EB-2015-0240

ONTARIO ENERGY BOARD

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 Essex Powerlines Corporation for an order approving a Smart Meter Disposition Rate Rider ("SMDR") and a Smart Meter Incremental Rate Rider ("SMIRR"), each to be effective January 1, 2015;

AND IN THE MATTER OF an application by Essex Powerlines Corporation for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2015;

AND IN THE MATTER OF a motion to review under Rule 41.01 of the *Rules of Practice and Procedure*.

SUPPLEMENTAL BOOK OF AUTHORITIES OF THE SCHOOL ENERGY COALITION

October 2, 2015

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Date: 2010 11 24
Docket: S-1-CV-2010000079

2010 NWTSC 92 (CanLII)

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NORTHLAND UTILITIES (YELLOWKNIFE) LIMITED and
NORTHLAND UTILITIES (NWT) LIMITED

Applicants

- and -

NORTHWEST TERRITORIES PUBLIC UTILITIES BOARD

Respondent

- and -

CITY OF YELLOWKNIFE and
TOWN OF HAY RIVER

Intervenors

Application for leave to appeal and appeal of a decision by the Public Utilities Board.

Heard at Yellowknife, NT, on November 2, 2010.

Reasons filed: November 24, 2010.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

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REASONS FOR JUDGMENT

[1] This is an application for leave to appeal and an appeal of a decision, numbered 4-2010, issued by the Northwest Territories Public Utilities Board (the "Board") on March 24, 2010.

[2] At the hearing before me, I granted leave and said that reasons for that decision would be forthcoming. Those reasons are contained within this judgment. Since counsel at the hearing were ready and willing to also argue the appeal on the merits, I proceeded to hear that as well. This judgment therefore also contains my reasons for decision on the appeal.

[3] The issue put before the court is whether the Board exceeded its jurisdiction when, as part of its ratesetting exercise for the period 2008-2010, it ordered the

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applicants to flow through to customers money received as a result of a tax refund for operations in 2007. The Applicants say it did and that its order amounts to retroactive ratesetting. The Intervenors argue that it is prospective ratesetting since it seeks to redress harm to current customers. The Board takes no position. For the reasons that follow, the appeal is allowed.

Background:

[4] The Board is established by the *Public Utilities Act*, R.S.N.W.T. 1988, c.24 (Supp.), to regulate public utilities in the Northwest Territories. It has jurisdiction to supervise the operations of utility companies, to approve municipal franchise agreements, and, most significantly for purposes of this appeal, to fix rates for utility services. It is part of what has been described by the Supreme Court of Canada, in *ATCO Gas & Pipelines Ltd.* v. *Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, as a "regulatory compact" (at para. 63):

> Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated ...(citations omitted)

[5] With respect to ratesetting, the Board regulates on the basis of specific years (called "test years"). It sets the rates for specific test years and once those rates are set they are final. The only exceptions to that are if the Board's order is merely an interim one or if a deferral account is established. Neither situation applies in this case.

[6] The Act contemplates that the objective for the Board is to fix "just and reasonable" rates. That is not explicit but in several sections dealing with ratesetting, such as subsections 49(1), 51(2), 51(3) and 51(4), the Act repeats the phrase "in fixing just and reasonable rates". In doing so, the Board determines a rate base consisting of the cost of the utility's property used to provide the service and its necessary working capital and then fixes a fair return on that rate base. All parties agree that the Act requires the Board to set rates on a prospective basis, such as described in *Northwestern Utilities Limited et al* v. *The City of Edmonton*, [1979] 1 S.C.R. 684 (at p. 691): "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."

[7] All parties also agree on another basic tenet of ratesetting by public utility boards, that being that, in the absence of specific legislative authority to do so, boards do not have the authority to retroactively change rates: see *ATCO Gas & Pipelines (supra)*, at para. 71. Rates are raised or lowered to reflect current conditions. They are not designed to pay back past excessive profits or recoup past operating losses. The Board can take into account past experience in setting the current rates; but, it cannot design a future rate so as to enable the utility to recover a past loss or to rectify for customers some past over-compensation of the utility. In either case the Board would be engaged in retroactive or retrospective ratesetting.

[8] This case concerns one particular aspect of the utilities' overall finances, the treatment of stock handling charges. In February, 2008, both Applicants filed their respective rate applications for the test years 2008-2010. Up to that time, stock handling charges had been capitalized as part of the company's rate base and the capitalized amount added to the pool of capital cost allowances. As the review of their rate applications went on, the Applicants became aware that these stock handling charges could be claimed as tax deductions. This was because of a ruling from the Canadian Revenue Agency received by their parent company in Alberta. The Applicants decided in early 2008 to claim these deductions on their 2007 tax returns. The Applicants then amended their 2008-2010 rate filings to include the projected benefit of similar deductions in the test years.

[9] It is worthwhile to note that there was no rate application or ruling by the Board for 2007. Rates had been set for the period of 2005-2006 and these were used as the basis for the rates charged in 2007. So the 2008-2010 application was the first opportunity to review the impact of deducting these charges as opposed to capitalizing them.

[10] The amounts received back by the Applicants, as a result of taking these deductions, were relatively small. They were $19,400 for one and $3,800 for the other.

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[11] On October 27, 2008, the Board issued two decisions, Decision 24-2008 and Decision 25-2008, dealing with the Applicants' 2008-2010 rate applications. Both decisions addressed the income tax deductions for stock handling charges in the same way:

> The Board notes NUL's treatment of stock handling charges for income tax purposes was different prior to the current test period. Prior to the current test period stock handling charges were not deducted for calculation of the income tax component of revenue requirement, both in the forecasts and in the actuals. As long as NUL's treatment of stock handling charges remains consistent for the forecasts as well as actuals, the Board considers customers will not be harmed. However, if NUL were to choose to follow the route of ATCO Gas and request that its prior year income taxes be reassessed by CRA to the maximum extent possible including deduction for stock handling charges then customers will be harmed if such charges were not were not flowed through to customers.

[12] Both decisions also contained a direction to the applicants that any tax refunds received as a result of claiming these deductions are to be “flowed through” to their customers. The Board's directions were as follows:

> In view of the foregoing, the Board will not direct NUL to retroactively adjust its deductions for stock handling charges respecting prior years. However, if NUL were to choose to request such deductions from CRA respecting prior years, the Board expects that any resulting income tax savings will be flowed through to NUL's customers.

[13] The Board did not say how the refunds are to be “flowed through” to the customers. But, both the Applicants and Intervenors assume that this means that the money received by the Applicants is to be paid over to the current customers.

[14] In January, 2009, the Applicants filed applications with the Board seeking a review and variance of these directions. The Applicants submitted that the stock handling charges related to a prior year, 2007, for which rates had been finalized, while the directions were contained within the Board's decisions relating to 2008-2010 rates. As such, so the Applicants argued, the Board's directions breached the principle against retroactive ratesetting and thus were outside the Board's jurisdiction.

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[15] In March, 2009, the Applicants requested the Board to defer consideration of their review and variance applications pending the outcome of an identical dispute before the Alberta Utilities Commission. The Board agreed to do so

[16] On November 12, 2009, the Alberta Utilities Commission issued Decision 2009-215 respecting the treatment of tax refunds received by ATCO Electric Ltd. for similar deductions claimed for prior years. The reasons of the Commission will be discussed in further detail later in these reasons but, in summary, the Commission considered itself to be bound by the principle against retroactive ratemaking, the principle of prospectivity, and the principle of regulatory certainty, and therefore precluded from directing ATCO Electric, either directly or indirectly, to return these funds from prior years to current customers. I was told that this decision has not been appealed or judicially reviewed.

[17] The Board reviewed the Alberta decision and continued with consideration of the review and variance applications. On March 24, 2010, the Board issued Decision 4-2010 in which it dismissed the Applicants' request to vary its earlier directions. This is the subject-matter of this appeal.

<u>Decision 4-2010</u>:

[18] In its decision, the Board started by noting that the rates established for the 2005-2006 period, being the rates that were in place in 2007, were based on the assumption that stock handling charges cannot be deducted for tax purposes. Rather, those charges were capitalized as part of the companies' rate base and the capitalized amount added to the pool of capital cost allowances. It also noted that the Applicants, after they became aware of the deductibility of these charges, had the discretion as to whether to claim the stock handling charges as a deduction for 2007 and prior years but chose to claim only for 2007.

[19] These two points led to what I think are the main arguments supporting the Board's decision.

[20] First, the Board stated that there are certain methodological underpinnings to the establishment of rates. Two of those relate to the calculation of income taxes and capital cost allowance deductions. Any retroactive change in the methodology used in

the establishment of rates, without regard to its impact on future rates, is, in the Board's view, a violation of the principle of prospectivity. In dismissing the Applicants' argument that the Board's directions amount to retroactive ratemaking, the Board wrote:

> The Board considers the amount of Capital Cost Allowance (CCA) that is claimed as a deduction in one time period versus another, for tax purposes, is a timing issue. If more CCA is claimed in a past year, then less Un-depreciated Capital Costs pools would be available for use in future years resulting in a reduction in the CCA deductions in future years. Since CCA claims in a past year impact future year tax calculations, the Board considers any potential adjustments to future customer rates to reflect the carry over effects of past deductions to be not a retroactive adjustment of historical rates but rather a prospective adjustment to restore the integrity of prospective rate making.

[21] Second, the Board was persuaded by the argument advanced by the Intervenors in this case that, since the claiming of stock handling charges as a deduction is solely within the discretion of the Applicants, there is no shared risk as between the utilities and the customers. In other words, this is a purely one-sided benefit. It is not an “efficiency” saving but merely a windfall due to a fortuitous tax ruling and, because claiming higher deductions in one year has an impact on the amount of tax due in future years because of the reduction in capital cost allowance available, the risk results in harm to the customers.

[22] Therefore, the Board was not convinced that its earlier directions were either inconsistent with prospective ratemaking or violated the principle prohibiting retroactive ratemaking.

<u>Application for Leave to Appeal</u>:

[23] Section 78(1) of the *Public Utilities Act* restricts appeals to questions of law or jurisdiction and an appellant must first obtain leave to appeal.

[24] The parties agree on the test to be applied to determine whether leave should be granted: *North West Co.* v. *Town of Fort Smith*, [2007] N.W.T.J. No. 6 (S.C.), at para. 16; *Atco Electric Ltd.* v. *Alberta (Energy and Utilities Board)*, [2003] A.J. No. 117 (C.A.), at para. 17. The Applicants must demonstrate that the appeal raises a serious

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arguable point. Subsumed within this test are four criteria: (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action; (3) whether the appeal is *prima facie* meritorious; and, (4) whether the appeal will unduly hinder the progress of the case. Also taken into consideration is the standard of review that will apply should leave be granted.

[25] In my view, as I will explain more fully later, the appeal raises a question of jurisdiction. Assuming that the Board had the power to embark on an examination of how, if any, these tax deductions and refunds were to be treated, the issue is whether the Board exceeded its jurisdiction by imposing directions that were tantamount to retroactive ratemaking. And, if it is a jurisdictional issue, then the Board must be correct in law. Thus the issue is significant to the practice.

[26] The issue is obviously significant to the action since it is determinative of the action. So determination of this point will not hinder progress of the action.

[27] The Intervenors argued that the appeal is insignificant since the practical effect of the Board's directions are immaterial. By that they mean that the amount of dollars at stake amount to an insignificant part of the Applicants' total revenue requirements. But, of course, the Applicants respond that it is the principle that counts, not the dollars. This appeal is essentially about the jurisdiction of the Board in exercising its ratesetting powers.

[28] I agree with the points made by the Applicants. Hence, I granted leave to appeal.

Standard of Review:

[29] It is trite law to state that a tribunal has only those powers that are expressly or implicitly conferred on it by its constituent statute. Either the Board had the jurisdiction to issue the directions, or it did not.

[30] The first issue that must be addressed, therefore, is the standard of review. However, as stated in *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190, it is not necessary to perform an analysis of this issue if the standard of review for the type of question in issue has already been determined by the jurisprudence.

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[31] Questions of jurisdiction are reviewed on a standard of "correctness": *ATCO Gas & Pipelines (supra)*, at para. 21. As previously mentioned, s.78(1) of the Act limits appeals to questions of law or jurisdiction. This generally calls for the application of the correctness standard: *Prairie North Regional Health Authority* v. *Kutzner*, [2010] S.J. No. 650 (C.A.), para. 31.

[32] Section 17 of the Act, however, states that the Board has exclusive jurisdiction for all matters in which jurisdiction is conferred on it by the Act and its decisions shall not be questioned or reviewed by judicial review or any other process. Section 19 provides that the Board's determination on a question of fact is conclusive and binding. These constitute privative provisions and therefore any question of fact is not subject to appeal.

[33] The Intervenors argued that the applicable standard of review is reasonableness since the issue, the direction to "flow through" to customers the benefits associated with any income tax reassessments, is one that calls for the special expertise enjoyed by the Board.

[34] There is no doubt that the Board is a specialized tribunal. But, in this case, the question is whether the Board exceeded its jurisdiction. If, as in the case of *Calgary* v. *Alberta (Energy and Utilities Board)*, [2010] A.J. No. 449 (C.A.), a case relied on by the Intervenors, the Board's jurisdiction is decided in its favour, then a review of its decision would be on the standard of reasonableness. But here the fundamental question is jurisdictional. Therefore correctness is the standard.

[35] When I speak of jurisdiction I am cognizant of the Supreme Court's admonishment that only "true" questions of jurisdiction attract the correctness standard of review. This was emphasized by Bastarache and Lebel J.J., writing for the majority, in *Dunsmuir (supra)*, at para. 59:

> Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. *"Jurisdiction" is intended in the narrow sense of whether or not the*

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> *tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.* The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta* v. *Calgary (City)*, [2004] 1 S.C.R. 485. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences. That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in CUPE that reviewing judges must not brand as jurisdictional issues that are doubtfully so. [Emphasis added; citations omitted.]

[36] The distinction between the "narrow" and "wide" meanings of jurisdiction was explained by Professors Jones and de Villars in their text, *Principles of Administrative Law* (5th ed.), at p. 140:

> In its broadest sense, "jurisdiction" means the authority to do every aspect of an *intra vires* action. In a narrower sense, however, "jurisdiction" means the power to commence or embark on a particular type of activity. A defect in jurisdiction "in the narrow sense" is thus distinguished from other errors - such as a breach of a duty to be fair, considering irrelevant evidence, acting for an improper purpose, or reaching an unreasonable result - which take place *after* the delegate has lawfully started its activity, but which cause it to leave or exceed its jurisdiction.
>
> ...
>
> It is important to remember that virtually all grounds for judicial review of administrative action depend upon an attack on some aspect of the delegate's jurisdiction (in the wider sense) to do the particular activity in question. Consequently, it is equally important to remember that any behaviour which causes the delegate to *exceed* its jurisdiction is just as fatal as any error which means that it never had jurisdiction "in the narrow sense" even to commence the exercise of its jurisdiction [Italics in original; footnotes omitted.]

[37] It is in the last sense of jurisdiction, as described above, that I understand the issue in this case. The Applicants argue that, while the Board may have had the authority to consider the fact that there was a tax refund, the Board *exceeded* its jurisdiction in making the directions it did. The standard of review for this is, as I

have said, correctness. If, however, the Board did not exceed its jurisdiction, the question then is whether these directions fall within the range of reasonable outcomes.

Submissions on the Appeal:

[38] The essence of the Applicants' argument is that the directions amount to retroactive ratemaking since they were made in the context of the 2008-2010 test years rate application whereas the tax refund applies to a prior year (2007). The 2007 rates were “final” and any attempt to reallocate funds from that period amounts to a revision of those rates. In simple terms, it would require the Applicants to give money received from tax refunds for a prior year to current customers.

[39] The Applicants' argument characterized the directions as an “adjustment” to the utility's revenue requirements for the prior year. How is this? Counsel simplified it for me by explaining that lower taxes means a lower cost base which in turn means lower revenue requirements which results in lower rates. Hence it is an implicit adjustment to the 2007 rate structure to have these funds flow through to the customers.

[40] The Applicants placed great reliance on the Alberta Utilities Commission Decision 2009-215 (referred to previously). In their view that decision addressed exactly the same issues as addressed by the Board in this case and held that any flow through of tax refunds to customers is prohibited by the principle against retroactive ratemaking.

[41] The Intervenors took the position that the Alberta Commission's decision did not deal with the same issues and, even if it did, that Commission came to the wrong conclusions.

[42] In their submission, the income tax deductions claimed by the Applicants have resulted in a reduction of the undepreciated capital cost balances available to offset future taxable income and thus lower income tax expenses. Consequently customers will pay a higher amount of income tax expense through rates in future years. Both the Alberta Commission and the Board in this case came to similar findings in this regard. Counsel for the Intervenors noted that the Board expressly stated that the

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customers have been “harmed” and the only way to rectify this is to flow through the tax refunds. Counsel described this as a non-reviewable finding of fact.

[43] The difference as between the Alberta Commission's decision and the Board's, in the Intervenors' submission, is that the Alberta Commission was considering various formulas, such as readjusting capital cost balances, while the Board was dealing with a straightforward cause-and-effect scenario, i.e., the deductions in the past cause harm in the present. Thus it is not an exercise in retroactive ratemaking but prospective ratemaking since it merely restores the integrity of the methodology used to set rates.

[44] Counsel also noted that the Alberta Commission did not simply leave the issue when it decided that it could not order a flow-through of the tax refunds in that case. It directed that a deferral account be established to include all income tax deductible capital costs on a go-forward basis.

[45] The Intervenors' counsel also made the argument that, since these tax refunds were received in 2008, and the Board was considering this issue as part of the 2008-2010 rate application review, it may consider these funds to be part of the revenues of the Applicants for a fiscal period under review (as permitted by s.51(2)(a) of the Act) or as part of the utilities' working capital (as required by s. 49(2)(b) of the Act). Thus there would be no requirement to restate the 2007 cost base or revenue requirements.

[46] Finally, the Intervenors made the point that if utilities keep changing the underlying basis of accounting or tax calculations then there would be no regulatory certainty. In this case, the rates were set on the basis that stock handling charges were 100% capitalized. The utilities have, after-the-fact, changed that to reflect 100% of these costs as tax deductible.

[47] In response, the Applicants point out that any “harm” suffered by current or future customers will be off-set by the fact that customers will benefit from the expensing of these costs since that will lower the amount of taxes payable. So, while the utilities benefit from the deduction taken for 2007, the customers will benefit in the test years and every year thereafter due to the increased tax deductions being claimed by the utilities.

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[48] Applicants' counsel also painted the Board's (and the Intervenors') attempt to frame the directions in reference to capital cost allowances and undepreciated capital cost base as merely an attempt to do indirectly what cannot be done directly (a point emphasized by the Alberta Commission in its decision). Any alternative technique or method to either justify or reallocate the refunds to the customers is equally objectionable on this ground.

<u>Analysis</u>:

[49] As I noted earlier, all parties agree that the Board, in exercising ratesetting powers, is required to do so prospectively and is prohibited from engaging in retroactive ratemaking. I think it would be helpful to set out some definitions since various terms are often used interchangeably and in different contexts. In the *Calgary* v. *Alberta* case (*supra*), Hunt J.A. gave a helpful description of the meaning of "prospective", "retroactive" and "retrospective", in the context of utility regulation (at paras. 46-49):

> A brief overview of some central principles of ratemaking, including the related concepts of retroactive and retrospective ratemaking, is necessary. Generally, ratemaking and rates must be prospective: *Coseka Resources Ltd.* v. *Saratoga Processing Co.* (1981), 31 A.R. 541 at para. 29, 16 Alta. L.R. (2d) 60 (C.A.). A utility's past financial results can be used to forecast future expenses, but a regulator cannot design future rates to recover past revenue deficiencies: *Northwestern Utilities Ltd. and al.* v. *Edmonton*, [1979] 1 S.C.R. 684 at 691 and 699 *("Northwestern Utilities")*.
>
> Retroactive ratemaking "establish[es] rates to replace or be substituted to those which were charged during that period": *Bell Canada* v. *Canada (Canadian Radio-Television and Telecommunications Commission*), [1989] 1 S.C.R. 1722 at 1749 ("*Bell Canada 1989*"). Utility regulators cannot retroactively change rates ("*Stores Block"* at para. 71) because it creates a lack of certainty for utility consumers. If a regulator could retroactively change rates, consumers would never be assured of the finality of rates they paid for utility services.
>
> Retrospective ratemaking, in contrast, imposes on the utility's current consumers shortfalls (or surpluses) incurred by previous generations of consumers. It is generally prohibited because it creates inequities or improper subsidizations as between past and present consumers (who may not be the same)...

