. They are, therefore, *prima facie* subject to provincial jurisdiction and the Board's power to set rates in relation to their use. Any attempt by the federal government to dictate the terms by which the owner of an electric distribution system must provide access to essential parts of its system is not merely incidental to the exercise of federal power.

The Board accepts that the *Telecommunications Act* itself and the legislative history leading up to the enactment of section 43(5) reflect important federal policy objectives, including the federal interest in the efficient joint use of support structures. However, the Board believes this policy must be read within constitutional limits. That the CRTC considers essential to the achievement of the policies of the *Telecommunications Act*, the power to compel provincial electric utilities to provide access to their support structures at CRTC-prescribed rates is not, however, justification for what the Board considers to be a significant interference with provincial jurisdiction over electric utilities and the Board's power to set rates for regulated services.

The Supreme Court has, more than once, cautioned that neither the social nor economic desirability of legislation can be considered in the determination of constitutional questions. In *Reference re Upper Churchill Water Rights Reversion Act*, McIntyre J. said:[38]

> [I]t is not for this Court to consider the desirability of legislation from a social or economic perspective where a constitutional issue is raised. As Laskin C.J. said in

[36] *Access to Telephone Company Support Structures*, p. 2

[37] *BCTel v. Shaw Cable*, at 451 and 456, citing *Transvision (Magog) Inc. v. Bell Canada* [1975] C.T.C. 463

[38] [1984] 1 S.C.R. 297, at 334-335. See also *Ontario Hydro v. Ontario (Labour Relations Board)* [1993] 3 S.C.R. 327, at 358 (per Lamer C.J.)

> *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42 at p. 76:
>
> > Where governments in good faith, as in this case, invoke authority to realize desirable economic policies, they must know that they have no open-ended means of achieving their goals when there are constitutional limitations on the legislative power under which they purport to act. They are entitled to expect that the Courts, and especially this Court, will approach the task of appraisal of the constitutionality of social and economic programmes with sympathy and regard for the serious consequences of holding them *ultra vires*. Yet, if the appraisal results in a clash with the Constitution, it is the latter which must govern.

In *CCT v. MEA*, the CRTC said the following:

> The Commission considers that section 43 provides a comprehensive legislative scheme in that it contemplates not only the construction of transmission lines but also access to existing supporting structures. It is of the view that ***the inability of Parliament to put into place a comprehensive legislative scheme in order to allow for the orderly deployment of distribution networks and the efficient joint use of existing support structures located on a public place, by either a cable distribution undertaking or a Canadian carrier, would affect a vital and essential part of the management, location, design and operation of those federal undertakings***. Subsection 43(5) ensures that support structures are shared whenever possible, thereby avoiding unnecessary expense and public inconvenience.[39]

To the Board, this reasoning reflects an overemphasis on federal policy objectives and a somewhat inverted application of the interjurisdictional immunity doctrine. In the Board's view, that doctrine *protects* federal undertakings from provincial intrusion, but is not, itself an independent source of federal jurisdiction based on desirable social and economic policies of the federal government.

As the Board has concluded, its approval of tariffs for electric distribution systems does not directly affect a vital or essential aspect of federal undertakings, nor does it indirectly impair federal undertakings in the relevant sense. Provincial regulation of utility tariffs may interfere with the achievement of a federal goal of efficient joint use of existing support structures. However, in the Board's view, that result neither confers jurisdiction on the federal government nor does it invalidate the exercise of the Board's power to approve a rate applicable to TransAlta's distribution poles.

Accordingly, for all of these reasons, the Board reaches a different conclusion than the CRTC. The Board concludes that the language of section 43 of the *Telecommunications Act* does not support an interpretation of section 43(5) that would make it applicable to provincially-regulated

[39] *CCTA v. MEA*, para. 93 (emphasis added)

utility poles. Therefore, the Board is of the view that these decisions of the CRTC do not impede the Board's conclusion that it has jurisdiction to approve Rate 9100 in this case.