> Sometimes *retrospective* ratemaking is referred to as *retroactive* ratemaking. This is because rates imposed on a future generation of consumers, while prospective, create obligations in respect of past transactions, and in this sense they are retroactive...

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[50] The *Calgary* case also illustrates, in its review of pertinent jurisprudence, that the only way in which expenses or surpluses from one year can be reallocated in a subsequent year, or rates can be changed after-the-fact, is by use of deferral accounts or interim rates. Neither applies in this case, as I previously mentioned.

[51] What the present case demonstrates are aspects of both "retrospective" and "retroactive" ratemaking, as those terms are used above. "Retrospective" because the Board, by its directions, is benefitting present customers from a gain incurred in a past year. "Retroactive" because, in taking the refunds away from the utilities and passing them on to the customers, the Board is in effect restating the utilities' rate base and revenue requirement for that past year.

[52] The Board itself seemed to recognize these principles in an earlier decision, number 4-2008 issued on January 30, 2008, dealing with an issue from the review of the Northwest Territories Power Corporation's 2006-2008 rate application. There, the Board issued a directive requiring the Corporation to refund to customers $345,000 that was, in the Board's term, "over-collected"for certain expenses between the 2001-2002 and 2005-2006 test year periods. As I understand it, the Board asserted that the Corporation had claimed certain expenses when setting the rates for those years but did not carry out all the work related to those expenses, resulting in savings in those years but the potential for higher expenses in future years when the work has to be done. The Corporation asked the Board to review this direction. In its decision, the Board vacated the direction "as a matter of law" after reviewing submissions regarding retroactive ratemaking.

[53] To start, I do not accept the Intervenors' argument that, just because the tax refunds were received in 2008, they can be considered by the Board as revenues applicable to the fiscal year for which the Board is considering setting rates. The amounts are directly referable to operations in 2007 and not to the test years under consideration by the Board. Similarly, the consideration of the working capital of the

utilities is the need to consider the “necessary” working capital for the period in question, not what may simply be available.

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[54] Since much emphasis was placed in argument on the Alberta Utilities Commission Decision 2009-215, I will review it in more detail.

[55] The Alberta decision was made in the context of ATCO Electric's application for approval of its 2009-2010 general tariff. In it ATCO identified the retention of income tax refunds, as a result of deductions for various costs (including stock handling charges), for 2006, 2007 and 2008 in the amount of $6 million. These costs were previously treated as capital additions for income tax purposes and formed part of the undepreciated capital cost which was then available to lower taxable income over a period of years through a yearly capital cost allowance deduction. In late 2007, however, ATCO became aware of the ability to deduct these items. Once that was identified, ATCO included provision for these deductions in its 2009-2010 tariff application.

[56] Various consumer groups intervened on the rate application and argued that, in order to receive the refunds, the undepreciated capital cost balances were reduced by the amount of the deductions thereby reducing the capital cost allowance in future years. These groups therefore asked that either the $6 million be flowed through to customers, or that the undepreciated capital cost balance be set at the level existing prior to ATCO's claim for the refunds, or that an adjustment be made to the rate base for 2009-2010.

[57] ATCO argued that all of these methods would amount to retroactive ratemaking since it would involve the Commission in adjusting or restating prior years' revenue requirements after the rates for those years had already been fixed. ATCO also argued, as the Applicants do here, that customers benefit in the long term due to its ability to take these deductions in future years.

[58] As I mentioned previously, the Alberta Commission considered the principle of prospectivity, the prohibition against retroactivity, and the need for regulatory certainty, and allowed ATCO to keep the money realized as a result of these deductions. The Commission held that these principles would be undermined if the refunds were to be paid to customers. It reasoned that the rates were finalized for the

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years to which the refunds related and all the alternatives considered were simply a mechanism to reallocate the refunds. Also, to make any of the adjustments proposed by the consumers would be simply doing indirectly what could not be done directly.

[59] The Commission acknowledged that, yes, the customers may have lost some benefit as a consequence of ATCO claiming the deductions but to do as the consumer groups proposed would offend the well-established regulatory principles previously mentioned. It referred to past situations to show that issues arising from the difference in treatment of capital versus expense as between tax and regulatory accounts are not new. And, the Commission also commented on the difference between the tax regime, where there may be reassessments and retroactive changes, and the regulatory regime where certainty is the norm (at para. 68):

> The Commission notes the conflicting incentives and imbalance that arise between shareholders and customers when customer rates are finalized but income tax reassessments and refunds may be requested and received by a utility outside of the test years. While the income tax legislation and its regulations allow for retroactive changes to be made in the calculation of income tax expense resulting in an income tax refund to the benefit of shareholders, the Commission must adhere to the principle against retroactive ratemaking, the prospectivity principle and the principle of regulatory certainty.

[60] In my opinion, the issues addressed by the Alberta Commission are the same ones that were before the Board in the present case. And, in my respectful view, the Commission was correct in its analysis.

[61] The Board based its decision on what it characterized as a “retroactive change in the methodological underpinnings used in the establishment of prospective rates” and seemed to say that if such a change had an impact on future rates it would be in violation of the principle of prospectivity. I must admit to some difficulty in understanding what exactly the Board is saying if I keep in mind that rates are set within the parameters of an application for specific test years. It is the methodology used to set rates for the test years in question that determines the rates (not some past or potential future methodology).

[62] The Board said, in its decision, that “any potential adjustments to future customer rates to reflect the carry over effects of past deductions (is) not a retroactive

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adjustment". I agree. But the point is that the adjustment is done to future rates, not by reaching back to a past year and flowing through benefits from that year to customers in a future rate period.

[63] The 2008-2010 application before the Board took into account the potential savings from the deductions that the Applicants are now able to take. Whether those savings actually off-set the reduction in available capital cost allowances is not the point (and the evidence on this was far from clear). The point is that the methodology used in the rate application under consideration is consistent with the changes in tax treatment and internally consistent.

[64] I agree with the Intervenors' counsel when he argues that the 2007 tax refunds cannot be considered as an "efficiency gain". They came about due to a change in federal tax policy as opposed to any efficiencies introduced by the utilities. But, if it is a windfall then the solution is not to provide one to the 2008-2010 customer base. The solution is to concentrate on developing appropriate rates for the test years based on current knowledge.

[65] Any attempt to deal with the refunds received for 2007 within the context of the 2008-2010 rate application is, in my opinion, tantamount to retroactive ratemaking. Calling it a "prospective adjustment" is merely doing indirectly what cannot be done directly. It is axiomatic that the courts will look to the substance of what is being done, and not merely the form, and strike down any attempt to do indirectly what a tribunal's enabling statute does not allow to be done directly: see, for example, *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198 (at p. 1291).

[66] It may well be, as the Intervenors' counsel suggested, that the Board in this case, as opposed to what was done in the Alberta case, was trying to strike a better balance between the interests of consumers and those of the utilities. The difficulty is that in its attempt to do so the Board exceeded its jurisdiction by engaging in what I previously described as both retroactive and retrospective ratemaking.

Conclusions:

[67] Leave to appeal is granted and the appeal is allowed. Decision 4-2010 is hereby set aside and an order will issue granting variance of Board Decisions 24-2008 and

25-2008 by vacating the direction to flow through to customers any benefits from tax deductions for stock handling charges in prior years.

[68] On the matter of costs, if the parties are unable to agree they may file written submissions to me within 60 days of the date of these reasons for judgment.

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J.Z. Vertes
J.S.C.

Dated this 24th day of November, 2010.

Counsel for the Applicant: Loyola G. Keough

Counsel for the Respondent: John Donihee

Counsel for the Intervenors: Thomas D. Marriott

Docket: S-1-CV-2010000079

2010 NWTSC 92 (CanLII)

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

NORTHLAND UTILITIES (YELLOWKNIFE) LIMITED and NORTHLAND UTILITIES (NWT) LIMITED

Applicants

- and -

NORTHWEST TERRITORIES PUBLIC UTILITIES BOARD

Respondent

- and -

CITY OF YELLOWKNIFE and
TOWN OF HAY RIVER

Intervenors

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE J.Z. VERTES

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MCI Telecommunications Corp., Petitioner, v. Public Service Commission of Utah; Brian T. Stewart, Chairman, James M. Byrne, Commissioner, Respondents. Tel-America of Salt Lake City, Inc., Petitioner, v. Public Service Commission of Utah; Brent H. Cameron, Commissioner; James M. Byrne, Commissioner; Brian T. Stewart, Chairman, Respondents.

No. 890251, No. 890252

SUPREME COURT OF UTAH

840 P.2d 765; 186 Utah Adv. Rep. 8; 1992 Utah LEXIS 38

May 12, 1992, Filed

SUBSEQUENT HISTORY: [1]** Rehearing Denied June 8, 1992. Released for Publication June 11, 1992.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner telecommunication companies appealed from the order of respondent Public Service Commission of Utah which denied its request to investigate a telecommunication provider's rate of return and order the telecommunication provider's refund to ratepayers all earnings that exceeded the authorized rate of return.

OVERVIEW: Following the enactment of the Tax Reform Act of 1986 (Act), which provided a reduction in the federal corporate income tax rate, petitioners filed a request, asking the commission to investigate a telecommunication provider's (provider) rate of return and order it to refund to ratepayers excess earnings. The commission denied relief and held that it had no authority to order a refund because a refund would constitute retroactive ratemaking in violation of Utah Code Ann. § 54-4-4(1). The court reversed and remanded, holding that the commission erred in its refusal to allow petitioners a factual hearing on whether the exception for unforeseeable and extraordinary decreases in expenses to the general rule against retroactive ratemaking was applicable. The court held that commission's failure to hold a factual hearing on the issue of utility misconduct was arbitrary and capricious, and that if, on remand, the Act is found to have caused an extraordinary decrease in expenses or if the provider engaged in misconduct, the provider's earnings, to the extent they exceeded its authorized rate of return should be refunded to its ratepayers.

OUTCOME: The court reversed and remanded the commission's order which denied petitioners' request that it investigate a providers' rate of return and order it to return to ratepayers excess earnings.

CORE TERMS: reduction, earning, rate of return, retroactive, unforeseeable, decrease, eba, rate-making, ratepayer, refund, misconduct, projected, rate case, Tax Reform Act, exceeded, agency action, interim, federal corporate, reparations, monthly, tax rate, tax rates, authority to grant, overearnings, accurately, projections, consumers, disclose, misstep, offset

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > Standards of Review > General Overview
[HN1] The Utah Administrative Procedures Act (UAPA), Utah Code Ann. §§ 63-46b-1 to -22 (1989), establishes the appropriate standards of review. UAPA applies to all agency adjudicative proceedings commenced on or after January 1, 1988.

Energy & Utilities Law > Utility Companies > Rates > General Overview

Governments > Legislation > Effect & Operation > Retrospective Operation
[HN2] As a general proposition, a utility's recoupment of costs that were greater than projected or revenues that were less than projected from future rates constitutes retroactive rate making.

Energy & Utilities Law > Utility Companies > Rates > General Overview
[HN3] The bar on retroactive rate making makes no exception for missteps in the ratemaking process even though the projections of expenses and revenues for the test year will necessarily vary from actual experience.

Energy & Utilities Law > Utility Companies > Rates > General Overview
[HN4] The exception to the rule against retroactive ratemaking for unforeseeable and extraordinary increases or decreases in expenses is recognized in Utah.

Energy & Utilities Law > Utility Companies > Rates > General Overview
[HN5] Ordinarily, changes in tax laws are not a sufficient basis for invoking the exception to the general rule against retroactive ratemaking.

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > General Overview
Energy & Utilities Law > Utility Companies > Rates > General Overview
[HN6] The Public Service Commission of Utah must make appropriate findings of fact to justify rate orders.

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > General Overview
Energy & Utilities Law > Utility Companies > Rates > General Overview
[HN7] A state regulatory commission, whose powers have been invoked to fix a reasonable rate, is entitled to know and before it can act advisedly must be informed of all relevant facts.

Energy & Utilities Law > Administrative Proceedings > General Overview
Energy & Utilities Law > Antitrust > General Overview
Energy & Utilities Law > Utility Companies > General Overview
[HN8] The Public Service Commission of Utah (commission) cannot discharge its statutory responsibilities without making findings on both ultimate and subordinate issues of fact. The commission's regulation of public monopolies must strictly adhere to those procedures designed to give appropriate protection to the interests of ratepayers, investors, the utilities themselves, and where they exist, competitors. Moreover, unless the commission complies with those procedures, the appellate court cannot perform its assigned task of judicial review.

Civil Procedure > Appeals > Rehearings
Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > General Overview
Energy & Utilities Law > Administrative Proceedings > Rehearings
[HN9] Under Utah Code Ann. §§ 54-7-15(2)(a) and (b), an issue must be presented to the Public Service Commission of Utah in a petition for rehearing to be raised on appeal.

Administrative Law > Judicial Review > General Overview
Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > Judicial Review
Energy & Utilities Law > Administrative Proceedings > Rehearings
[HN10] Utah Code Ann. § 54-7-15 states in part: (1) Before seeking judicial review of Public Service Commission's action, any party who is dissatisfied with an order of the commission shall meet the requirements of this section. (2) (a) After any order or decision has been made by the commission, any party to the action or proceeding may apply for rehearing of any matters determined in the action or proceeding. (b) No applicant may urge or rely on any ground not set forth in the application in an appeal to any court.

Energy & Utilities Law > Administrative Proceedings > Ratemaking
Energy & Utilities Law > Utility Companies > Rates > General Overview

[HN11] A utility that misleads or fails to disclose information pertinent to whether a ratemaking proceeding should be initiated or to the proper resolution of such a proceeding cannot invoke the rule against retroactive rate making to avoid refunding rates improperly collected.

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > General Overview
Energy & Utilities Law > Administrative Proceedings > Ratemaking
Energy & Utilities Law > Utility Companies > Rates > General Overview
[HN12] If a utility misleads the Public Service Commission of Utah or the Committee of Consumer Services by withholding relevant ratemaking information, the rates fixed by the Commission cannot be based on reasonable projections of the utility's revenues and expenses.

Civil Procedure > Judgments > Relief From Judgment > Fraud
Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > Authority
Energy & Utilities Law > Utility Companies > Rates > General Overview
[HN13] The Public Service Commission of Utah has the inherent power to reopen a rate order if a utility engages in misconduct.

Energy & Utilities Law > Utility Companies > Rates > Ratemaking Factors > Rate of Return
[HN14] An authorized rate of return is intended to be an estimate of the return on equity that investors would require before they would invest in the utility. The rate of return is neither a guarantee of nor a limit on profits. A utility should be rewarded for becoming more efficient through its own efforts. If the authorized rate of return were an absolute ceiling on profits, that objective would be subverted.

Energy & Utilities Law > Utility Companies > Rates > Ratemaking Factors > Rate of Return
[HN15] If a utility earns profits in excess of its authorized rate of return because of an exception to the rule against retroactive rate making, the authorized rate is the best available measure of a fair return and earnings in excess of that rate are subject to refund.

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Ted D. Smith, Salt Lake City, for U.S. West Communications.

David L. Stott, Laurie L. Noda, Salt Lake City, for Public Service Commission.

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Thomas M. Zarr, Stanley K. Stoll, Daniel D. Hill, Salt Lake City, for Tel-America.

Michael L. Ginsberg, Salt Lake City, for Division of Public Utilities.

JUDGES: STEWART, Hall, Howe, Durham, ZIMMERMAN

OPINION BY: STEWART

OPINION

[*767] *STEWART, Justice*:

In 1985, the Public Service Commission (Commission) granted Mountain States Telephone and Telegraph Co., now U.S. West Corp. (U.S. West), [1] a $ 22 million general rate increase and established 14.2% as its authorized rate of return on equity. In granting the increase, the Commission assumed that U.S. West would pay a federal corporate income tax of 46%, the then-existing rate.

1 Mountain Bell became U.S. West Corp. in 1988. We will use the name "U.S. West" throughout this opinion for ease of reference.

[2]** On October 22, 1986, Congress enacted the Tax Reform Act of 1986 (Act), which provided a two-step reduction in the federal corporate income tax rate, from 46% to 40% effective June 1987, and then to 34% effective January 1988. This amounted to a total reduction of approximately 26%.

In December 1986, the Commission requested that the major utilities in the state provide it with information showing the anticipated effect of the reduced income tax rates on their earnings. The president of U.S. West responded that although the initial impact on cash flow would be negative, "the tax law is a critical factor in averting rate requests." He further stated, "Considering all of the data, I feel very good about the possibility of rate stability for our customers over the next few years. The benefits of the 1986 Tax Reform Act will go to ratepayers since they work to offset intrastate increases in our continuously changing industry." In January 1987, the Commission requested that the Utah Division of Public Utilities (Division) review the responses of the companies. The Division recommended that the Commission not order U.S. West to reduce its rates. The Commission then directed the Division **[**3]** to undertake a formal investigation of U.S. West's rate of return.

The Committee of Consumer Services (Committee) was created by the Legislature to serve as "advocate . . . of positions most advantageous to a majority of residential consumers." Utah Code Ann. § 54-10-4(3) (1990). On June 1, 1987, the Committee filed a motion with the Commission asking it to declare the rates of all public utilities subject to the Commission's jurisdiction interim rates or, alternatively, to require them to establish refund reserve accounts from which excess earnings could be refunded to ratepayers. The Commission denied the motion on June 30, 1987, referring in part to the Division's report that U.S. West's rate of return for 1986 and 1987 would be less than 13% and 12% respectively, less than its authorized rate of 14.2%. **[*768]** The Division represented that the net effect of the Act on U.S. West's earnings would net an increase of $ 1.2 million in 1987 and $ 0.5 million in 1988. The Division also reported that it was monitoring U.S. West's earnings on a monthly basis and would alert the Commission to any significant changes.

By August 1987, utility regulators in forty-three states and the District **[**4]** of Columbia had taken some action to reduce utility rates in response to the Act.

On August 11, 1987, the Committee requested that U.S. West disclose its earnings. U.S. West objected on the ground that the Division was already monitoring its earnings. The Committee then moved to compel U.S. West to respond to the request for data. The Commission ruled in November 1987 that the motion to compel would be held in abeyance pending completion of the Division's investigation, but that in the meantime the Division should give the Committee the financial information it had obtained from U.S. West.

On September 1, 1987, the Division filed a second report with the Commission indicating that U.S. West's rate of return remained below its 14.2% authorized rate of return. Again, the Division recommended that the Commission take no action.

The Division's conclusions appear to have been seriously in error. U.S. West's actual rate return had exceeded its authorized rate of return in six of the first eight months of 1987, even though the first phase of the federal tax reduction was not effective until June 1987. Data furnished by U.S. West to MCI Telecommunications Corporation in September **[**5]** 1988 in response to interrogatories provided the following monthly breakdown for U.S. West's return on equity for its Utah intrastate operations:

Month	1987	1988
January	12.02%	17.23%
February	15.14%	15.62%
March	3.52%	22.04%
April	15.00%	16.23%
May	16.62%	12.29%

June	17.86%	16.02%
July	16.24%	
August	25.31%	
September	20.76%	
October	17.24%	
November	19.89%	
December	24.48%	

As is evident from these figures, U.S. West's rate of return increased dramatically after the first phase of the tax reduction became effective. For the last six months of 1987, U.S. West's average monthly rate of return on equity was over 20%.

In December 1987, the Division and U.S. West privately negotiated a $ 9 million reduction in future rates to be effective January 1, 1988. The Commission approved the stipulation without a hearing or findings of fact to justify the amount of reduction and without disclosing what U.S. West's earnings had been in 1987, what they would likely be in 1988, or by how much they exceeded the authorized rate of return.

Subsequent events disclosed that the $ 9 million reduction was inadequate to reduce U.S. West's earnings to its authorized rate of **[**6]** return. U.S. West's high rate of earnings continued for the first six months of 1988. During that period, its average monthly earnings were in excess of a 16% rate of return, even with the January 1987 rate reduction. Thus, U.S. West's earnings significantly exceeded its authorized rate of return for each of the twelve months following the effective date of the *first* phase of the tax reductions under the Act.

On January 28, 1988, the Committee requested that U.S. West produce the financial data on which the $ 9 million rate reduction **[*769]** was negotiated. This request was made after the *second* phase of the tax reduction became effective. U.S. West responded that it considered the investigation closed and refused to disclose the data. The Committee then hired an independent consulting firm to review both the settlement and U.S. West's earnings. In May 1988, the firm issued a report asserting that the $ 9 million stipulated rate reduction was "clearly inadequate."

In July 1988, the Commission initiated a general rate case, docket No. 88-049-07, to investigate the reasonableness of U.S. West's rates and earnings. Again the Commission denied the Committee's request to declare **[**7]** U.S. West's rates interim rates. Instead, the Commission ruled that if U.S. West's earnings were in excess of its authorized rate of return, they would be subject to a rebuttable presumption that they were unjust and unreasonable and subject to refund. In August 1988, the Division, the Committee, and U.S. West stipulated to a further rate reduction of $ 31 million, a $ 20 million reduction to be effective September 1, 1988, and an $ 11 million reduction to be effective January 1, 1989.

On September 22, 1988, the Commission, with no findings of fact, rejected the stipulated reduction and ordered an interim rate reduction of only $ 27 million, $ 16 million of which would be effective August 1, 1988, and $ 11 million of which would be effective January 1, 1989.

Then, in October 1988, the Commission, at U.S. West's request, vacated its September 22 order reducing rates by $ 27 million -- again with no findings of fact -- and instead approved a stipulation for a permanent reduction of $ 26 million, $ 16 million to be effective September 22, 1988, and $ 10 million to be effective January 1, 1989. The Commission, also at U.S. West's request, vacated its August 2 order declaring that **[**8]** earnings in excess of U.S. West's authorized rate of return were presumptively unjust and unreasonable and subject to refund. In addition, the parties agreed that there would be no further demands for interim rate decreases pending the conclusion of the general rate case, and the Commission approved the agreement, again without findings.

Finally, one year later, in October 1989, after formal hearings and extensive findings of fact and conclusions of law, the Commission entered still another rate reduction order of almost $ 22 million to be effective

November 15, 1989.

Thus, over a period of approximately two years, the Commission entered three orders reducing U.S. West's rates in a four-step process by a total of $ 57 million. The reductions were apparently due, at least in part, to the fact that the Tax Reform Act had decreased U.S. West's federal tax liability, thereby increasing its earnings to a level significantly in excess of its authorized rate of return.

While the Commission was considering the stipulation on which the October 1988 rate reduction was based, David Irvine, a U.S. West ratepayer and former PSC Commissioner, filed a request for agency action, asking the Commission **[**9]** to (1) investigate U.S. West's rate of return for the years 1987 and 1988, and (2) order U.S. West to refund to the ratepayers all earnings exceeding the 14.2% authorized rate of return. The Commission subsequently granted MCI Telecommunications Corp. (MCI), Tel-America of Salt Lake City, Inc. (Tel-America), and other interested parties, including a number of members of the Utah Legislature, leave to join in the request.

The Commission severed the request for agency action from the general rate case and assigned the request for agency action docket No. 88-049-18. The Commission denied the relief sought by the request. Although the Commission found that U.S. West's earnings had exceeded its authorized rate of return for the period in question, it did not state by how much. It did state, however, that the Tax Reform Act was a cause of the overearnings. The Commission ruled that it had no authority to order a refund because a refund would constitute retroactive rate making in violation of Utah Code Ann. § 54-4-4(1) and *Utah Department of Business Regulation* **[*770]** *v. Public Service Commission*, 720 P.2d 420 (Utah 1986).

I. STANDARD OF REVIEW

[HN1] The Utah Administrative **[**10]** Procedures Act (UAPA), Utah Code Ann. §§ 63-46b-1 to -22 (1989), establishes the appropriate standards of review. UAPA applies to all agency adjudicative proceedings commenced on or after January 1, 1988. *Id.* § 63-46b-22(1).

The primary issues to be resolved are whether the Commission erred in (1) ruling that there is no applicable exception to the rule against retroactive rate making for unforeseeable and extraordinary events, and (2) ruling that there was no basis for a factual inquiry into whether U.S. West engaged in misconduct by presenting misleading information on actual and projected earnings or by improperly avoiding disclosure of its earnings. Both issues are questions of law, subject to de novo review. Utah Code Ann. § 63-46b-16(4)(d); *Mountain States Tel. & Tel. Co. v. Public Service Comm'n*, 754 P.2d 928, 930 (Utah 1988).

II. EXCEPTIONS TO THE PROHIBITION AGAINST RETROACTIVE RATE MAKING

[HN2] As a general proposition, a utility's recoupment of costs that were greater than projected or revenues that were less than projected from future rates constitutes retroactive rate making. The leading case in this jurisdiction prohibiting retroactive rate **[**11]** making is *Utah Department of Business Regulation v. Public Service Commission*, 720 P.2d 420 (Utah 1986) [hereinafter *EBA*]. Utah Power & Light Co. had established an energy balancing account (eba account), an accounting device created to facilitate interim rate increases to compensate for rapidly escalating fuel costs. Utah Power transferred greater than expected revenues that had accrued in the eba account to general revenues. The purpose of the transfer was to benefit the stockholders. If left in the eba account, the increased revenues would have benefited the ratepayers. Utah Power argued that the transfer was an accounting adjustment, not retroactive rate making, that the ratepayers would reap a windfall if the unexpected revenues remained in the eba account, and that, even with the transfer, Utah Power shareholders would receive a lower return on equity (13.25%) than the authorized rate (16.3%).

The Court held that Utah Power could not transfer the unanticipated increased revenues out of the eba account to benefit the stockholders. The Court stated that in a general rate proceeding utility rates are fixed on the basis of projected costs and revenues **[**12]** for a future "test" year. Although the Legislature had specifically authorized interim rate increases to adjust for rapidly increasing fuel costs in a bob-tailed rate proceeding, the Court held that the utility could not recoup lost earnings caused by costs greater than projected or by revenues less than projected in the prior rate case. The Court reasoned that "neither the pass-through legislation nor the Commission's general grant of regulatory authority permits a utility to have retroactive revenue adjustments in order to guarantee shareholders the rate of return initially anticipated." *EBA*, 720 P.2d at 423.

The Court explained that the prohibition against retroactive rate making is designed to provide utilities with an incentive to operate efficiently. For that reason, utilities are not allowed to recoup unanticipated costs or unrealized revenues.

> This process places both the utility and the consumers at risk that the rate-making procedures have not accurately predicted costs and revenues. If the utility underestimates its costs or overestimates revenues, the utility makes less money. By the same token, if a utility's revenues exceed expectations **[**13]** or if costs are below predictions, the utility keeps the excess. Overestimates and underestimates are then taken into account at the next general rate proceeding in an attempt to arrive at a just and reasonable future rate.

EBA, 720 P.2d at 420-21 (citations omitted). Therefore, [HN3] "the bar on retroactive **[*771]** rate making makes no exception for missteps in the rate-making process," even though the projections of expenses and revenues for the test year will necessarily vary from actual experience. *Id.* at 424.

A. *Exception For Extraordinary and Unforeseeable Expenses or Revenues*

MCI and Tel-America acknowledge the general rule against retroactive rate making, but argue that the instant case falls within an exception that applies when an unforeseeable event results in an extraordinary increase or decrease in expenses or revenues.

A number of courts have recognized the exception for unforeseeable and extraordinary increases in a utility's expenses. Increased expenses from natural disasters, such as extreme weather conditions, and other extraordinary events are the typical bases for the exception. *See*, *e.g.*, *Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 428 N.W.2d 302, 306-07 (Iowa 1988) **[**14]** (one-time assessment for permanent storage of nuclear waste under Nuclear Waste Act of 1982 was extraordinary, unforeseeable expense); *Narragansett Elec. Co. v. Burke*, 415 A.2d 177, 178-80 (R.I. 1980) (extraordinary ice storm); *In re Green Mountain Power Corp.*, 147 Vt. 509, 519 A.2d 595, 597-99 (Vt. 1986) (unscheduled shutdown of nuclear plant extraordinary expense); *Wisconsin's Environmental Decade, Inc. v. Public Serv. Comm'n*, 98 Wis. 2d 682, 298 N.W.2d 205, 212 (Wis. Ct. App. 1980) (severe ice storm); *Re Kansas City Power & Light Co.*, 75 Pub. Util. Rep. 4th (PUR) 1, 38-41 (Mo. Pub. Serv. Comm. 1986) (severe ice storm); *Re Kansas City Power & Light Co.*, 55 Pub. Util. Rep. 4th (PUR) 468, 480-81 (Mo. Pub. Serv. Comm. 1983) (power outage caused by interruption of water supply to boiler). In *Green Mountain Power*, the Vermont Supreme Court explained the rationale for the exception:

> "If this treatment is not to be permitted, not only would there be a serious question as to whether the Company has been afforded a fair opportunity to earn a reasonable rate of return, it would also imply the need for an upward **[**15]** revision of the rate of return in *all* cases in the future. Such a revision, of course, would have to be based on a prediction of inherently unpredictable events -- the occurrence of extraordinary plant shut-downs."
>
> The Board's conclusion was correct. Once it is clear that a particular cost is "extraordinary" and that it does not result from company mismanagement, or imperfect forecasts, treatment of such costs through appropriate amortization in future rate determinations does not constitute a "true-up"of past calculations, because a truly extraordinary cost by definition would not be factored into the original rate.

Green Mountain Power, 519 A.2d at 597 (citations omitted) (emphasis in original) (quoting Order of Vermont Public Service Board); *accord Burke*, 415 A.2d at 178-79.

The exception has been applied not only to unforeseeable and extraordinary increases in expenses, but also to unforeseeable and extraordinary decreases in expenses. *See*, *e.g.*, *Re Narragansett Elec. Co.*, 57 Pub. Util. Rep. 4th (PUR) 549, 558 (R.I. Pub. Utils. Comm. 1984) (excess earnings due to "unanticipated economic recovery **[**16]** and unforeseeable weather"); *see also Chesapeake and Potomac Tel. Co. v. Public Serv. Comm'n*, 514 A.2d 1159, 1170 (D.C. 1986) (reimbursement of license contract payments previously paid to AT&T); *Turpen v. Oklahoma Corp. Comm'n*, 769 P.2d 1309, 1332 (Okla. 1988) (AT&T's reimbursement to subject utility was unexpected windfall).

The extraordinary and unforeseeable nature of the expenses recognized under the exception differentiates them from expenses inaccurately estimated because of a misstep in the rate-making process, such as the inability to predict precisely, or from mismanagement. An increase or decrease in expenses that is unforeseeable at the time of a rate-making proceeding cannot, by hypothesis, be taken into account in fixing just and reasonable rates. Furthermore, because the increase or decrease must have an extraordinary effect on the utility's earnings, the increase or decrease **[*772]** will necessarily be outside the normal range of variance that occurs in projecting future expenses.

If a rate-making body were to attempt to make allowance for an unforeseeable and extraordinary increase or decrease in expenses in fixing rates, a task **[**17]** that by definition is impossible, the resulting rates would always be unjust and unreasonable, if not confiscatory or exploitive, as to either ratepayers or stockholders. To achieve fairness, the exception allows recoupment of such expenses either in future rates or in some other appropriate fashion.

The rule stated in the *EBA* case is a sound rate-making principle, but it only applies to "missteps in the rate-making process." It does not apply where justice and equity require that adjustments be made for unforeseen windfalls or disasters not caused by the utility. We emphasize that the exception for unforeseeable and extraordinary events cannot be invoked simply because a utility experiences expenses that are greater or revenues that are less than those projected in the general rate proceeding.

In the instant case, the Commission held that the rule against retroactive rate making barred any relief sought by the request for agency action and that no exception to the rule was applicable. The Commission did not specifically state, however, whether there was an exception for unforeseeable and extraordinary expenses. We now hold that [HN4] the exception for unforeseeable and extraordinary **[**18]** increases or decreases in expenses is recognized in this state.

We also hold that the Commission's refusal to allow petitioners a factual hearing on whether the exception applies was error. The extent of the reduction of corporate income tax rates under the Act was clearly unforeseeable when the last general rate case was decided in 1985. [HN5] Ordinarily, changes in tax laws are not a sufficient basis for invoking the exception to the general rule. Here, however, the federal corporate income tax rate was cut by more than one-fourth. As the United States Court of Appeals for the District of Columbia Circuit commented in connection with the Act, "The change in [Carolina Power & Light Company's] tax costs at issue here was caused by an act of Congress (one only marginally more foreseeable than an act of God)." *Carolina Power & Light Co. v. FERC*, 274 U.S. App. D.C. 5, 860 F.2d 1097, 1102 (D.C. Cir. 1988).

U.S. West, the Division, and the Commission argue that the Act was foreseeable and that "the Commission and the Division foresaw the potential impact of the [Act] and acted responsibly in attempting to deal with it." The Commission, however, did not foresee the Tax Reform Act in the general **[**19]** rate case in 1985. In fact, that case assumed a federal tax rate of 46%.

Moreover, it appears that the Commission seriously misappraised the effect of the Act after it was enacted, as evidenced by the gross inadequacy of the 1987 rate reduction. There is even doubt that the Commission accurately foresaw the effect of the Act in 1988 when it agreed to a $ 26 million rate reduction, and only a few months later, to another $ 20 million reduction. Even if we agreed with the Commission that it foresaw the effect of the tax reduction and took action to remedy it in 1987, it is clear that the Commission did not understand the full effect of the Act with sufficient clarity to remedy U.S. West's overearnings. Whether that failure was a result of U.S. West's failure to disclose relevant financial data and projections promptly should be explored on remand.

Not only did the Commission fail to foresee the effect of the Act, but there is significant evidence, at least on this record, that the Act provided an extraordinary decrease in U.S. West's expenses and a corresponding extraordinary increase in earnings.

Furthermore, whether the Commission and the Division acted responsibly in attempting **[**20]** to deal with the effects of the Act, as the Commission asserted, is problematic. The Commission's procedural handling of U.S. West's excessive earnings in the 1987 and 1988 rate reductions was irregular, if not illegal. The only explanation **[*773]** given by the Commission for the 1987 and 1988 rate reductions is found in its order denying the amended request for agency action, where the Commission stated that U.S. West "earned in excess of its authorized rate of return in calendar years 1989 and 1988," and the only explanation the Commission has given for the overearnings is, "One of the reasons for the over-earning was the impact upon U.S. West of the Tax Reform Act of 1986." These explanations are clearly inadequate. The Commission has never indicated what U.S. West's actual earnings and rate of return were for the years in question, by how much its actual rate of return exceeded the authorized rate of return, what rate of return the 1987 and 1988 rate reductions were intended to produce, why the reductions were stretched out over three steps, whether the reductions were intended to reduce U.S. West's earnings to the level authorized in the December 1985 general rate case or to some **[**21]** other level, or whether the Commission allowed U.S. West to offset the decrease in taxes by increases in other expense items not associated with the Act.

The Commission sought to explain its delayed response to U.S. West's overearnings by stating that the Division initially indicated that its analysis of U.S. West's financial data would reveal off-sets to the income tax reduction and it suggested no need for Commission action. The Commission stated, "The Division made a good faith effort to accurately and correctly analyze the information provided to it by the utility." That finding begs the question whether U.S. West promptly disclosed sufficiently specific and accurate financial information, a question the Commission has not addressed.

Moreover, the fixing of utility rates by private negotiation with no findings of fact raises serious questions about the legality and integrity of the procedures the Commission employed. The Commission serves a crucial role in protecting ratepayers from overreaching by entities with monopoly power that provide essential services. We have on many occasions emphasized that [HN6] the Commission must make appropriate findings of fact to justify rate orders. **[**22]** In *Utah Department of Business Regulation v. Public Service Commission*, 614 P.2d 1242, 1245 (Utah 1980), we stated that the first prerequisite of a rate order is that it be preceded by a hearing and findings. We explained:

> [HN7] A state regulatory commission, whose powers have been invoked to fix a reasonable rate, is entitled to know and before it can act advisedly must be informed of all relevant facts. Otherwise, the hands of the regulatory body could be tied in such fashion it could not effectively determine whether a proposed rate was justified.

Id. at 1246. Although *Department of Business Regulation* dealt with an effort to increase rates, the same principle applies here, where the Commission acted to decrease rates. In that case, we emphasized the importance of adherence to proper procedures and specifically condemned procedures of the type employed here:

> In summary, there is no provision in the Public Utilities Act which precludes the authority of the P.S.C. to conduct an abbreviated proceeding to adjust a utility rate or charge, but any rate so adjusted must be predicated upon a finding that such adjusted rate is just **[**23]** and reasonable. In turn, this finding must be supported by substantial evidence concerning every significant element in the rate making components (expense or investment) which is claimed by the applicant as the basis to justify a rate adjustment.

Id. at 1249-50.

Similarly, In *Milne Truck Lines, Inc. v. Public Service Commission*, 720 P.2d 1373, 1378 (Utah 1986), we stated that [HN8] the Commission cannot discharge its statutory responsibilities without making findings on both ultimate and subordinate issues of fact. Once again, we emphasized that the Commission's regulation of public monopolies must strictly adhere to those procedures designed to give appropriate protection to the interests of ratepayers, investors, the utilities themselves, and where they exist, competitors. *Id*. Moveover, unless **[*774]** the Commission complies with those procedures, this Court cannot perform its assigned task of judicial review. *Id.*; *Mountain States Legal Found. v. Utah Public Serv. Comm'n*, 636 P.2d 1047, 1058

(Utah 1981).

Here, the Commission issued two orders that reduced U.S. West's rates by a total of $ 35 million with no findings **[**24]** of fact on either subordinate or ultimate factual issues pertaining to the reasonableness of the reduction or to the reasonableness of the rates that went into effect after the reduction. Given the sequence of the Commission's orders and rate reductions, it seems highly likely that the first two reductions were not sufficient to offset the effect of the reduced income tax rate. In any event, it appears that by reducing the rates in a three-step manner the Commission allowed U.S. West to collect excessive rates and earnings, at least until all the reductions finally went into effect.

On remand, the Commission should make factual findings on all relevant issues. Its findings must, at a minimum, include (1) U.S. West's earnings and rate of return for the years 1986, 1987, 1988, and 1989 and the earnings and profits that would have been realized but for the stipulated rate reductions in 1987 and 1988; (2) the extent to which U.S. West's earnings exceeded the authorized rate of return in 1987, 1988, and 1989, both with and without the stipulated rate reductions; (3) the amount of the decrease in U.S. West's federal corporate income tax liabilities for the years 1987, 1988, and 1989 **[**25]** as a result of the decrease in the federal tax rates compared with what U.S. West's tax liabilities would have been under the federal corporate income tax rates in effect in December 1985; (4) the amount, if any, of increased expenses or decreased revenues that were offset against U.S. West's tax savings in negotiating the 1987 and 1988 rate reductions and whether they should have been allowed under the *EBA* case to "true up" past projections; and (5) whether U.S. West was cooperative, accurate, and forthright in the information provided and representations made to the Committee, the Division and the Commission, including its initial representation by the president of U.S. West as to the expected effect of the Act.

B. *Utility Misconduct as an Exception to the Rule Against Retroactive Rate Making*

Petitioners also argue that the rule against retroactive rate making does not bar a refund of earnings obtained as a result of utility misconduct and that the Commission acted arbitrarily and capriciously in not holding a hearing on whether U.S. West was guilty of misconduct in not providing timely, accurate, and specific information as to its actual or projected earnings for 1987 **[**26]** and 1988.

Before addressing the substantive issues, we address a procedural question. The Commission, the Division, and U.S. West argue that petitioners failed to raise in their petitions for rehearing the issue whether the Commission erred in failing to hold a factual hearing on the allegation that U.S. West engaged in misconduct. [HN9] Under Utah Code Ann. § 54-7-15(2)(a) and (b), an issue must be presented to the Commission in a petition for rehearing to be raised on appeal. [2] *See Hi-Country Homeowners Ass'n v. Public Serv. Comm'n*, 779 P.2d 682, 683-84 (Utah 1989); *Williams v. Public Serv. Comm'n*, 754 P.2d 41, 46 (Utah 1988); *Utah Dep't of Business Regulation v. Public Serv. Comm'n*, 602 P.2d 696, 699 (Utah 1979).