2.4 Paramountcy

According to the constitutional doctrine of paramountcy, federal legislation in relation to the same matter as provincial legislation prevails (i.e. is paramount over) the provincial legislation. This kind of inconsistency can arise in the Canadian federation because federal and provincial laws can apply in the same territory, owing to the "double aspect" doctrine of Canadian constitutional law or the "pith and substance" doctrine, which allows each jurisdiction to enact valid law that may have an incidental effect on the other's jurisdiction.[40]

The fact that federal and provincial legislation exist in relation to the same subject matter does not trigger the paramountcy doctrine. The Supreme Court of Canada has recently confirmed that a federal enactment prevails over a provincial one only if there is "an actual conflict in the operation when the two statutes purport to function side by side"[41] and then only to the extent of the inconsistency.

TELUS argues that section 43(5) of the *Telecommunications Act* applies so as to confer jurisdiction on the CRTC to determine the terms of access–including rates–to TransAlta's distribution poles in relation to cable operators and telecommunications carriers. TELUS submits that even if the relevant provisions of the EU Act and PUB Act confer jurisdiction on the Board to set a rate for the same purpose, section 43(5) must prevail.

Since the Board has concluded that section 43(5) does not authorize the CRTC to exercise the jurisdiction contended for by TELUS, in the Board's view, the question of paramountcy does not arise. It is the Board, and the Board alone, with the jurisdiction to set a just and reasonable rate for the shared use of distribution poles forming part of an electric distribution system. Accordingly, the Board concludes that the federal paramountcy doctrine has no application in this case.

2.5 Conclusion

The Board concludes that the provisions of the EU Act and the PUB Act conferring jurisdiction on the Board to set rates for the shared use of distribution poles forming part of an electric distribution system are valid provincial legislation adopted pursuant to sections 92 (10) and 92(13) of the *Constitution Act, 1867*.

The Board's rate-setting power is not directed at the Cable Intervenors, TELUS or any other federal undertaking and, therefore, does not directly affect them in any of their vital or essential aspects. In addition, the exercise of its rate-setting power by the Board in this case does not indirectly affect them in any such aspect, but if it does, the exercise of Board power does not impair these undertakings so as to "sterilize them in all their activities or functions".

[40] Hogg, *Constitutional Law of Canada*, §16.1

[41] *M&D Farm Ltd. V. Manitoba Agricultural Credit Corp*. (1999) 176 D.L.R. (4th) 585, at 595 (para. 17)

The Board also concludes that section 43(5) of the *Telecommunications Act* does not apply to the support structures of electric distribution systems. Therefore, the doctrine of paramountcy has no application in this case.

Therefore, the Board concludes that it has the constitutional jurisdiction to consider TransAlta's application for approval of Rate 9100.

Accordingly, the Board will now consider whether to approve Rate 9100 as being just and reasonable and, therefore, in the public interest.

3 RATE 9100

3.1 Position of TransAlta

TransAlta proposed a Shared Use of Overhead Facilities rate (Rate 9100) of $19.00 per pole per year for each company attaching to TransAlta's distribution poles. TransAlta stated that it calculated the cost sharing for overhead facilities on a simplified hypothetical system where each utility constructs its own system without regard for existing facilities. Each utility's share of the combined cost of the three systems was applied to TransAlta's embedded pole cost to arrive at a preliminary share by utility.

TransAlta noted that it requires longer poles than telephone or cable companies therefore TransAlta was prepared to bear a higher than average share of the costs. TransAlta stated that, in areas where only TransAlta and one other party are present (telephone or cable), TransAlta accounts for 54% of the cost and the other party accounts for 46% of the cost. In an area where TransAlta and two other parties are present (telephone and cable), TransAlta accounts for 38% of the cost while telephone and cable each account for 31% of the total cost. TransAlta stated that, when the weighted average system is taken into consideration, each of the telephone and cable utilities account for 36% of the total.

TransAlta submitted that its proposed methodology for setting Rate 9100 is a reasonable middle-ground between incremental and avoided cost methods. TransAlta disagreed with TELUS' recommended incremental costing approach as it can result in cross-subsidization.