2 [HN10] Section 54-7-15 states in part:

> (1) Before seeking judicial review of the commission's action, any party . . . who is dissatisfied with an order of the commission shall meet the requirements of this section.
>
>> (2) (a) After any order or decision has been made by the commission, any party to the action or proceeding . . . may apply for rehearing of any matters determined in the action or proceeding.
>>
>> (b) No applicant may urge or rely on any ground not set forth in the application in an appeal to any court.

[27]** In response to the petition for agency action, the Commission issued an order on November 1, 1988, which stated, "It is contemplated by the Commission that the parties **[*775]** will address in their legal memoranda the threshold issue of whether the Commission has the legal authority to grant the relief requested. . . ." Petitioners' memoranda accordingly focused on the legal issue whether the Commission had authority to grant any relief in light of the *EBA* case and not on the facts that might support any particular theory justifying relief. Neither side argued factual issues in that context. The Commission ruled, as a matter of law, that the rule against retroactive rate making governed and that there was no applicable exception to that rule. The Commission stated, "We would agree that certain exceptions to the rule are reasonable; for example, where it could be demonstrated that the utility had misrepresented important ratemaking information or otherwise misled regulators." The Commission concluded, however, that there was no factual basis for that exception, although the Commission had held no factual hearing on the issue and the parties were not allowed to focus specifically on **[**28]** the factual basis for the exception.

MCI's and Tel-America's petitions for rehearing stated that they were filed for and on behalf of all petitioners and all customers of U.S. West. They both asserted, inter alia, that the Commission erred in ruling that the rule against retroactive rate making barred any relief and that the Commission's order denying relief was arbitrary and capricious. We conclude that petitioners adequately raised the issue of utility misconduct and that the issue is properly before this Court.

[HN11] A utility that misleads or fails to disclose information pertinent to whether a rate-making proceeding should be initiated or to the proper resolution of such a proceeding cannot invoke the rule against retroactive rate making to avoid refunding rates improperly collected. The rule against retroactive rate making was not intended to permit a utility to subvert the integrity of rate-making proceedings. *se Southwest Gas Corp. v. Public Serv. Comm'n*, 86 Nev. 662, 474 P.2d 379, 383 (Nev. 1970). [HN12] If a utility misleads the Commission or the Division by withholding relevant rate-making information, the rates fixed by the Commission cannot be based on reasonable projections **[**29]** of the utility's revenues and expenses. The rule against retroactive rate making was designed to ensure the integrity of the rate-making process, not to shelter a utility's improperly obtained revenues.

Moreover, [HN13] the Commission has the inherent power to reopen a rate order if a utility engages in misconduct. *In re Minnesota Pub. Util. Commission's Initiation of Summary Investigation*, 417 N.W.2d 274, 280-82 (Minn. Ct. App. 1987); *see also State ex rel. Corbin v. Arizona Corp. Comm'n*, 143 Ariz. 219, 693 P.2d 362 (Ariz. Ct. App. 1984).

The Commission stated that the Division's analysis of U.S. West's earnings was "complicated during the time period in question by changes in the U.S. West accounting system, delays in preparation of U.S. West's budget, swings in monthly earning reports, etc." That finding, however, does not address whether U.S. West acted forthrightly and made timely and accurate information available to the Division, the Commission, and the Committee so that each could accurately analyze U.S. West's actual and projected earnings. Significantly, the Commission's finding does not explain why the rate of return figures finally provided by U.S. **[**30]** West pursuant to MCI's interrogatories evaded disclosure for so long. The Commission's explanation is simply inadequate under the circumstances. In this regard, it is significant that the $ 9 million rate reduction negotiated by the Division and U.S. West and approved by the Commission was characterized by an independent consulting firm as "clearly inadequate." That characterization was substantiated, at least to some degree, by the subsequent $ 26 million stipulated rate reduction a mere ten months later.

We conclude that given the facts appearing on the record and the allegations made by MCI and Tel-America to the Commission, the Commission's failure to hold a factual hearing on the issue of utility misconduct was arbitrary and capricious. *See* **[*776]** Utah Code Ann. § 63-46b-16(4)(iv) (1989).

III. REFUNDS AND REPARATIONS

U.S. West argues that petitioners have no remedy in the form of reparations under Utah Code Ann. § 54-7-20 because the availability of reparations is limited by § 54-4-4, which states that rates found to be just and reasonable under that section are to be "thereafter observed and in force." [3]

3 U.S. West relies on *American Salt Co. v. W.S. Hatch Co.*, 748 P.2d 1060 (Utah 1987), for the proposition that the Commission has no authority to grant reparations where a utility has charged rates that have been previously approved by the Commission. *American Salt* is inapposite. There, we held that the Commission was without authority to grant relief from a previously approved tariff rate because an application for a special commodity rate was not made prior to the hauling in question. Therefore, the Commission's order requiring American Salt to pay the tariff rate was not disturbed. The case stands for the proposition that in the motor common carrier context, the Commission may not grant relief from an approved tariff rate where an application for a special commodity rate is not made prior to the hauling. It does not stand for the general proposition U.S. West urges.

[31]** Section 54-4-4, however, does not preclude a remedy in this case. If the rates charged by U.S. West fall within an exception to the rule against retroactive rate making in this case, they are not just and reasonable.

Finally, petitioners argue that an authorized rate of return imposes an absolute legal ceiling on a utility's profits and that all profits in excess of that rate are refundable. As a general proposition, we disagree. [HN14] An authorized rate of return is intended to be an estimate of the return on equity that investors would require before they would invest in the utility. The rate of return is neither a guarantee of nor a limit on profits. A utility should be rewarded for becoming more efficient through its own efforts. If the authorized rate of return were an absolute ceiling on profits, that objective would be subverted.

Nevertheless, [HN15] if a utility earns profits in excess of its authorized rate of return because of an exception to the rule against retroactive rate making, the authorized rate is the best available measure of a fair return and earnings in excess of that rate are subject to refund. Accordingly, if on remand the Tax Reform Act of 1986 is found to have **[**32]** resulted in an unforeseeable and extraordinary decrease in expenses or if U.S. West is found to have engaged in misconduct, we hold that U.S. West's earnings, to the extent they exceeded its authorized rate of return established in the 1985 general rate case, should be refunded to U.S. West ratepayers. Any refund of excess earnings that might be appropriate, whether by way of reparations, refund, or credit against future rates, must not be solely for the named petitioners; all U.S. West's ratepayers are entitled to the benefit of any remedy the Commission finds to be appropriate.

Reversed and remanded.

WE CONCUR:

Gordon R. Hall, Chief Justice

Richard C. Howe, Associate Chief Justice

Christine M. Durham, Justice

CONCUR BY: ZIMMERMAN

CONCUR

ZIMMERMAN, Justice: (Concurring)

I join the majority opinion, but write only to make explicit what I consider the underlying concern of the majority.

Today, we inform the Commission that the *EBA* decision does not preclude a retroactive adjustment of rates where they are either too high or too low as a result of an extraordinary and unforeseeable circumstance. The *EBA* case still prohibits retroactive rate making to address missteps in the rate-setting **[**33]** process or the normally occurring unexpected events that may lower or raise rates of return over time. Like the majority, I am unsure that even the tax changes' very large impact on the utility's income warrants invocation of the "extraordinary and unforeseeable" exception to the ban on retroactive rate making. However, the Commission should at least consider the issue.

The profoundly troubling aspect of the matter before us is the inexplicable failure of the Division and the Commission to do their statutorily mandated jobs in the face **[*777]** of overwhelming evidence that the utility had made, and unless the Commission took remedial measures solely within its authority would continue to make, profits far beyond those anticipated at the time of the proceeding which set the current utility rates charged consumers. At almost every turn, the conduct of the Commission and the Division raises serious questions about whether the regulatory authorities -- which state law charges with seeing that utility rates provide a fair but not exorbitant rate of return -- were shirking the duty imposed upon them by law to check profiteering by the utility. I realize that these are harsh words, but from **[**34]** the record before us, it is difficult to reach any other conclusion.

Today's decision provides the Commission with a tool to deal with truly extraordinary and unforeseeable circumstances that impact the profits of a utility. Our decision also attempts to ensure that the Commission does the public's business in the open and that it explains in detail the rationale for its actions. However, nothing we can do can guarantee a vigorous and effective regulation of monopolistic utilities. That responsibility rests with the Commission.

3

SUPREME COURT OF CANADA

CITATION: Ontario (Energy Board) *v.* Ontario Power Generation Inc., 2015 SCC 44

DATE: 20150925
DOCKET: 35506

BETWEEN:

Ontario Energy Board
Appellant
and
Ontario Power Generation Inc., Power Workers' Union, Canadian Union of Public Employees, Local 1000 and Society of Energy Professionals
Respondents
\- and -
Ontario Education Services Corporation
Intervener

CORAM: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.

REASONS FOR JUDGMENT: (paras. 1 to 121)	Rothstein J. (McLachlin C.J. and Cromwell, Moldaver, Karakatsanis and Gascon JJ. concurring)
DISSENTING REASONS: (paras. 122 to 161)	Abella J.

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

ONT. (ENERGY BOARD) *v.* ONT. POWER GENERATION

Ontario Energy Board *Appellant*

v.

Ontario Power Generation Inc.,
Power Workers' Union, Canadian Union
of Public Employees, Local 1000 and
Society of Energy Professionals *Respondents*

and

Ontario Education Services Corporation *Intervener*

Indexed as: Ontario (Energy Board) *v.* Ontario Power Generation Inc.

2015 SCC 44

File No.: 35506.

2014: December 3; 2015: September 25.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Public utilities — Electricity — Rate-setting decision by utilities regulator — Utility seeking to recover incurred or committed compensation costs in utility rates set by Ontario Energy Board — Whether Board bound to apply particular prudence test in evaluating utility costs — Whether Board's decision to disallow $145 million in labour compensation costs related to utility's nuclear operations reasonable — Ontario Energy Board, 1998, S.O. 1998, c. 15, Sch. B, ss. 78.1(5)(6).

Administrative law — Boards and tribunals — Appeals — Standing — Whether Ontario Energy Board acted improperly in pursuing appeal and in arguing in favour of reasonableness of its own decision — Whether Board attempted to use appeal to "bootstrap" its original decision by making additional arguments on appeal.

In Ontario, utility rates are regulated through a process by which a utility seeks approval from the Ontario Energy Board for costs the utility has incurred or expects to incur in a specified period of time. Where the Board approves of the costs, they are incorporated into utility rates such that the utility receives payment amounts to cover the approved expenditures. The Board disallowed certain payment amounts applied for by Ontario Power Generation ("OPG") as part of its rate application covering the 2011-2012 operating period. Specifically, the Board disallowed $145 million in labour compensation costs related to OPG's nuclear operations on the grounds that OPG's labour costs were out of step with those of comparable entities in the regulated power generation industry. A majority of the Ontario Divisional Court dismissed OPG's appeal and upheld the decision of the Board. The Court of Appeal set aside the decisions of the Divisional Court and the Board and remitted the matter to the Board for redetermination in accordance with its reasons.

The crux of OPG's argument here is that the Board is legally required to compensate OPG for all of its prudently committed or incurred costs. OPG asserts that prudence in this context has a particular methodological meaning that requires the Board to assess the reasonableness of OPG's decision to incur or commit to costs at the time the decisions to incur or commit to the costs were made and that OPG ought to benefit from a presumption of prudence. The Board on the other hand argues that a particular prudence test methodology is not compelled by law, and that in any case the costs disallowed here were not committed nuclear compensation costs, but are better characterized as forecast costs.

OPG also raises concerns regarding the Board's role in acting as a party on appeal from its own decision, arguing that the Board's aggressive and adversarial defence of its decision was improper, and the Board attempted to use the appeal to bootstrap its original decision by making additional arguments on appeal. The Board argues that the structure of utilities regulation in Ontario makes it necessary and important for it to argue the merits of its decision on appeal.

Held (Abella J. dissenting): The appeal should be allowed. The decision of the Court of Appeal is set aside and the decision of the Board is reinstated.

Per McLachlin C.J. and **Rothstein**, Cromwell, Moldaver, Karakatsanis and Gascon JJ.: The first issue is the appropriateness of the Board's participation in the appeal. The concerns with regard to tribunal participation on appeal from the tribunal's own decision should not be read to establish a categorical ban. A discretionary approach provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis. Because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. Further, some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute. The following factors are relevant in informing the court's exercise of its discretion: statutory provisions addressing the structure, processes and role of the particular tribunal and the mandate of the tribunal, that is, whether the function of the tribunal is to adjudicate individual conflicts between parties or whether it serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest. The importance of fairness, real and perceived, weighs more heavily against tribunal standing where the tribunal served an adjudicatory function in the proceeding. Tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

Consideration of these factors in the context of this case leads to the conclusion that it was not improper for the Board to participate in arguing in favour of the reasonableness of its decision on appeal. The Board was the only respondent in the initial review of its decision. It had no alternative but to step in if the decision was to be defended on the merits. Also, the Board was exercising a regulatory role by setting just and reasonable payment amounts to a utility. In this case, the Board's participation in the instant appeal was not improper.

The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns the types of argument a tribunal may make, while the bootstrapping issue concerns the content of those arguments. A tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal. A tribunal may not defend its decision on a ground that it did not rely on in the decision under review. The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, absent a power to vary its decision or rehear the matter, it cannot use judicial review as a chance to amend, vary, qualify or supplement its reasons. While a permissive stance towards new arguments by tribunals on appeal serves the interests of justice insofar as it ensures that a reviewing court is presented with the strongest arguments in favour of both sides, to permit bootstrapping may undermine the importance of reasoned, well-written original decisions. In this case, the Board did not impermissibly step beyond the bounds of its original decision in its arguments before the Court. The arguments raised by the Board on appeal do not amount to impermissible bootstrapping.

The merits issue concerns whether the appropriate methodology was followed by the Board in its disallowance of $145 million in labour compensation costs sought by OPG. The just-and-reasonable approach to recovery of the cost of services provided by a utility captures the essential balance at the heart of utilities regulation: to encourage investment in a robust utility infrastructure and to protect consumer interests, utilities must be allowed, over the long run, to earn their cost of capital, no more, no less. In order to ensure the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to cost to efficiently provide the services they receive, taking account of both operating and capital costs. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and utilities may be assured of an opportunity to earn a fair return for providing those services.

The *Ontario Energy Board Act, 1998* does not prescribe the methodology the Board must use to weigh utility and consumer interests when deciding what constitutes just and reasonable payment amounts to the utility. However, the *Ontario*

Energy Board Act, 1998 places the burden on the applicant utility to establish that payments amounts approved by the Board are just and reasonable. It would thus seem inconsistent with the statutory scheme to presume that utility decisions to incur costs were prudent. The Board has broad discretion to determine the methods it may use to examine costs — but it cannot shift the burden of proof contrary to the statutory scheme.

The issue is whether the Board was bound to use a no hindsight, presumption of prudence test to determine whether labour compensation costs were just and reasonable. The prudent investment test, or prudence review, is a valid and widely accepted tool that regulators may use when assessing whether payments to a utility would be just and reasonable. However, there is no support in the statutory scheme for the notion that the Board should be required as a matter of law, under the *Ontario Energy Board Act, 1998* to apply the prudence test such that the mere decision not to apply it when considering committed costs would render its decision on payment amounts unreasonable. Where a statute requires only that the regulator set "just and reasonable" payments, as the *Ontario Energy Board Act, 1998* does in Ontario, the regulator may make use of a variety of analytical tools in assessing the justness and reasonableness of a utility's proposed payment amounts. This is particularly so where, as here, the regulator has been given express discretion over the methodology to be used in setting payment amounts.

Where the regulator has discretion over its methodological approach, understanding whether the costs at issue are "forecast" or "committed" may be helpful in reviewing the reasonableness of a regulator's choice of methodology. Here, the labour compensation costs which led to the $145 million disallowance are best understood as partly committed costs and partly costs subject to management discretion. They are partly committed because they resulted from collective agreements entered into between OPG and two of its unions, and partly subject to management discretion because OPG retained some flexibility to manage total staffing levels in light of, among other things, projected attrition of the workforce. It is not reasonable to treat these costs as entirely forecast. However, the Board was not bound to apply a particular prudence test in evaluating these costs. It is not necessarily unreasonable, in light of the particular regulatory structure established by the *Ontario Energy Board Act, 1998*, for the Board to evaluate committed costs using a method other than a no-hindsight prudence review. Applying a presumption of prudence would have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998* and would therefore not have been reasonable. The question of whether it was reasonable to assess a particular cost using hindsight should turn instead on the circumstances of that cost.

In this case, the nature of the disputed costs and the environment in which they arose provide a sufficient basis to find that the Board did not act unreasonably in not applying the prudent investment test in determining whether it would be just and reasonable to compensate OPG for these costs and disallowing. Since the costs at issue are operating costs, there is little danger that a disallowance of these costs will have a chilling effect on OPG's willingness to incur operating costs in the future, because costs of the type disallowed here are an inescapable element of operating a utility. Further, the costs at issue arise in the context of an ongoing repeat-player relationship between OPG and its employees. Such a context supports the reasonableness of a regulator's decision to weigh all evidence it finds relevant in striking a just and reasonable balance between the utility and consumers, rather than confining itself to a no-hindsight approach. There is no dispute that collective agreements are "immutable" between employees and the utility. However, if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs. The Board's decision in no way purports to force OPG to break its contractual commitments to unionized employees. It was not unreasonable for the Board to adopt a mixed approach that did not rely on quantifying the exact share of compensation costs that fell into the forecast and committed categories. Such an approach represents an exercise of the Board's methodological discretion in addressing a challenging issue where these costs did not fit easily into one category or the other.

The Board's disallowance may have adversely impacted OPG's ability to earn its cost of capital in the short run. Nevertheless, the disallowance was intended to send a clear signal that OPG must take responsibility for improving its performance. Such a signal may, in the short run, provide the necessary impetus for OPG to bring its compensation costs in line with what, in the Board's opinion, consumers should justly expect to pay for an efficiently provided service. Sending such a signal is consistent with the Board's market proxy role and its objectives under s. 1 of the *Ontario Energy Board Act, 1998*.

Per **Abella** J. (dissenting): The Board's decision was unreasonable because the Board failed to apply the methodology set out for itself for evaluating just and reasonable payment amounts. It both ignored the legally binding nature of the collective agreements between Ontario Power Generation and the unions and failed to distinguish between committed compensation costs and those that were reducible.

The Board stated in its reasons that it would use two kinds of review in order to determine just and reasonable payment amounts. As to "forecast costs", that is, those over which a utility retains discretion and can still be reduced or avoided, the Board explained that it would review such costs using a wide range of evidence, and that the onus would be on the utility to demonstrate that its forecast costs were reasonable. A different approach, however, would be applied to those costs the company could not "take action to reduce". These costs, sometimes called "committed costs", represent binding commitments that leave a utility with no discretion about whether to make the payment. The Board explained that it would evaluate these costs using a "prudence review". The application of a prudence review does not shield these costs from scrutiny, but it does include a presumption that the costs were prudently incurred.

Rather than apply the methodology it set out for itself, however, the Board assessed *all* compensation costs in Ontario Power Generation's collective agreements as adjustable forecast costs, without determining whether any of them were costs for which there is no opportunity for the company to take action to reduce. The Board's failure to separately assess the compensation costs committed as a result of the collective agreements from other compensation costs, ignored not only its own methodological template, but labour law as well.

The compensation costs for approximately 90 per cent of Ontario Power Generation's regulated workforce were established through legally binding collective agreements which obligated the utility to pay fixed levels of compensation, regulated staffing levels, and provided unionized employees with employment security. The obligations contained in these collective agreements were immutable and legally binding commitments. The agreements therefore did not just leave the utility with limited flexibility regarding overall compensation or staffing levels, they made it *illegal* for the utility to alter the compensation and staffing levels of 90 per cent of its regulated workforce in a manner that was inconsistent with its commitments under the agreements.

The Board, however, applying the methodology it said it would use for the utility's forecast costs, put the onus on Ontario Power Generation to prove the reasonableness of all its compensation costs and concluded that it had failed to provide compelling evidence or documentation or analysis to justify compensation levels. Had the Board used the approach it said it would use for costs the company had no opportunity to reduce, it would have used an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable.

It may well be that Ontario Power Generation has the ability to manage some staffing levels through attrition or other mechanisms that did not breach the utility's commitments under its collective agreements, and that these costs may therefore properly be characterized as forecast costs. But no factual findings were made by the Board about the extent of any such flexibility. There is in fact no evidence in the record, nor any evidence cited in the Board's decision, setting out what proportion of Ontario Power Generation's compensation costs were fixed and what proportion remained subject to the utility's discretion. Given that collective agreements are legally binding, it was unreasonable for the Board to assume that Ontario Power Generation could reduce the costs fixed by these contracts in the absence of any evidence to that effect.

Selecting a test which is more likely to confirm the Board's assumption that collectively-bargained costs are excessive, misconceives the point of the exercise, namely, to determine whether those costs were in fact excessive. Blaming collective bargaining for what are *assumed* to be excessive costs, imposes the appearance of an ideologically-driven conclusion on what is intended to be a principled methodology based on a distinction between committed and forecast costs, not between costs which are collectively bargained and those which are not. While the Board has wide discretion to fix payment amounts that are just and reasonable and, subject to certain limitations, to establish the methodology used to determine such amounts, once the Board establishes a methodology, it is, at the very least, required to faithfully apply it.

Absent methodological clarity and predictability, Ontario Power Generation would be unable to know how to determine what expenditures and investments to make and how to present them to the Board for review. Wandering sporadically from approach to approach, or failing to apply the methodology it declares itself to be following, creates uncertainty and leads, inevitably, to needlessly wasting public time and resources in constantly having to anticipate and respond to moving regulatory targets. Whether or not one can fault the Board for failing to use a particular methodology, what the Board can unquestionably be analytically faulted for, is evaluating all compensation costs fixed by collective agreements as being amenable to adjustment. Treating these compensation costs as reducible was unreasonable.

The appeal should accordingly be dismissed, the Board's decision set aside, and the matter remitted to the Board for reconsideration.

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By Rothstein J.

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By Abella J. (dissenting)

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APPEAL from a judgment of the Ontario Court of Appeal (Rosenberg, Goudge and Blair JJ.A.), 2013 ONCA 359, 116 O.R. (3d) 793, 365 D.L.R. (4th) 247, 307 O.A.C. 109, [2013] O.J. No. 3917 (QL), 2013 CarswellOnt 9792 (WL Can.), setting aside a decision of the Divisional Court (Aitken, Swinton and Hoy JJ.), 2012 ONSC 729, 109 O.R. (3d) 576, 347 D.L.R. (4th) 355, [2012] O.J. No. 862 (QL), 2012 CarswellOnt 2710 (WL Can.), and setting aside a decision of the Ontario Energy Board, EB-2010-0008, March 10, 2011 (online: http://www.ontarioenergyboard.ca/oeb/_Documents/Decisions/dec_reasons_OPG_Payment_20110310.pdf), 2011 LNONOEB 57 (QL), 2011 CarswellOnt 3723 (WL Can.). Appeal allowed, Abella J. dissenting.

Glenn Zacher, *Patrick Duffy* and *James Wilson*, for the appellant.

John B. Laskin, *Crawford Smith*, *Myriam Seers* and *Carlton Mathias*, for the respondent Ontario Power Generation Inc.

Richard P. Stephenson and *Emily Lawrence*, for the respondent the Power Workers' Union, Canadian Union of Public Employees, Local 1000.

Paul J. J. Cavalluzzo and *Amanda Darrach*, for the respondent the Society of Energy Professionals.

Mark Rubenstein, for the intervener.

The judgment of McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.was delivered by

ROTHSTEIN J. —

[1] In Ontario, utility rates are regulated through a process by which a utility seeks approval from the Ontario Energy Board ("Board") for costs the utility has incurred or expects to incur in a specified period of time. Where the Board approves of costs, they are incorporated into utility rates such that the utility receives payment amounts to cover the approved expenditures. This case concerns the decision of the Board to disallow certain payment amounts applied for by Ontario Power Generation Inc. ("OPG") as part of its rate application covering the 2011-2012 operating period. Specifically, the Board disallowed $145 million in labour compensation costs related

to OPG's nuclear operations on the grounds that OPG's labour costs were out of step with those of comparable entities in the regulated power generation industry.

[2] OPG appealed the Board's decision to the Ontario Divisional Court. A majority of the court dismissed the appeal and upheld the decision of the Board. OPG then appealed that decision to the Ontario Court of Appeal, which set aside the decisions of the Divisional Court and the Board and remitted the matter to the Board for redetermination in accordance with its reasons. The Board now appeals to this Court.

[3] OPG asserts that the Board's decision to disallow these labour compensation costs was unreasonable. The crux of OPG's argument is that the Board is legally required to compensate OPG for all of its prudently committed or incurred costs. OPG asserts that prudence in this context has a particular methodological meaning that requires the Board to assess the reasonableness of OPG's decisions to incur or commit to costs at the time the decisions to incur or commit to the costs were made and that OPG ought to benefit from a presumption of prudence. Because the Board did not employ this prudence methodology, OPG argues that its decision was unreasonable.

[4] The Board argues that a particular "prudence test" methodology is not compelled by law, and that in any case the costs disallowed here were not "committed" nuclear compensation costs, but are better characterized as forecast costs.

[5] OPG also raises concerns regarding the Board's role in acting as a party on appeal from its own decision. OPG argues that in this case, the Board's aggressive and adversarial defence of its original decision was improper, and that the Board attempted to use the appeal to "bootstrap" its original decision by making additional arguments on appeal.

[6] The Board asserts that the scope of its authority to argue on appeal was settled when it was granted full party rights in connection with the granting of leave by this Court. Alternatively, the Board argues that the structure of utilities regulation in Ontario makes it necessary and important for it to argue the merits of its decisions on appeal.

[7] In my opinion, the labour compensation costs which led to the $145 million disallowance are best understood as partly committed costs and partly costs subject to management discretion. They are partly committed because they resulted from collective agreements entered into between OPG and two of its unions, and partly subject to management discretion because OPG retained some flexibility to manage total staffing levels in light of, among other things, projected attrition of the workforce. It is not reasonable to treat these costs as entirely forecast. However, I do not agree with OPG that the Board was bound to apply a particular prudence test in evaluating these costs. The *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, and associated regulations give the Board broad latitude to determine the methodology it uses in assessing utility costs, subject to the Board's ultimate duty to

ensure that payment amounts it orders be just and reasonable to both the utility and consumers.

[8] In this case, the nature of the disputed costs and the environment in which they arose provide a sufficient basis to find that the Board did not act unreasonably in disallowing the costs.

[9] Regarding the Board's role on appeal, I do not find that the Board acted improperly in arguing the merits of this case, nor do I find that the arguments raised on appeal amount to impermissible "bootstrapping".

[10] Accordingly, I would allow the appeal, set aside the decision of the Court of Appeal, and reinstate the decision of the Board.

I. Regulatory Framework

[11] The *Ontario Energy Board Act, 1998* establishes the Board as a regulatory body with authority to oversee, among other things, electricity generation in the province of Ontario. Section 1 sets out the objectives of the Board in regulating electricity, which include:

> **1.** (1) . . .
>
> 1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

Accordingly, the Board must ensure that it regulates with an eye to balancing both consumer interests and the efficiency and financial viability of the electricity industry. The Board's role has also been described as that of a "market proxy": 2012 ONSC 729, 109 O.R. (3d) 576, at para. 54; 2013 ONCA 359, 116 O.R. (3d) 793, at para. 38. In this sense, the Board's role is to emulate as best as possible the forces to which a utility would be subject in a competitive landscape: *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board),* 2010 ONCA 284, 99 O.R. (3d) 481, at para. 48.

[12] One of the Board's most powerful tools to achieve its objectives is its authority to fix the amount of payments utilities receive in exchange for the provision of service. Section 78.1(5) of the *Ontario Energy Board Act, 1998* provides in relevant part:

(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; . . .

[13] Section 78.1(6) provides: ". . . the burden of proof is on the applicant in an application made under this section".

[14] As I read these provisions, the utility applies for payment amounts for a future period (called the "test period"). The Board will accept the payment amounts applied for unless the Board is not satisfied that amounts are just and reasonable. Where the Board is not satisfied, s. 78.1(5) empowers it to fix other payment amounts which it finds to be just and reasonable.

[15] This Court has had the occasion to consider the meaning of similar statutory language in *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186. In that case, the Court held that "fair and reasonable" rates were those "which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested" (pp. 192-93).

[16] This means that the utility must, over the long run, be given the opportunity to recover, through the rates it is permitted to charge, its operating and capital costs ("capital costs" in this sense refers to all costs associated with the utility's invested capital). This case is concerned primarily with operating costs. If recovery of operating costs is not permitted, the utility will not earn its cost of capital, which represents the amount investors require by way of a return on their investment in order to justify an investment in the utility. The required return is one that is equivalent to what they could earn from an investment of comparable risk. Over the long run, unless a regulated utility is allowed to earn its cost of capital, further investment will be discouraged and it will be unable to expand its operations or even

maintain existing ones. This will harm not only its shareholders, but also its customers: *TransCanada Pipelines Ltd. v. National Energy Board*, 2004 FCA 149, 319 N.R. 171.

[17] This of course does not mean that the Board must accept every cost that is submitted by the utility, nor does it mean that the rate of return to equity investors is guaranteed. In the short run, return on equity may vary, for example if electricity consumption by the utility's customers is higher or lower than predicted. Similarly, a disallowance of any operating costs to which the utility has committed itself will negatively impact the return to equity investors. I do not intend to enter into a detailed analysis of how the cost of equity capital should be treated by utility regulators, but merely to observe that any disallowance of costs to which a utility has committed itself has an effect on equity investor returns. This effect must be carefully considered in light of the long-run necessity that utilities be able to attract investors and retain earnings in order to survive and operate efficiently and effectively, in accordance with the statutory objectives of the Board in regulating electricity in Ontario.

[18] As noted above, the burden is on the utility to satisfy the Board that the payment amounts it applies for are just and reasonable. If it fails to do so, the Board may disallow the portion of the application that it finds is not for amounts that are just and reasonable.

[19] Where applied-for operating costs are disallowed, the utility, if it is able to do so, may forego the expenditure of such costs. Where the expenditure cannot be

foregone, the shareholders of the utility will have to absorb the reduction in the form of receiving less than their anticipated rate of return on their investment, i.e. the utility's cost of equity capital. In such circumstances it will be the management of the utility that will be responsible in the future for bringing its costs into line with what the Board considers just and reasonable.

[20] In order to ensure that the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to cost to efficiently provide the services they receive, taking account of both operating and capital costs. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and utilities may be assured of an opportunity to earn a fair return for providing those services.

II. Facts

[21] OPG is Ontario's largest energy generator, and is subject to rate regulation by the Board. OPG came into being in 1999 as one of the successor corporations to Ontario Hydro. It operates Board-regulated nuclear and hydroelectric facilities that generate approximately half of Ontario's electricity. Its sole shareholder is the Province of Ontario.

[22] It employs approximately 10,000 people in connection with its regulated facilities, 95 percent of whom work in its nuclear business. Approximately 90 percent

of its employees in its regulated businesses are unionized, with approximately two thirds of unionized employees represented by the Power Workers' Union, Canadian Union of Public Employees, Local 1000 ("PWU"), and one third represented by the Society of Energy Professionals ("Society").

[23] Since early in its existence as an independent utility, OPG has been aware of the importance of improving its corporate performance. As part of a general effort to improve its business, OPG undertook efforts to benchmark its nuclear performance against comparable power plants around the world. In a memorandum of agreement ("MOA") with the Province of Ontario dated August 17, 2005, OPG committed to the following:

> OPG will seek continuous improvement in its nuclear generation business and internal services. OPG will benchmark its performance in these areas against CANDU nuclear plants worldwide as well as against the top quartile of private and publicly-owned nuclear electricity generators in North America. OPG's top operational priority will be to improve the operation of its existing nuclear fleet.
>
> (A.R., vol. III, at p. 215)

[24] As part of OPG's first-ever rate application with the Board in 2007, for a test period covering the years 2008 and 2009, OPG sought approval for a $6.4 billion "revenue requirement"; this term refers to "the total revenue that is required by the company to pay all of its allowable expenses and also to recover all costs associated with its invested capital": L. Reid and J. Todd, "New Developments in Rate Design for Electricity Distributors", in G. Kaiser and B. Heggie, eds., *Energy Law and Policy*

(2011), 519, at p. 521. This constituted an increase of $1 billion over the revenue requirement that it had sought and was granted under the regulatory scheme in place prior to the Board's assumption of regulatory authority over OPG: EB-2007-0905, Decision with Reasons, November 3, 2008 (the "Board 2008-2009 Decision") (online), at pp. 5-6).

[25] The Board found that OPG was not meeting the nuclear performance expectations of its sole shareholder and that it had done little to conduct benchmarking of its performance against that of its peers, despite its commitment to do so dating back to 2005. Indeed, the only evidence of benchmarking that OPG submitted as part of its rate application was a 2006 report from Navigant Consulting, Inc. (the "Navigant Report"), which found that OPG was overstaffed by 12 percent in comparison to its peers. The Board found that OPG had not acted on the recommendations of the Navigant Report and had not commissioned subsequent benchmarking studies to assess its performance (Board 2008-2009 Decision, at pp. 27 and 30). The Board also found that operating costs at OPG's Pickering nuclear facilities were "far above industry averages" (p. 29). The Board thus disallowed $35 million of OPG's proposed revenue requirement and directed OPG to prepare benchmarking studies for use in future applications (p. 31).

[26] In explaining the importance of benchmarking, the Board stated: "The reason why the MOA emphasized benchmarking was because such studies can and do

shine a light on inefficiencies and lack of productivity improvement" (Board 2008-2009 Decision, at p. 30).

[27] On May 5, 2010, shortly before OPG was set to file its second rate application, which is the subject of this appeal, the Ontario Minister of Energy and Infrastructure wrote to the President and CEO of OPG to ensure that OPG would demonstrate in its upcoming rate application "concerted efforts to identify cost saving opportunities and focus [its] forthcoming rate application on those items that are essential to the safe and reliable operation of [its] existing assets and projects already under development" (A.R., vol. IV, at p. 38).

[28] On May 26, 2010, OPG filed its payment amounts application for the 2011-2012 test period. As part of its evidence before the Board, OPG submitted two reports by ScottMadden Inc., a general management consulting firm specializing in benchmarking and business planning for nuclear facilities. The Phase 1 report compared OPG's nuclear operational and financial performance against that of external peers using industry performance metrics. The Phase 2 final report discussed performance improvement targets with the intent of improving OPG's nuclear business. OPG collaborated with ScottMadden on the Phase 1 and 2 reports, which were released on July 2, 2009 and September 11, 2009, respectively.

[29] OPG's rate application pertained to a test period beginning on January 1, 2011 and ending on December 31, 2012. OPG sought approval of a $6.9 billion revenue requirement, which represented an increase of 6.2 percent over OPG's then-

current revenue based on the preceding year's approved utility rates. Of the $6.9 billion revenue requirement sought by OPG, $2.8 billion pertained to compensation costs, of which approximately $2.4 billion concerned OPG's nuclear business.

[30] A substantial portion of OPG's wage and compensation expenses were fixed by OPG's collective agreements with the unions, PWU and the Society. At the time of its application, OPG was party to a collective agreement with PWU, effective from April 2009 through March 2012, while its collective agreement with the Society expired on December 31, 2010. These collective agreements provided annual wage increases between 2 percent and 3 percent. OPG forecast an additional 1 percent increase for step progressions and promotions of unionized staff. Following the Board's hearing in this case, an interest arbitrator ordered a new collective agreement between OPG and the Society, effective February 3, 2011. This collective agreement provided wage increases that varied between 1 percent and 3 percent.

III. Judicial History

A. *Ontario Energy Board: EB-2010-0008, Decision With Reasons, March 10, 2011 (the "Board Decision") (Online)*

[31] In its decision concerning OPG's rate application for the 2011-2012 test period, the Board stated that it enjoyed broad discretion pursuant to Ontario Regulation 53/05 (*Payments Under Section 78.1 of the Act*) and s. 78.1 of the *Ontario Energy Board Act, 1998* to "adopt the mechanisms it judges appropriate in setting just

and reasonable rates" (p. 18). The Board recognized that different tests could apply depending on whether its analysis concerned the recovery of forecast costs or an after-the-fact review of costs already incurred. In this rate application, it was appropriate to take into consideration all evidence that the Board deemed relevant to assess the reasonableness of OPG's revenue requirement.

[32] The Board rejected OPG's proposed revenue requirement of $6.9 billion, reducing it by $145 million over the test period "to send a clear signal that OPG must take responsibility for improving its performance" (p. 86). Key to its disallowance was the Board's finding that OPG was overstaffed and that its compensation levels were excessive.

[33] Regarding the number of staff, the Board pointed out that a benchmarking study commissioned by OPG itself, the ScottMadden Phase 2 final report, suggested that certain staff positions could be reduced or eliminated altogether. The Board suggested that OPG could review its organizational structure and reassign or eliminate positions in the coming years, as 20 percent to 25 percent of its staff were set to retire between 2010 and 2014 and it was possible to make greater use of external contractors. Regarding compensation, the Board found that OPG had not submitted compelling evidence justifying the benchmarking of its salaries of non-management employees to the 75th percentile of a survey of industry salaries conducted by Towers Perrin. Instead, the Board considered the proper benchmark to be the 50th percentile, the same percentile against which OPG benchmarks

management compensation. In determining the appropriate disallowance, the Board acknowledged that OPG may not have been able to achieve the full $145 million in savings for the test period through the reduction of compensation levels alone because of its collective agreements with the unions.

B. *Ontario Superior Court of Justice, Divisional Court: 2012 ONSC 729, 109 O.R. (3d) 576*

[34] OPG appealed the Board Decision on the basis that it was unreasonable and that the reasons provided were inadequate. OPG argued that the Board should have conducted a prudent investment test — that is, it should have restricted its review of compensation costs to a consideration of whether the collective agreements that prescribed the compensation costs were prudent at the time they were entered into. OPG also argued that the Board should have presumed that the costs were prudent.

[35] The panel of three Divisional Court judges was split. Justice Hoy (as she then was), for the majority, found the Board Decision reasonable because management had the ability to reduce total compensation costs in the future within the framework of the collective agreement. Applying a strict prudent investment test would not permit the Board to fulfill its statutory objective of promoting cost effectiveness in the generation of electricity. It was particularly important for the Board to exercise its authority to set just and reasonable rates given the "double monopoly" dynamic at play:

> The collective agreements were concluded between a regulated monopoly, which passes costs on to consumers, not a competitive enterprise, and two unions which account for approximately 90 per cent of the employees and amount to a near, second monopoly, based on terms inherited from Ontario Hydro and in face of the reality that running a nuclear operation without the employees would be extremely difficult. [para. 54]

[36] Justice Aitken dissented, finding that,

> to the extent that [nuclear compensation] costs were predetermined, in the sense that they were locked in as a result of collective agreements entered prior to the date of the application and the test period, OPG only had to prove their prudence or reasonableness based on the circumstances that were known or that reasonably could have been anticipated at the time the decision to enter those collective agreements was made. [para. 83]

She would have held that the Board's failure to undertake a separate and explicit prudence review for the committed portion of nuclear compensation costs, coupled with its consideration of hindsight factors in assessing the reasonableness of these costs, rendered the Board Decision unreasonable.

C. *Ontario Court of Appeal: 2013 ONCA 359, 116 O.R. (3d) 793*

[37] The Ontario Court of Appeal reversed the Divisional Court's decision and remitted the case to the Board. The court drew a distinction between forecast costs and committed costs, with committed costs being those that the utility "is committed to pay in [the test period]" and that "cannot be managed or reduced by the utility in that time frame, usually because of contractual obligations" (para. 29). Although costs

may not require actual payment until the future, as in this case, costs that have been "contractually incurred to be paid over the time frame are nonetheless committed even though they have not yet been paid" (para. 29). When reviewing such costs, the court held that the Board must undertake a prudence review as described in *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2006), 210 O.A.C. 4 (paras. 15-16). By failing to follow this jurisprudence and by requiring that OPG "manage costs that, by law, it cannot manage", the Board acted unreasonably (para. 37).