TransAlta stated that the shared-use poles it installs are of a greater height and strength than single-use poles. TransAlta submitted that the incremental property is installed to minimize overall costs and is done on behalf of the shared-use customers. TransAlta provided the following as typical capital costs for a single phase installation:

Pole Description	Pole Class	Pole Height	Cost
Shared-use	Class 4	40 ft.	$564
Single-use	Class 5	35 ft.	$360
Incremental Cost			$204

TransAlta noted that if the electric distribution system were unavailable for shared-use, non-owner tenants would be required to install their own distribution systems. TransAlta estimated that an avoided cost methodology would have yielded a rate of $50/pole/year based on the cost of installing a pole suitable for telephone and cable installation. However, the avoided cost method would result in the over-recovery of costs with telecommunication and cable consumers subsidizing electric customers. TransAlta rejected such an approach to avoid cross-subsidization.

TransAlta stated that its annual embedded cost per pole is $51.00 per year and therefore proposed the annual rate of $19.00/pole/year.

3.2 Position of TELUS

TELUS noted that TransAlta's proposed Rate 9100 was based on the apportionment of the embedded costs of the support structures to non-owner tenants. TELUS stated that this methodology based Rate 9100 on the cost of constructing a similar distribution system and has not taken into account the relationship between costs TransAlta experienced in provision of services and the rate charged to non-owner tenants.

TELUS suggested that Rate 9100 reflected an arbitrary and inappropriate allocation of capital costs to non-owner pole tenants. TELUS submitted that TransAlta had not shown that it had incurred additional costs on shared poles compared to single-use poles as TransAlta had not shown a causal relationship between the rate it charges and the capital costs incurred. Noting TransAlta's statement that it does not differentiate between single-use and joint-use poles, TELUS submitted that, as a result, the cost of the poles are included in TransAlta's rate base and have been accounted for in the rates TransAlta charged to their electric customers.

TELUS submitted that TransAlta had exercised monopoly power, which was reflected in the rate charged by TransAlta for the shared use of its distribution poles.

TELUS submitted that the cost increase in Rate 9100 was out of line with cost increases experienced in all other industries. In addition, TELUS submitted that the proposed Rate 9100 was twice as high as the rate TELUS was allowed to charge by the CRTC for pole attachment by non-owner tenants. Furthermore TELUS stated that a non-owner tenant would not receive twice as much value attaching to TransAlta's poles over TELUS's poles.

TELUS submitted that attachment fees need only include the recovery of incremental costs, which would be very low. TELUS also recognized that TransAlta should be fairly compensated for incremental nuisance and administration costs, but Rate 9100 should reflect the benefit non-owner pole tenants receive from attachment.

TELUS referred to Telecom Decision CRTC 97-15, *Co-Location*, in which the CRTC prescribed a 25% mark-up of Phase II incremental costs. TELUS reasoned that there is spare capacity on the poles and spare capacity is akin to incremental costs, so that a 25% mark-up should be applied to the nuisance and administration costs of attachment. TELUS suggested that this rationale would result in a rate of $3.00 per pole per year.

TELUS actually proposed a rate of $9.60 per pole per year, which was based on Telecom Decision CRTC 95-13, *Access to Telephone Company Support Structures*[42]. TELUS noted that attachment rates were based on the causally attributable costs incurred by the owner as a result of the user placing its cable on the pole (such as administration costs and lost productivity) and a usage-based contribution to fixed support structure costs. TELUS assumed that TransAlta experienced similar support structure costs when calculating the rate of $9.60, and noted that this level would contribute over 20% of total costs associated with TransAlta's poles.

3.3 Position of the FIRM Customers

The FIRM Customers noted that TELUS assumed TransAlta's costs were consistent with those of telecommunications carriers to arrive at TELUS's proposed rate of $9.60 per year. However, the FIRM Customers submitted that TELUS had not provided any evidence to support this assumption. The FIRM Customers also noted that TELUS did not provide evidence as to the calculation of their suggested rate or indication whether the rate was based on cost of service. As a result, the FIRM Customers suggested that it was not appropriate to compare the two rates and TELUS's proposed rate should be disregarded.

In the view of the FIRM Customers, TransAlta had provided support for their embedded cost of $51.00 per pole per year. The FIRM Customers noted TransAlta's position that their methodology was neither arbitrary nor inappropriate, but rather a reasonable middle ground between incremental and avoided cost methods of determining Rate 9100. The FIRM Customers further noted that TransAlta rejected the "incremental cost" method, as it would result in TELUS and the Cable Intervenors gaining a benefit at the expense of electric customers.