IV. Issues

[38] The Board raises two issues on appeal:

1. What is the appropriate standard of review?

2. Was the Board's decision to disallow $145 million of OPG's revenue requirement reasonable?

[39] Before this Court, OPG has argued that the Board stepped beyond the appropriate role of a tribunal in an appeal from its own decision, which raises the following additional issue:

3. Did the Board act impermissibly in pursuing its appeal in this case?

V. Analysis

[40] It is logical to begin by considering the appropriateness of the Board's participation in the appeal. I will next consider the appropriate standard of review, and then the merits issue of whether the Board's decision in this case was reasonable.

A. *The Appropriate Role of the Board in This Appeal*

(1) Tribunal Standing

[41] In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 ("*Northwestern Utilities*"), per Estey J., this Court first discussed how an administrative decision-maker's participation in the appeal or review of its own decisions may give rise to concerns over tribunal impartiality. Estey J. noted that "active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties" (p. 709). He further observed that tribunals already receive an opportunity to make their views clear in their original decisions: ". . . it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court" (p. 709).

[42] The Court in *Northwestern Utilities* ultimately held that the Alberta Public Utilities Board — which, like the Ontario Energy Board, had a statutory right

to be heard on judicial appeal (see *Ontario Energy Board Act, 1998*, s. 33(3)) — was limited in the scope of the submissions it could make. Specifically, Estey J. observed that

> [i]t has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. [p. 709]

[43] This Court further considered the issue of agency standing in *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, which involved judicial review of a British Columbia Labour Relations Board decision. Though a majority of the judges hearing the case did not endorse a particular approach to the issue, La Forest J., Dickson C.J. concurring, accepted that a tribunal had standing to explain the record and advance its view of the appropriate standard of review and, additionally, to argue that its decision was reasonable.

[44] This finding was supported by the need to make sure the Court's decision on review of the tribunal's decision was fully informed. La Forest J. cited *B.C.G.E.U. v. Indust. Rel. Council* (1988), 26 B.C.L.R. (2d) 145 (C.A.), at p. 153, for the proposition that the tribunal is the party best equipped to draw the Court's attention to

> those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area.

(*Paccar*, at p. 1016)

La Forest J. found, however, that the tribunal could not go so far as to argue that its decision was correct (p. 1017). Though La Forest J. did not command a majority, L'Heureux-Dubé J. also commented on tribunal standing in her dissent, and agreed with the substance of La Forest J.'s analysis (p. 1026).

[45] Trial and appellate courts have struggled to reconcile this Court's statements in *Northwestern Utilities* and *Paccar*. Indeed, while this Court has never expressly overturned *Northwestern Utilities*, on some occasions, it has permitted tribunals to participate as full parties without comment: see, e.g., *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; see also *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309 (C.A.) ("*Goodis*"), at para. 24.

[46] A number of appellate decisions have grappled with this issue and "for the most part now display a more relaxed attitude in allowing tribunals to participate in judicial review proceedings or statutory appeals in which their decisions were subject to attack": D. Mullan, "Administrative Law and Energy Regulation", in Kaiser and Heggie, 35, at p. 51. A review of three appellate decisions suffices to establish the rationale behind this shift.

[47] In *Goodis*, the Children's Lawyer urged the court to refuse or limit the standing of the Information and Privacy Commissioner, whose decision was under review. The Ontario Court of Appeal declined to apply any formal, fixed rule that would limit the tribunal to certain categories of submissions and instead adopted a contextual, discretionary approach: *Goodis*, at paras. 32-34. The court found no principled basis for the categorical approach, and observed that such an approach may lead to undesirable consequences:

> For example, a categorical rule denying standing if the attack asserts a denial of natural justice could deprive the court of vital submissions if the attack is based on alleged deficiencies in the structure or operation of the tribunal, since these are submissions that the tribunal is uniquely placed to make. Similarly, a rule that would permit a tribunal standing to defend its decision against the standard of reasonableness but not against one of correctness, would allow unnecessary and prevent useful argument. Because the best argument that a decision is reasonable may be that it is correct, a rule based on this distinction seems tenuously founded at best as Robertson J.A. said in *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, [2002] N.B.J. No. 114, 249 N.B.R. (2d) 93 (C.A.); at para. 32.
>
> (*Goodis*, at para. 34)

[48] The court held that *Northwestern Utilities* and *Paccar* should be read as the source of "fundamental considerations" that should guide the court's exercise of discretion in the context of the case: *Goodis*, at para. 35. The two most important considerations, drawn from those cases, were the "importance of having a fully informed adjudication of the issues before the court" (para. 37), and "the importance of maintaining tribunal impartiality": para. 38. The court should limit tribunal participation if it will undermine future confidence in its objectivity. The court

identified a list of factors, discussed further below, that may aid in determining whether and to what extent the tribunal should be permitted to make submissions: paras. 36-38.

[49] In *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3, Stratas J.A. identified two common law restrictions that, in his view, restricted the scope of a tribunal's participation on appeal from its own decision: finality and impartiality. Finality, the principle whereby a tribunal may not speak on a matter again once it has decided upon it and provided reasons for its decision, is discussed in greater detail below, as it is more directly related to concerns surrounding "bootstrapping" rather than agency standing itself.

[50] The principle of impartiality is implicated by tribunal argument on appeal, because decisions may in some cases be remitted to the tribunal for further consideration. Stratas J.A. found that "[s]ubmissions by the tribunal in a judicial review proceeding that descend too far, too intensely, or too aggressively into the merits of the matter before the tribunal may disable the tribunal from conducting an impartial redetermination of the merits later": *Quadrini*, at para. 16. However, he ultimately found that these principles did not mandate "hard and fast rules", and endorsed the discretionary approach set out by the Ontario Court of Appeal in *Goodis*: *Quadrini*, at paras. 19-20.

[51] A third example of recent judicial consideration of this issue may be found in *Leon's Furniture Ltd. v. Information and Privacy Commissioner (Alta.*),

2011 ABCA 94, 502 A.R. 110. In this case, Leon's Furniture challenged the Commissioner's standing to make submissions on the merits of the appeal (para. 16). The Alberta Court of Appeal, too, adopted the position that the law should respond to the fundamental concerns raised in *Northwestern Utilities* but should nonetheless approach the question of tribunal standing with discretion, to be exercised in view of relevant contextual considerations: paras. 28-29.

[52] The considerations set forth by this Court in *Northwestern Utilities* reflect fundamental concerns with regard to tribunal participation on appeal from the tribunal's own decision. However, these concerns should not be read to establish a categorical ban on tribunal participation on appeal. A discretionary approach, as discussed by the courts in *Goodis*, *Leon's Furniture*, and *Quadrini*, provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis: see N. Semple, "The Case for Tribunal Standing in Canada" (2007), 20 *C.J.A.L.P*. 305; L. A. Jacobs and T. S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing Before the Courts" (2002), 81 *Can. Bar Rev*. 616; F. A. V. Falzon, "Tribunal Standing on Judicial Review" (2008), 21 *C.J.A.L.P*. 21.

[53] Several considerations argue in favour of a discretionary approach. Notably, because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. For example, a tribunal may be able to explain how one

interpretation of a statutory provision might impact other provisions within the regulatory scheme, or to the factual and legal realities of the specialized field in which they work. Submissions of this type may be harder for other parties to present.

[54] Some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. Our judicial review processes are designed to function best when both sides of a dispute are argued vigorously before the reviewing court. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute.

[55] Canadian tribunals occupy many different roles in the various contexts in which they operate. This variation means that concerns regarding tribunal partiality may be more or less salient depending on the case at issue and the tribunal's structure and statutory mandate. As such, statutory provisions addressing the structure, processes and role of the particular tribunal are key aspects of the analysis.

[56] The mandate of the Board, and similarly situated regulatory tribunals, sets them apart from those tribunals whose function it is to adjudicate individual conflicts between two or more parties. For tribunals tasked with this latter responsibility, "the importance of fairness, real and perceived, weighs more heavily" against tribunal standing: *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476, 344 D.L.R. (4th) 292, at para. 42.

[57] I am thus of the opinion that tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

[58] In this case, as an initial matter, the *Ontario Energy Board Act, 1998* expressly provides that "[t]he Board is entitled to be heard by counsel upon the argument of an appeal" to the Divisional Court: s. 33(3). This provision neither expressly grants the Board standing to argue the merits of the decision on appeal, nor does it expressly limit the Board to jurisdictional or standard-of-review arguments as was the case for the relevant statutory provision in *Quadrini*: see para. 2.

[59] In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court's exercise of this discretion:

> (1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.

> (2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond

> to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.
>
> (3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

[60] Consideration of these factors in the context of this case leads me to conclude that it was not improper for the Board to participate in arguing in favour of the reasonableness of its decision on appeal. First, the Board was the only respondent in the initial review of its decision. Thus, it had no alternative but to step in if the decision was to be defended on the merits. Unlike some other provinces, Ontario has no designated utility consumer advocate, which left the Board — tasked by statute with acting to safeguard the public interest — with few alternatives but to participate as a party.

[61] Second, the Board is tasked with regulating the activities of utilities, including those in the electricity market. Its regulatory mandate is broad. Among its many roles: it licenses market participants, approves the development of new

transmission and distribution facilities, and authorizes rates to be charged to consumers. In this case, the Board was exercising a regulatory role by setting just and reasonable payment amounts to a utility. This is unlike situations in which a tribunal may adjudicate disputes between two parties, in which case the interests of impartiality may weigh more heavily against full party standing.

[62] The nature of utilities regulation further argues in favour of full party status for the Board here, as concerns about the appearance of partiality are muted in this context. As noted by Doherty J.A., "[l]ike all regulated bodies, I am sure Enbridge wins some and loses some before the [Board]. I am confident that Enbridge fully understands the role of the regulator and appreciates that each application is decided on its own merits by the [Board]": *Enbridge*, at para. 28. Accordingly, I do not find that the Board's participation in the instant appeal was improper. It remains to consider whether the content of the Board's arguments was appropriate.

(2) Bootstrapping

[63] The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns what types of argument a tribunal may make, i.e. jurisdictional or merits arguments, while the bootstrapping issue concerns the content of those arguments.

[64] As the term has been understood by the courts who have considered it in the context of tribunal standing, a tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal: see, e.g., *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, 2002 NBCA 27, 249 N.B.R. (2d) 93. Put differently, it has been stated that a tribunal may not "defen[d] its decision on a ground that it did not rely on in the decision under review": *Goodis*, at para. 42.

[65] The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, "absent a power to vary its decision or rehear the matter, it has spoken finally on the matter and its job is done": *Quadrini*, at para. 16, citing *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. Under this principle, the court found that tribunals could not use judicial review as a chance to "amend, vary, qualify or supplement its reasons": *Quadrini*, at para. 16. In *Leon's Furniture*, Slatter J.A. reasoned that a tribunal could "offer interpretations of its reasons or conclusion, [but] cannot attempt to reconfigure those reasons, add arguments not previously given, or make submissions about matters of fact not already engaged by the record": para. 29.

[66] By contrast, in *Goodis*, Goudge J.A. found on behalf of a unanimous court that while the Commissioner had relied on an argument not expressly set out in her original decision, this argument was available for the Commissioner to make on appeal. Though he recognized that "[t]he importance of reasoned decision making

may be undermined if, when attacked in court, a tribunal can simply offer different, better, or even contrary reasons to support its decision" (para. 42), Goudge J.A. ultimately found that the Commissioner was permitted to raise a new argument on judicial review. The new argument presented was "not inconsistent with the reason offered in the decision. Indeed it could be said to be implicit in it": para. 55. "It was therefore proper for the Commissioner to be permitted to raise this argument before the Divisional Court and equally proper for the court to decide on that basis": para. 58.

[67] There is merit in both positions on the issue of bootstrapping. On the one hand, a permissive stance toward new arguments by tribunals on appeal serves the interests of justice insofar as it ensures that a reviewing court is presented with the strongest arguments in favour of both sides: Semple, at p. 315. This remains true even if those arguments were not included in the tribunal's original reasons. On the other hand, to permit bootstrapping may undermine the importance of reasoned, well-written original decisions. There is also the possibility that a tribunal, surprising the parties with new arguments in an appeal or judicial review after its initial decision, may lead the parties to see the process as unfair. This may be particularly true where a tribunal is tasked with adjudicating matters between two private litigants, as the introduction of new arguments by the tribunal on appeal may give the appearance that it is "ganging up" on one party. As discussed, however, it may be less appropriate in general for a tribunal sitting in this type of role to participate as a party on appeal.

[68] I am not persuaded that the introduction of arguments by a tribunal on appeal that interpret or were implicit but not expressly articulated in its original decision offends the principle of finality. Similarly, it does not offend finality to permit a tribunal to explain its established policies and practices to the reviewing court, even if those were not described in the reasons under review. Tribunals need not repeat explanations of such practices in every decision merely to guard against charges of bootstrapping should they be called upon to explain them on appeal or review. A tribunal may also respond to arguments raised by a counterparty. A tribunal raising arguments of these types on review of its decision does so in order to uphold the initial decision; it is not reopening the case and issuing a new or modified decision. The result of the original decision remains the same even if a tribunal seeks to uphold that effect by providing an interpretation of it or on grounds implicit in the original decision.

[69] I am not, however, of the opinion that tribunals should have the unfettered ability to raise entirely new arguments on judicial review. To do so may raise concerns about the appearance of unfairness and the need for tribunal decisions to be well reasoned in the first instance. I would find that the proper balancing of these interests against the reviewing courts' interests in hearing the strongest possible arguments in favour of each side of a dispute is struck when tribunals do retain the ability to offer interpretations of their reasons or conclusions and to make arguments implicit within their original reasons: see *Leon's Furniture*, at para. 29; *Goodis*, at para. 55.

[70] In this case, I do not find that the Board impermissibly stepped beyond the bounds of its original decision in its arguments before this Court. In its reply factum, the Board pointed out — correctly, in my view — that its submissions before this Court simply highlight what is apparent on the face of the record, or respond to arguments raised by the respondents.

[71] I would, however, urge the Board, and tribunal parties in general, to be cognizant of the tone they adopt on review of their decisions. As Goudge J.A. noted in *Goodis*:

> … if an administrative tribunal seeks to make submissions on a judicial review of its decision, it [should] pay careful attention to the tone with which it does so. Although this is not a discrete basis upon which its standing might be limited, there is no doubt that the tone of the proposed submissions provides the background for the determination of that issue. A tribunal that seeks to resist a judicial review application will be of assistance to the court to the degree its submissions are characterized by the helpful elucidation of the issues, informed by its specialized position, rather than by the aggressive partisanship of an adversary. [para. 61]

[72] In this case, the Board generally acted in such a way as to present helpful argument in an adversarial but respectful manner. However, I would sound a note of caution about the Board's assertion that the imposition of the prudent investment test "would in all likelihood not change the result" if the decision were remitted for reconsideration (A.F., at para. 99). This type of statement may, if carried too far, raise concerns about the principle of impartiality such that a court would be justified in exercising its discretion to limit tribunal standing so as to safeguard this principle.

B. *Standard of Review*

[73] The parties do not dispute that reasonableness is the appropriate standard of review for the Board's actions in applying its expertise to set rates and approve payment amounts under the *Ontario Energy Board Act, 1998*. I agree. In addition, to the extent that the resolution of this appeal turns on the interpretation of the *Ontario Energy Board Act, 1998,* the Board's home statute, a standard of reasonableness presumptively applies: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 30; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at para. 35. Nothing in this case suggests the presumption should be rebutted.

[74] This appeal involves two distinct uses of the term "reasonable". One concerns the standard of review: on appeal, this Court is charged with evaluating the "justification, transparency and intelligibility" of the Board's reasoning, and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). The other is statutory: the Board's rate-setting powers are to be used to ensure that, in its view, a just and reasonable balance is struck between utility and consumer interests. These reasons will attempt to keep the two uses of the term distinct.

C. *Choice of Methodology Under the Ontario Energy Board Act, 1998*

[75] The question of whether the Board's decision to disallow recovery of certain costs was reasonable turns on how that decision relates to the Board's statutory and regulatory powers to approve payments to utilities and to have these payments reflected in the rates paid by consumers. The Board's general rate- and payment-setting powers are described above under the "Regulatory Framework" heading.

[76] The just-and-reasonable approach to recovery of the cost of services provided by a utility captures the essential balance at the heart of utilities regulation: to encourage investment in a robust utility infrastructure and to protect consumer interests, utilities must be allowed, over the long run, to earn their cost of capital, no more, no less.

[77] The *Ontario Energy Board Act, 1998* does not, however, either in s. 78.1 or elsewhere, prescribe the methodology the Board must use to weigh utility and consumer interests when deciding what constitutes just and reasonable payment amounts to the utility. Indeed, s. 6(1) of O. Reg. 53/05 expressly permits the Board, subject to certain exceptions set out in s. 6(2), to "establish the form, <u>methodology</u>, assumptions and calculations used in making an order that determines payment amounts for the purpose of section 78.1 of the Act".

[78] As a contrasting example, s. 6(2) 4.1 of O. Reg. 53/05 establishes a specific methodology for use when the Board reviews "costs incurred and firm financial commitments made in the course of planning and preparation for the

development of proposed new nuclear generation facilities". When reviewing such costs, the Board must be satisfied that "the costs were <u>prudently incurred</u>" and that "the financial commitments were <u>prudently made</u>": s. 6(2)4.1. The provision thus establishes a specific context in which the Board's analysis is focused on the prudence of the decision to incur or commit to certain costs. The absence of such language in the more general s. 6(1) provides further reason to read the regulation as providing broad methodological discretion to the Board in making orders for payment amounts where the specific provisions of s. 6(2) do not apply.

[79] Regarding whether a presumption of prudence must be applied to OPG's decisions to incur costs, neither the *Ontario Energy Board Act, 1998* nor O. Reg. 53/05 expressly establishes such a presumption. Indeed, the *Ontario Energy Board Act, 1998* places the burden on the applicant utility to establish that payment amounts approved by the Board are just and reasonable: s. 78.1(6) and (7). It would thus seem inconsistent with the statutory scheme to presume that utility decisions to incur costs were prudent.

[80] Justice Abella concludes that the Board's review of OPG's costs should have consisted of "an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable": para. 150. Such an approach is contrary to the statutory scheme. While the Board has considerable methodological discretion, it does not have the freedom to displace the burden of proof established by s. 78.1(6) of the *Ontario Energy Board Act, 1998* ". . . the burden of proof is on the

applicant in an application made under this section". Of course, this does not imply that the applicant must systematically prove that every single cost is just and reasonable. The Board has broad discretion to determine the methods it may use to examine costs — it just cannot shift the burden of proof contrary to the statutory scheme.

[81] In judicially reviewing a decision of the Board to allow or disallow payments to a utility, the court's role is to assess whether the Board reasonably determined that a certain payment amount was "just and reasonable" for both the utility and the consumers. Such an approach is consistent with this Court's rate-setting jurisprudence in other regulatory domains in which the regulator is given methodological discretion, where it has been observed that "[t]he obligation to act is a question of law, but the choice of the method to be adopted is a question of discretion with which, under the statute, no Court of law may interfere": *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764, at para. 40 (concerning telecommunication rate-setting), quoting *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12 (S.C.C.), at p. 13 (concerning railway freight rates). Of course, today this statement must be understood to permit intervention by a court where the exercise of discretion rendered a decision unreasonable. Accordingly, it remains to determine whether the Board's analytical approach to disallowing the costs at issue in this case rendered the Board's decision unreasonable under the "just and reasonable" standard.

D. *Characterization of Costs at Issue*

[82] Forecast costs are costs which the utility has not yet paid, and over which the utility still retains discretion as to whether the disbursement will be made. A disallowance of such costs presents a utility with a choice: it may change its plans and avoid the disallowed costs, or it may incur the costs regardless of the disallowance with the knowledge that the costs will ultimately be borne by the utility's shareholders rather than its ratepayers. By contrast, committed costs are those for which, if a regulatory board disallows recovery of the costs in approved payments, the utility and its shareholders will have no choice but to bear the burden of those costs themselves. This result may occur because the utility has already spent the funds, or because the utility entered into a binding commitment or was subject to other legal obligations that leave it with no discretion as to whether to make the payment in the future.

[83] There is disagreement between the parties as to how the costs disallowed by the Board in this matter should be characterized. The Board asserts that compensation costs for the test period are forecast insofar as they have not yet been disbursed, while OPG asserts that the costs should be characterized as committed, because OPG is under a contractual obligation to pay those amounts when they become due. This disagreement is important because a "no hind-sight" prudence review, which is discussed in detail below, has developed in the context of "committed" costs. Indeed, it makes no sense to apply such a test where a utility still

retains discretion over whether the costs will ultimately be incurred; the decision to commit the utility to such costs has not yet been made. Accordingly, where the regulator has discretion over its methodological approach, understanding whether the costs at issue are "forecast" or "committed" may be helpful in reviewing the reasonableness of a regulator's choice of methodology.

[84] In this case, at least some of the compensation costs that the Board found to be excessive were driven by collective agreements to which OPG had committed before the application at issue, and which established compensation costs that were, in aggregate, above the 75th percentile for comparable positions at other utilities. The collective agreements left OPG with limited flexibility regarding overall compensation rates or staffing levels — OPG was required to abide by wage and staffing levels established by collective agreements, and retained flexibility only over terms outside the bounds of those agreements — and thus those portions of OPG's compensation rates and staffing levels that were dictated by the terms of the collective agreements were committed costs.

[85] However, the Board found that OPG's compensation costs for the test period were not entirely driven by the collective agreements, and thus were not entirely committed, because OPG retained some flexibility to manage total staffing levels in light of projected attrition of a mature workforce. The Board Decision did not, however, include detailed forecasts regarding exactly how much of the $145 million in disallowed compensation costs could be recovered through natural

reduction in employee numbers or other adjustments, and how much would necessarily be borne by the utility and its shareholder. Accordingly, the disallowed costs at issue must be understood as being at least partially committed. It is unreasonable to characterize them as entirely forecast in view of the constraints placed on OPG by the collective agreements.

[86] Having established that the disallowed costs are at least partially committed, it is necessary to consider whether the Board acted reasonably in not applying a no-hindsight prudent investment test in assessing those costs. Accordingly, I now turn to the jurisprudential history and methodological details of the prudent investment test.

E. *The Prudent Investment Test*

[87] In order to assess whether the Board's methodology was reasonable in this case, it is necessary to provide some background on the prudent investment test (sometimes referred to as "prudence review" or the "prudence test") in order to identify its origins, place it in context, and explore how it has been understood by utilities, regulators, and legislators.

(1) American Jurisprudence

[88] American jurisprudence has played a significant role in the history of the prudent investment test in utilities regulation. In discussing this history, I would first

reiterate this Court's observation that "[w]hile the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue": *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board),* 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 54.

[89] The origins of the prudent investment test in the context of utilities regulation may be traced to Justice Brandeis of the Supreme Court of the United States, who wrote a concurring opinion in 1923 to observe that utilities should receive deference in seeking to recover "investments which, under ordinary circumstances, would be deemed reasonable": *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri,* 262 U.S. 276 (1923), at p. 289, fn.1.

[90] In the decades that followed, American utility regulators tasked with reviewing past-incurred utility costs generally employed one of two standards: the "used and useful" test or the "prudent investment" test (J. Kahn, "Keep *Hope* Alive: Updating the Prudent Investment Standard for Allocating Nuclear Plant Cancellation Costs" (2010), 22 *Fordham Envtl. L. Rev*. 43, at p. 49). These tests took different approaches to determining what costs could justly and reasonably be passed on to ratepayers. The used and useful test allowed utilities to earn returns only on those investments that were actually used and useful to the utility's operations, on the principle that ratepayers should not be compelled to pay for investments that do not benefit them.

[91] By contrast, the prudent investment test followed Justice Brandeis's preferred approach by allowing for recovery of costs provided they were not imprudent based on what was known at the time the investment or expense was incurred: Kahn, at pp. 49-50. Though it may seem problematic from the perspective of consumer interests to adopt the prudent investment test — a test that allows for payments related to investments that may not be used or useful — it gives regulators a tool to soften the potentially harsh effects of the used and useful test, which may place onerous burdens on utilities. Disallowing recovery of the cost of failed investments that appeared reasonable at the time, for example, may imperil the financial health of utilities, and may chill the incentive to make such investments in the first place. This effect may then have negative implications for consumers, whose long-run interests will be best served by a dynamically efficient and viable electricity industry. Thus, the prudent investment test may be employed by regulators to strike the appropriate balance between consumer and utility interests: see Kahn, at pp. 53-54.

[92] The states differed in their approaches to setting the statutory foundation for utility regulation. Regulators in some states were free to apply the prudent investment test, while other states enacted statutory provisions disallowing compensation in respect of capital investments that were not "used and useful in service to the public": *Duquesne Light Co. v. Barasch,* 488 U.S. 299 (1989), at p. 302. Notably, when asked in *Duquesne* to consider whether "just and reasonable" payments to utilities required, as a constitutional matter, that the prudent investment

test be applied to past-incurred costs, the U.S. Supreme Court held that "[t]he designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors": p. 316.

[93] American courts have also recognized that there may exist some contexts in which certain features of the prudent investment test may be less justifiable. For example, the Supreme Court of Utah considered whether a presumption of reasonableness was justified when reviewing costs passed to a utility by an unregulated affiliate entity, and concluded that it was not appropriate:

> . . . we do not think an affiliate expense should carry a presumption of reasonableness. While the pressures of a competitive market might allow us to assume, in the absence of a showing to the contrary, that nonaffiliate expenses are reasonable, the same cannot be said of affiliate expenses not incurred in an arm's length transaction.
>
> (*U.S. West Communications, Inc. v. Public Service Commission of Utah*, 901 P.2d 270 (Utah 1995), p. 274)

[94] Treatment of the prudent investment test in American jurisprudence thus indicates that the test has been employed as a tool that may be useful in arriving at just and reasonable outcomes, rather than a mandatory feature of utilities regulation that must be applied regardless of whether there is statutory language to that effect.

(2) <u>Canadian Jurisprudence</u>

[95] Following its emergence in American jurisprudence, several Canadian utility regulators and courts have also considered the role of prudence review and, in some cases, applied a form of the prudent investment test. I provide a review of some of these cases here not in an attempt to exhaustively catalogue all uses of the test, but rather to set out the way in which the test has been invoked in various contexts.

[96] In *British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia*, [1960] S.C.R. 837, Martland J. observed that the statute at issue in that case directed that the regulator, in fixing rates,

> (a) . . . shall consider all matters which it deems proper as affecting the rate: [and]
>
> (b) . . . shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service. [p. 852]
>
> (Quoting *Public Utilities Act*, R.S.B.C. 1948, s. 16(1)(*b*) (repealed S.B.C. 1973, c. 29, s. 187).)

The consequence of this statutory language, Martland J. held, was that the regulator, "when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but that it must, when actually setting the rate, meet the two requirements specifically mentioned in clause (*b*)": at p. 856. That is, the regulator, under this statute, must ensure that the public pays only fair and reasonable charges, and that the utility secures a fair and reasonable return upon its property used *or prudently and reasonably acquired*. This express statutory protection for the recovery of prudently made property acquisition costs thus provides an example of statutory language under which this Court found a non-discretionary obligation to provide a fair return to utilities for capital expenditures that were either used or prudently acquired.

[97] In 2005, the Nova Scotia Utility and Review Board ("NSUARB") considered and adopted a definition of the prudent investment test articulated by the Illinois Commerce Commission:

> . . . prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. . . . Hindsight is not applied in assessing prudence. . . . A utility's decision is prudent if it was within the range of decisions reasonable persons might have made. . . . The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being imprudent.
>
> (*Nova Scotia Power Inc, Re*, 2005 NSUARB 27 ("*Nova Scotia Power 2005*"), at para. 84 (CanLII))

The NSUARB then wrote that "[f]ollowing a review of the cases, the Board finds that the definition of imprudence as set out by the Illinois Commerce Commission is a reasonable test to be applied in Nova Scotia": para. 90. The NSUARB then considered, among other things, whether the utility's recent fuel procurement strategy had been prudent, and found that it had not: para. 94. It did not, however, indicate that it believed itself to be compelled to apply the prudent investment test.

[98] The NSUARB reaffirmed its endorsement of the prudent investment test in 2012: *Re Nova Scotia Power Inc. (Re)*, 2012 NSUARB 227 ("*Nova Scotia Power 2012*"), at paras. 143-46 (CanLII). In that case, the utility whose submissions were under review "confirmed that from its perspective this is the test the Board should apply": para. 146. The NSUARB then applied the prudence test in evaluating whether several of the utility's operational decisions were prudent, and found that some were not: para. 188.

[99] In 2006, the Ontario Court of Appeal considered the meaning of the prudent investment test in *Enbridge*. This case is of particular interest for two reasons. First, the Ontario Court of Appeal endorsed in its reasons a specific formulation of the prudent investment test framework:

> – Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.
>
> – To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.
>
> – Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.
>
> – Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time. [para. 10]

[100] Second, the Court of Appeal in *Enbridge* made certain statements that suggest that the prudent investment test was a necessary approach to reviewing committed costs. Specifically, it noted that in deciding whether Enbridge's requested rate increase was just and reasonable,

> the [Board] was required to balance the competing interests of Enbridge and its consumers. That balancing process is achieved by the application of what is known in the utility rate regulation field as the "prudence" test. Enbridge was entitled to recover its costs by way of a rate increase only if those costs were "prudently" incurred. [para. 8]

The Court of Appeal also noted that the Board had applied the "proper test": para. 18. These statements tend to suggest that the Court of Appeal was of the opinion that prudence review is an inherent and necessary part of ensuring just and reasonable payments.

[101] However, the question of whether the prudence test was a required feature of just-and-reasonable analysis in this context was not squarely before the Court of Appeal in *Enbridge*. Rather, the parties in that case "were in substantial agreement on the general approach the Board should take to reviewing the prudence of a utility's decision" (para. 10), and the question at issue was whether the Board had reasonably applied that agreed-upon approach. In this sense, *Enbridge* is similar to *Nova Scotia Power 2012*: both cases involved the application of prudence analysis in contexts where there was no dispute over whether an alternative methodology could reasonably have been applied.

(3) <u>Conclusion Regarding the Prudent Investment Test</u>

[102] The prudent investment test, or prudence review, is a valid and widely accepted tool that regulators may use when assessing whether payments to a utility would be just and reasonable. While there exists different articulations of prudence review, *Enbridge* presents one express statement of how a regulatory board might structure its review to assess the prudence of utility expenditures at the time they were incurred or committed. A no-hindsight prudence review has most frequently been applied in the context of capital costs, but *Enbridge* and *Nova Scotia Power* (both *2005* and *2012*) provide examples of its application to decisions regarding operating costs as well. I see no reason in principle why a regulatory board should be barred from applying the prudence test to operating costs.

[103] However, I do not find support in the statutory scheme or the relevant jurisprudence for the notion that the Board should be *required* as a matter of law, under the *Ontario Energy Board Act, 1998*, to apply the prudence test as outlined in *Enbridge* such that the mere decision not to apply it when considering committed costs would render its decision on payment amounts unreasonable. Nor is the creation of such an obligation by this Court justified. As discussed above, where a statute requires only that the regulator set "just and reasonable" payments, as the *Ontario Energy Board Act, 1998* does in Ontario, the regulator may make use of a variety of analytical tools in assessing the justness and reasonableness of a utility's proposed payment amounts. This is particularly so where, as here, the regulator has been given

express discretion over the methodology to be used in setting payment amounts: O. Reg. 53/05, s. 6(1).

[104] To summarize, it is not necessarily unreasonable, in light of the particular regulatory structure established by the *Ontario Energy Board Act, 1998*, for the Board to evaluate committed costs using a method other than a no-hindsight prudence review. As noted above, applying a presumption of prudence would have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998* and would therefore not have been reasonable. The question of whether it was reasonable to assess a particular cost using hindsight should turn instead on the circumstances of that cost. I emphasize, however, that this decision should not be read to give regulators *carte blanche* to disallow a utility's committed costs at will. Prudence review of committed costs may in many cases be a sound way of ensuring that utilities are treated fairly and remain able to secure required levels of investment capital. As will be explained, particularly with regard to committed capital costs, prudence review will often provide a reasonable means of striking the balance of fairness between consumers and utilities.

[105] This conclusion regarding the Board's ability to select its methodology rests on the particulars of the statutory scheme under which the Board operates. There exist other statutory schemes in which regulators are expressly required to compensate utilities for certain costs prudently incurred: see *British Columbia*

Electric Railway Co. Under such a framework, the regulator's methodological discretion may be more constrained.

(4) Application to the Board's Decision

[106] In this case, the Board disallowed a total of $145 million in compensation costs associated with OPG's nuclear operations, over two years. As discussed above, these costs are best understood as at least partly committed. In view of the nature of these particular costs and the circumstances in which they became committed, I do not find that the Board acted unreasonably in not applying the prudent investment test in determining whether it would be just and reasonable to compensate OPG for these costs.

[107] First, the costs at issue are operating costs, rather than capital costs. Capital costs, particularly those pertaining to areas such as capacity expansion or upgrades to existing facilities, often entail some amount of risk, and may not always be strictly necessary to the short-term ongoing production of the utility. Nevertheless, such costs may often be a wise investment in the utility's future health and viability. As such, prudence review, including a no-hindsight approach (with or without a presumption of prudence, depending on the applicable statutory context), may play a particularly important role in ensuring that utilities are not discouraged from making the optimal level of investment in the development of their facilities.

[108] Operating costs, like those at issue here, are different in kind from capital costs. There is little danger in this case that a disallowance of these costs will have a chilling effect on OPG's willingness to incur operating costs in the future, because costs of the type disallowed here are an inescapable element of operating a utility. It is true that a decision such as the Board's in this case may have the effect of making OPG more hesitant about committing to relatively high compensation costs, but that was precisely the intended effect of the Board's decision.

[109] Second, the costs at issue arise in the context of an ongoing, "repeat-player" relationship between OPG and its employees. Prudence review has its origins in the examination of decisions to pursue particular investments, such as a decision to invest in capacity expansion; these are often one-time decisions made in view of a particular set of circumstances known or assumed at the time the decision was made.

[110] By contrast, OPG's committed compensation costs arise in the context of an ongoing relationship in which OPG will have to negotiate compensation costs with the same parties in the future. Such a context supports the reasonableness of a regulator's decision to weigh all evidence it finds relevant in striking a just and reasonable balance between the utility and consumers, rather than confining itself to a no-hindsight approach. Prudence review is simply less relevant when the Board's focus is not solely on compensating for past commitments, but on regulating costs to be incurred in the future as well. As will be discussed further, the Board's ultimate disallowance was not targeted exclusively at committed costs, but rather was made

with respect to the total compensation costs it evaluated in aggregate. Though the Board acknowledged that OPG may not have had the discretion to reduce spending by the entire amount of the disallowance, the disallowance was animated by the Board's efforts to get OPG's ongoing compensation costs under control.

[111] Having already given OPG a warning that the Board found its operational costs to be of concern (see Board 2008-2009 Decision, at pp. 28-32), it was not unreasonable for the Board to be more forceful in considering compensation costs to ensure effective regulation of such costs going forward. The Board's statement that its disallowance was intended "to send a clear signal that OPG must take responsibility for improving its performance" (Board Decision, at p. 86) shows that it had the ongoing effects of its disallowance squarely in mind in issuing its decision in this case.

[112] The reasonableness of the Board's decision to disallow $145 million in compensation costs is supported by the Board's recognition of the fact that OPG was bound to a certain extent by the collective agreements in making staffing decisions and setting compensation rates, and its consideration of this factor in setting the total disallowance: Board Decision, at p. 87. The Board's methodological flexibility ensures that its decision need not be "all or nothing". Where appropriate, to the extent that the utility was unable to reduce its costs, the total burden of such costs may be moderated or shared as between the utility's shareholders and the consumers. The Board's moderation in this case shows that, in choosing to disallow costs without

applying a formal no-hindsight prudence review, it remained mindful of the need to ensure that any disallowance was not unfair to OPG and certainly did not impair the viability of the utility.

[113] Justice Abella, in her dissent, acknowledges that the Board has the power under prudence review to disallow committed costs in at least some circumstances: para. 152. However, she speculates that any such disallowance could "imperil the assurance of reliable electricity service": para. 156. A large or indiscriminate disallowance might create such peril, but it is also possible for the Board to do as it did here, and temper its disallowance to recognize the realities facing the utility.

[114] There is no dispute that collective agreements are "immutable" between employees and the utility. However, if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs. The existence both of collective bargaining for utility employees and of the Board's power to fix payment amounts covering compensation costs indicates neither regime can trump the other. The Board cannot interfere with the collective agreement by ordering that a utility break its obligations thereunder, but nor can the collective agreement supersede the Board's duty to ensure a just and reasonable balance between utility and consumer interests.

[115] Justice Abella says that the Board's review of committed costs using hindsight evidence appears to contradict statements made earlier in its decision. The

Board wrote that it would use all relevant evidence in assessing forecast costs but that it would limit itself to a no-hindsight approach in reviewing costs that OPG could not "take action to reduce": Board Decision, at p. 19. In my view, these statements can be read as setting out a reasonable approach for analyzing costs that could reliably be fit into forecast or committed categories. However, not all costs are amenable to such clean categorization by the Board in assessing payment amounts for a test period.

[116] With regard to the compensation costs at issue here, the Board declined to split the total cost disallowance into forecast and committed components in conducting its analysis. As Hoy J. observed, "[g]iven the complexity of OPG's business, and respecting its management's autonomy, [the Board] did not try to quantify precisely the amount by which OPG could reduce its forecast compensation costs within the framework of the existing collective bargaining agreements": Div. Ct. reasons, at para. 53. That is, the Board did not split all compensation costs into either "forecast" or "committed", but analyzed the disallowance of compensation costs as a mix of forecast and committed expenditures over which management retained some, but not total, control.

[117] It was not unreasonable for the Board to proceed on the basis that predicting staff attrition rates is an inherently uncertain exercise, and that it is not equipped to micromanage business decisions within the purview of OPG management. These considerations mean that any attempt to predict the exact degree to which OPG would be able to reduce compensation costs (in other words, what

share of the costs were forecast) would be fraught with uncertainty. Accordingly, it was not unreasonable for the Board to adopt a mixed approach that did not rely on quantifying the exact share of compensation costs that fell into the forecast and committed categories. Such an approach is not inconsistent with the Board's discussion at pp. 18-19, but rather represents an exercise of the Board's methodological discretion in addressing a challenging issue where these costs did not fit easily into the categories discussed in that passage.

[118] Justice Abella emphasizes throughout her reasons that the costs established by the collective agreements were not adjustable. I do not dispute this point. However, to the extent that she relies on the observation that the collective agreements "made it *illegal* for the utility to alter the compensation and staffing levels" of the unionized workforce (para. 149 (emphasis in original)), one might conclude that the Board was in some way trying to interfere with OPG's obligations under its collective agreements. It is important not to lose sight of the fact that the Board decision in no way purports to force OPG to break its contractual commitments to unionized employees.

[119] Finally, her observation that the Canadian Nuclear Safety Commission ("CNSC") "has . . . imposed staffing levels on Ontario Power Generation to ensure safe and reliable operation of its nuclear stations" (para. 127) is irrelevant to the issues raised in this case. While the regime put in place by the CNSC surely imposes operational and staffing restraints on nuclear utilities (see OPG record, at pp. 43-46),

there is nothing in the Board's reasons, and no argument presented before this Court, suggesting that the Board's disallowance will result in a violation of the provisions of the *Nuclear Safety and Control Act*, S.C. 1997, c. 9.

[120] I have noted above that it is essential for a utility to earn its cost of capital in the long run. The Board's disallowance may have adversely impacted OPG's ability to earn its cost of capital in the short run. Nevertheless, the disallowance was intended "to send a clear signal that OPG must take responsibility for improving its performance" (Board Decision, at p. 86). Such a signal may, in the short run, provide the necessary impetus for OPG to bring its compensation costs in line with what, in the Board's opinion, consumers should justly expect to pay for an efficiently provided service. Sending such a signal is consistent with the Board's market proxy role and its objectives under s. 1 of the *Ontario Energy Board Act, 1998*.