The FIRM Customers also noted that TransAlta's rebuttal evidence demonstrated there were additional costs arising from the shared use of the distribution poles. The FIRM Customers noted the Cable Intervenor's response that space currently used by them is space TransAlta does not use, but characterized it as a narrow and incorrect view. The FIRM Customers noted the evidence indicating that if the space was not used, the poles would be several feet shorter.

The FIRM Customers concluded that, in the absence of other evidence, a Rate 9100 charge of $18.36 per pole per year should be approved. The FIRM Customers submitted that Rate 9100 is "a tariff relating to the electric utility" and the Board had the jurisdiction to consider, approve, vary or disapprove of Rate 9100.

3.4 Board Findings

TransAlta filed the 1996 GTA that included the request for approval of Rate 9100. As previously noted, on September 1, 2000, TransAlta's distribution business was sold to UtiliCorp. Owing to the conditions attached to the Board's approval of the sale to UtiliCorp, the proposed Rate 9100 will effectively form part of UtiliCorp's distribution tariff. Although the Board has referred to

[42] TELUS noted that this decision does not prescribe a formula to calculate the rate. However, the methodology to develop the rate is based in Telecom Decision CRTC 86-16, *Support Structures And Related Items – Public Proceeding on Rates.*

TransAlta throughout this Decision, the approved Rate 91000 will be approved as a UtiliCorp tariff item.

The Board notes that it has not previously been requested to approve a rate for Shared Use of Overhead Facilities as it has been a negotiated rate between TransAlta and its customers. The Board further notes that TransAlta's proposed Rate 9100 has not been implemented on an interim basis. The previously negotiated rate between TransAlta and its customers continues to apply.

The Board notes TransAlta's evidence that there is an incremental cost for distribution poles when they provide a shared use. The Board considers it reasonable that those customers (i.e. the telecommunications carriers and cable operators) that benefit from the use of TransAlta's distribution poles should pay an appropriate rate so that TransAlta's other customers do not incur or cross-subsidize this additional cost.

TransAlta's evidence was that the annual embedded cost per pole is $51 per year. The Board notes that shared use poles are of a greater height and strength than single-use poles. In the Board's view, TransAlta used a reasonable methodology to allocate the cost of the pole among the parties using the pole. Therefore, the Board considers that TransAlta's allocation of 36% of the $51 embedded cost per pole per year appears to be reasonable. The Board however notes that this results in a $18.36 cost/pole/year, which TransAlta apparently has rounded to $19/pole/year. The Board considers it reasonable to approve a rate of $18.35/pole/year.

The Board will approve Rate 9100 effective December 1, 2000. Currently, there is no Board approved rate for the shared use of overhead facilities. In these circumstances, the Board considers it appropriate to approve the Rate only on a going forward basis.

The Board, therefore, approves Rate 9100 as attached in Schedule "A" effective January 1, 2001.

4 BOARD ORDER

Therefore, it is ordered that Rate 9100 be approved effective January 1, 2001.

Dated in Calgary, Alberta on December 27, 2000.

ALBERTA ENERGY AND UTILITIES BOARD

(Original signed "B. T. McManus")

B. T. McManus, Q.C.
Presiding Member

(Original signed "N. McCrank")

N. McCrank, Q.C.
Member

(Original signed "M. Bruni")

M. Bruni, Q.C.
Acting Member

UTILICORP NETWORKS CANADA (ALBERTA) LTD.

Effective: January 1, 2001
for consumption from
October 1, 2000

SCHEDULE "A"

RATE 9100
SHARED USE OF OVERHEAD FACILITIES

Availability	This service is available to TELUS and any communication or cable company who attaches a cable, fiber optic or any other linear equipment to UtiliCorp's distribution poles.	
Rate 9100	Price/Pole/Year	$18.35/attachment
Restrictions	The customer may not directly or indirectly resell, lease or assign space on UtiliCorp's distribution poles or on any attachment to UtiliCorp's distribution poles without UtiliCorp's written consent.	

The Terms and Conditions of Electric Service apply to all of UtiliCorp's customers and provide for other charges, including an arrears charge of 1.5% per month.