VI. Conclusion

[121] I do not find that the Board acted improperly in pursuing this matter on appeal; nor do I find that it acted unreasonably in disallowing the compensation costs at issue. Accordingly, I would allow the appeal, set aside the decision of the Court of Appeal, and reinstate the decision of the Board.

The following are the reasons delivered by

ABELLA J. —

[122] The Ontario Energy Board was established in 1960 to set rates for the sale and storage of natural gas and to approve pipeline construction projects. Over time, its powers and responsibilities evolved. In 1973, the Board became responsible for reviewing and reporting to the Minister of Energy on electricity rates. During this period, Ontario's electricity market was lightly regulated, dominated by the government-owned Ontario Hydro, which owned power generation assets responsible for about 90 per cent of electricity production in the province: Ron W. Clark, Scott A. Stoll and Fred D. Cass, *Ontario Energy Law: Electricity* (2012), at p. 134; *2011 Annual Report* of the Office of the Auditor General of Ontario, at pp. 5 and 67.

[123] A series of legislative measures in the late 1990s were adopted to transform the electricity industry into a market-based one driven by competition. Ontario Hydro was unbundled into five entities. One of them was Ontario Power Generation Inc., which was given responsibility for controlling the power generation assets of the former Ontario Hydro. It was set up as a commercial corporation with one shareholder — the Province of Ontario: Clark, Stoll and Cass, at pp. 5-7 and 134.

[124] As of April 1, 2008, the Board was given the authority by statute to set payments for the electricity generated by a prescribed list of assets held by Ontario Power Generation: *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B., s. 78.1(2); O. Reg. 53/05, *Payments Under Section 78.1 of the Act*, s. 3. Under the legislative scheme, Ontario Power Generation is required to apply to the Board for the approval of "just and reasonable" payment amounts: *Ontario Energy Board Act*,

1998, s. 78.1(5). The Board sets its own methodology to determine what "just and reasonable" payment amounts are, guided by the statutory objectives to maintain a "financially viable electricity industry" and to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service": O. Reg. 53/05, s. 6(1); *Ontario Energy Board Act, 1998*, ss. 1(1)1 and 1(1)2.

[125] Ontario Power Generation remains the province's largest electricity generator. It was unionized by the Ontario Hydro Employees' Union (the predecessor to the Power Workers' Union) in the 1950s, and by the Society of Energy Professionals in 1992: Richard P. Chaykowski, *An Assessment of the Industrial Relations Context and Outcomes at OPG* (2013) (online), at s. 6.2. Today, Ontario Power Generation employs approximately 10,000 people in its regulated businesses, 90 per cent of whom are unionized. Two thirds of these unionized employees are represented by the Power Workers' Union, and the rest by the Society of Energy Professionals.

[126] Both the Power Workers' Union and the Society of Energy Professionals had collective agreements with Ontario Hydro before Ontario Power Generation was established. As a successor company to Ontario Hydro, Ontario Power Generation inherited the full range of these labour relations obligations: Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 69. Ontario Power Generation's collective agreements with its unions prevent the utility from unilaterally reducing staffing or compensation levels.

[127] The Canadian Nuclear Safety Commission, an independent federal government agency responsible for ensuring compliance with the *Nuclear Safety and Control Act*, S.C. 1997, c. 9, has also imposed staffing levels on Ontario Power Generation to ensure safe and reliable operation of its nuclear stations.

[128] On May 26, 2010, Ontario Power Generation applied to the Board for a total revenue requirement of $6,909.6 million, including $2,783.9 million in compensation costs — wages, benefits, pension servicing, and annual incentives — to cover the period from January 1, 2011 to December 31, 2012: EB-2010-0008, at pp. 8, 49 and 80.

[129] In its decision, the Board explained that it would use "two types of examination" to assess the utility's expenditures. When evaluating forecast costs — costs that the utility has estimated for a future period and which can still be reduced or avoided — the Board said that Ontario Power Generation bears the burden of showing that these costs are reasonable. On the other hand, when the Board would be evaluating costs for which "[t]here is no opportunity for the company to take action to reduce", otherwise known as committed costs, it said that it would undertake "an after-the-fact prudence review . . . conducted in the manner which includes a presumption of prudence", that is, a presumption that the utility's expenditures are reasonable: p. 19.

[130] The Board made no distinction between those compensation costs that were reducible and those that were not. Instead, it subjected all compensation costs to

the kind of assessment it uses for reducible, forecast costs and disallowed $145 million because it concluded that the utility's compensation rates and staffing levels were too high.

[131] On appeal, a majority of the Divisional Court upheld the Board's order. In dissenting reasons, Aitken J. concluded that the Board's decision was unreasonable because it did not apply the proper approach to the compensation costs which were, as a result of legally binding collective agreements, fixed and not adjustable. Instead, the Board "lumped" all compensation costs together and made no distinction between those that were the result of binding contractual obligations and those that were not. As she said:

> First, I consider any limitation on [Ontario Power Generation's] ability to manage nuclear compensation costs on a go-forward basis, due to binding collective agreements in effect prior to the application and the test period, to be costs previously incurred and subject to an after-the-fact, two-step, prudence review. Second, I conclude that, in considering [Ontario Power Generation's] nuclear compensation costs, as set out in its application, the [Board] in its analysis (though not necessarily in its final number) was required to differentiate between such earlier incurred liabilities and other aspects of the nuclear compensation cost package that were truly projected and not predetermined. Third, in my view, the [Board] was required to undergo a prudence review in regard to those aspects of the nuclear compensation package that arose under binding contracts entered prior to the application and the test period. In regard to the balance of factors making up the nuclear compensation package, the [Board] was free to determine, based on all available evidence, whether such factors were reasonable. Fourth, had a prudence review been undertaken, there was evidence upon which the [Board] could reasonably have decided that the presumption of prudence had been rebutted in regard to those cost factors mandated in the collective agreements. Unfortunately, I cannot find anywhere in the Decision of the [Board] where such an analysis was undertaken. The [Board] lumped all nuclear compensation costs together. It dealt with them as if they all emanated from the same type of factors

> and none reflected contractual obligations to which the [Ontario Power Generation] was bound due to a collective agreement entered prior to the application and the test period. Finally, I conclude that, when the [Board] was considering the reasonableness of the nuclear compensation package, it erred in considering evidence that came into existence after the date on which the collective agreements were entered when it assessed the reasonableness of the rates of pay and other binding provisions in the collective agreements. [para. 75]

[132] The Court of Appeal unanimously agreed with Aitken J.'s conclusion, finding that "the compensation costs at issue before the [Board] were committed costs" which should therefore have been assessed using a presumption of prudence. As they both acknowledged, it was open to the Board to find that the presumption had been rebutted in connection with the binding contractual obligations, but the Board acted unreasonably in failing to take the immutable nature of the fixed costs into consideration.

[133] I agree. The compensation costs for approximately 90 per cent of Ontario Power Generation's regulated workforce were established through legally binding collective agreements which obligated the utility to pay fixed levels of compensation, regulated staffing levels, and provided unionized employees with employment security. Ontario Power Generation's compensation costs were therefore overwhelmingly predetermined and could not be adjusted by the utility during the relevant period. These are precisely the type of costs that the Board referred to in its decision as costs for which "[t]here is no opportunity for the company to take action to reduce" and which must be subjected to "a prudence review conducted in the manner which includes a presumption of prudence": p. 19.

[134] In my respectful view, failing to acknowledge the legally binding, non-reducible nature of the cost commitments reflected in the collective agreements and apply the review the Board itself said should apply to such costs, rendered its decision unreasonable.

Analysis

[135] Pursuant to s. 78.1(5) of the *Ontario Energy Board Act, 1998*, upon application from Ontario Power Generation, the Board is required to determine "just and reasonable" payment amounts to the utility. In the utility regulation context, the phrase "just and reasonable" reflects the aim of "navigating the straits" between overcharging a utility's customers and underpaying the utility for the public service it provides: *Verizon Communications Inc. v. Federal Communications Commission*, 535 U.S. 467 (2002), at p. 481; see also *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186, at pp. 192-93.

[136] The methodology adopted by the Board to determine "just and reasonable" payments to Ontario Power Generation draws in part on the regulatory concept of "prudence". Prudence is "a legal basis for adjudging the meeting of utilities' public interest obligations, specifically in regard to rate proceedings": Robert E. Burns et al., *The Prudent Investment Test in the 1980s*, report NRRI-84-16, The National Regulatory Research Institute, April 1985, at p. 20. The concept emerged in the early 20th century as a judicial response to the "mind-numbing complexity" of other approaches being used by regulators to determine "just and reasonable"

amounts, and introduced a legal presumption that a regulated utility has acted reasonably: *Verizon Communications*, at p. 482. As Justice Brandeis famously explained in 1923:

> The term prudent investment is not used in a critical sense. There should not be excluded from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. <u>Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.</u> [Emphasis added.]
>
> (*State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923), at p. 289, fn. 1, per Brandeis J., dissenting).

[137] The presumption of prudence is the starting point for the type of examination the Board calls a "prudence review". In undertaking a prudence review, the Board applies a "well-established set of principles":

- Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.
- To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.
- Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.
- Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time.

> (*Enersource Hydro Mississauga Inc. (Re)*, 2012 LNONOEB 373 (QL), at para. 55, citing *Enbridge Gas Distribution (Re)*, 2002 LNONOEB 4 (QL), at para. 3.12.2).

[138] This form of prudence review, including a presumption of prudence and a ban on hindsight, was endorsed by the Board and by the Ontario Court of Appeal as an appropriate method to determine "just and reasonable" rates in *Enbridge Gas Distribution Inc. (Re)*, at paras. 3.12.1 to 3.12.5, aff'd *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2006), 210 O.A.C. 4, at paras. 8 and 10-12.

[139] In the case before us, however, the Board decided not to submit all costs to a prudence review. Instead, it stated that it would use two kinds of review. The first would apply to "forecast costs", that is, those over which a utility retains discretion and can still be reduced or avoided. It explained in its reasons that it would review such costs using a wide range of evidence, and that the onus was on the utility to demonstrate that its forecast costs were reasonable:

> When considering forecast costs, the onus is on the company to make its case and to support its claim that the forecast expenditures are reasonable. The company provides a wide spectrum of such evidence, including business cases, trend analysis, benchmarking data, etc. The test is not dishonesty, negligence, or wasteful loss; the test is reasonableness. And in assessing reasonableness, the Board is not constrained to consider only factors pertaining to [Ontario Power Generation]. The Board has the discretion to find forecast costs unreasonable based on the evidence — and that evidence may be related to the cost/benefit analysis, the impact on ratepayers, comparisons with other entities, or other considerations.
>
> The benefit of a forward test period is that the company has the benefit of the Board's decision in advance regarding the recovery of forecast costs. To the extent costs are disallowed, for example, a forward test period provides the company with the opportunity to adjust its plans accordingly. In other words, there is not necessarily any cost borne by

> shareholders (unless the company decides to continue to spend at the higher level in any event). [p. 19]

[140] A different approach, the Board said, would be applied to those costs the company could not "take action to reduce". These costs, sometimes called "committed costs", represent binding commitments that leave a utility with no discretion about whether to make the payment. The Board explained that it evaluates these costs using a "prudence review", which includes a presumption that the costs were prudently incurred:

> Somewhat different considerations will come into play when undertaking an after-the-fact prudence review. In the case of an after-the-fact prudence review, if the Board disallows a cost, it is necessarily borne by the shareholder. There is no opportunity for the company to take action to reduce the cost at that point. For this reason, the Board concludes there is a difference between the two types of examination, with the after-the-fact review being a prudence review conducted in the manner which includes a presumption of prudence. [p. 19]

[141] In *Enersource Hydro Mississauga Inc. (Re)*, for example, the Board concluded that it had to conduct a prudence review when evaluating the costs that Enersource had already incurred:

> This issue concerns expenditures which have largely already been incurred by the company. . . . Given that the issue concerns past expenditures which are now in dispute, the Board must conduct a prudence review. [para. 55]

[142] As the Board said in its reasons, the prudence review makes sense for committed costs because disallowing costs Ontario Power Generation cannot avoid, forces the utility to pay out of pocket for expenses it has already incurred. This could negatively affect Ontario Power Generation's ability to operate, leading the utility to restructure its relationships with the financial community and its service providers, or even lead to bankruptcy: see Burns et al., at pp. 129-65. These outcomes would "increase capital costs and utility rates above the levels that would exist with a limited prudence penalty", forcing Ontario consumers to pay higher electricity bills: Burns et al., at p. vi.

[143] The issue in this appeal therefore centres on the Board assessing *all* compensation costs in Ontario Power Generation's collective agreements as adjustable forecast costs, without determining whether any of them were costs for which "[t]here is no opportunity for the company to take action to reduce". The Board did not actually call them forecast costs, but by saying that "collective agreements may make it difficult to eliminate positions quickly" and that "changes to union contracts . . . will take time" (pp. 85 and 87), the Board was clearly treating them as reducible in theory. Moreover, the fact that it failed to apply the prudence review it said it would apply to non-reducible costs confirms that it saw the collectively bargained commitments as adjustable.

[144] The Board did not explain why it considered compensation costs in collective agreements to be adjustable forecast costs, but the effect of its approach

was to deprive Ontario Power Generation of the benefit of the Board's assessment methodology that treats committed costs differently. In my respectful view, the Board's failure to separately assess the compensation costs committed as a result of the collective agreements from other compensation costs, ignored not only its own methodological template, but labour law as well.

[145] Ontario Power Generation was a party to binding collective agreements with the Power Workers' Union and the Society of Energy Professionals covering most of the relevant period. At the time of the application, it had already entered into a collective agreement with the Power Workers' Union for the period of April 1, 2009 to March 31, 2012.

[146] Its collective agreement with the Society of Energy Professionals, which required resolution by binding mediation-arbitration in the event of contract negotiations disputes, expired on December 31, 2010. As a result of a bargaining impasse, the terms of a new collective agreement for January 1, 2011 to December 31, 2012 were imposed by legally binding arbitration: *Ontario Power Generation v. Society of Energy Professionals*, [2011] O.L.A.A. No. 117 (QL).

[147] The collective agreements with the Power Workers' Union and the Society of Energy Professionals prescribed the compensation rates for staff positions held by represented employees, strictly regulated staff levels at Ontario Power Generation's facilities, and limited the utility's ability to unilaterally reduce its compensation rates and staffing levels. The collective agreement with the Power

Workers' Union, for example, stipulated that there would be no involuntary layoffs during the term of the agreement. Instead, Ontario Power Generation would be required either to relocate surplus staff or offer severance in accordance with rates set out in predetermined agreements between the utility and the union: "Collective Agreement between Ontario Power Generation Inc. and Power Workers' Union", April 1, 2009 to March 31, 2012, at art. 11.

[148] Similarly, Ontario Power Generation's collective agreement with the Society of Energy Professionals severely limited the utility's bargaining power and control over compensation levels. When the contract between Ontario Power Generation and the Society of Energy Professionals expired on December 31, 2010, the utility's bargaining position had been that its sole shareholder, the Province of Ontario, had directed that there be a zero net compensation increase over the next two-year term. The parties could not reach an agreement and the dispute was therefore referred to binding arbitration as required by previous negotiations. The resulting award by Kevin M. Burkett provided mandatory across-the-board wage increases of three per cent on January 1, 2011, two per cent on January 1, 2012, and a further one per cent on April 1, 2012: *Ontario Power Generation v. Society of Energy Professionals*, at paras. 1, 9, and 28.

[149] The obligations contained in these collective agreements were immutable and legally binding commitments: *Labour Relations Act, 1995*, s. 56. As a result, Ontario Power Generation was prohibited from unilaterally reducing the staffing

levels, wages, or benefits of its unionized workforce. These agreements therefore did not just leave the utility "with limited flexibility regarding overall compensation rates or staffing levels", as the majority notes (at para. 84), they made it *illegal* for the utility to alter the compensation and staffing levels of 90 per cent of its regulated workforce in a manner that was inconsistent with its commitments under the agreements.

[150] Instead, the Board, applying the methodology it said it would use for the utility's forecast costs, put the onus on Ontario Power Generation to prove the reasonableness of its costs and concluded that it had failed to provide "compelling evidence" or "documentation or analysis" to justify compensation levels: p. 85. Had the Board used the approach it said it would use for costs the company had "no opportunity . . . to reduce", it would have used an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable.

[151] Applying a prudence review to these compensation costs would hardly, as the majority suggests, "have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998*". To interpret the burden of proof in s. 78.1(6) of the *Ontario Energy Board Act* so strictly would essentially prevent the Board from ever conducting a prudence review, notwithstanding that it has comfortably done so in the past and stated, even in its reasons in this case, that it would review committed costs using an "after-the-fact prudence review" which "includes a presumption of prudence". Under the majority's logic, however, since a prudence review always

involves a presumption of prudence, the Board would not only be limiting its methodological flexibility, it would be in breach of the Act.

[152] The application of a prudence review does not shield the utility's compensation costs from scrutiny. As the Court of Appeal observed, a prudence review

> does not mean that the [Board] is powerless to review the compensation rates for [Ontario Power Generation]'s unionized staff positions or the number of those positions. In a prudence review, the evidence may show that the presumption of prudently incurred costs should be set aside, and that the committed compensation rates and staffing levels were not reasonable; however, the [Board] cannot resort to hindsight, and must consider what was known or ought to have been known at the time. A prudence review allows for such an outcome, and permits the [Board] both to fulfill its statutory mandate and to serve as a market proxy, while maintaining a fair balance between [Ontario Power Generation] and its customers. [para. 38]

[153] The majority's suggestion (at para. 114) that "if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs", is puzzling. The legislature did not intend for *any* costs to be "inevitably" imposed on consumers. What it intended was to give the Board authority to determine just and reasonable payment amounts based on Ontario Power Generation's existing and proposed commitments. Neither collective agreements nor any other contractual obligations were intended to be "inevitably" imposed. They were intended to be inevitably considered in the balance. But it is precisely because

of the unique nature of binding commitments that the Board said it would impose a different kind of review on these costs.

[154] It may well be that Ontario Power Generation has the ability to manage some staffing levels through attrition or other mechanisms that did not breach the utility's commitments under its collective agreements, and that these costs may therefore properly be characterized as forecast costs. But no factual findings were made by the Board about the extent of any such flexibility. There is in fact no evidence in the record, nor any evidence cited in the Board's decision, setting out what proportion of Ontario Power Generation's compensation costs were fixed and what proportion remained subject to the utility's discretion. The Board made virtually no findings of fact regarding the extent to which the utility could reduce its collectively bargained compensation costs. On the contrary, the Board, as Aitken J. noted, "lumped" all compensation costs together, acknowledged that reducing those in the collective agreements would "take time" and "be difficult", and dealt with them as globally adjustable.

[155] Given that collective agreements are legally binding, it was unreasonable for the Board to assume that Ontario Power Generation could reduce the costs fixed by these contracts in the absence of any evidence to that effect. To use the majority's words, these costs are "legal obligations that leave [the utility] with no discretion as to whether to make the payment in the future" (para. 82). According to the Board's

own methodology, costs for which "[t]here is no opportunity for the company to take action to reduce" are entitled to "a presumption of prudence": p. 19.

[156] Disallowing costs that Ontario Power Generation is legally required to pay as a result of its collective agreements, would force the utility and the Province of Ontario, the sole shareholder, to make up the difference elsewhere. This includes the possibility that Ontario Power Generation would be forced to reduce investment in the development of capacity and facilities. And because Ontario Power Generation is Ontario's largest electricity generator, it may not only threaten the "financial viability" of the province's electricity industry, it could also imperil the assurance of reliable electricity service.

[157] The majority nonetheless assumes that the ongoing relationship between Ontario Power Generation and the unions should give the Board greater latitude in disallowing the collectively bargained compensation costs than it would have had if it applied a no-hindsight, presumption-of-prudence analysis. It also accepts the Board's conclusion that Ontario Power Generation's collectively bargained compensation costs may be "excessive", and therefore concludes that the Board was reasonable in choosing to avoid the "prudence" test in order to so find. This approach finds no support even in the methodology the Board set out for itself for evaluating just and reasonable payment amounts.

[158] In my respectful view, selecting a test which is more likely to confirm an assumption that collectively bargained costs are excessive, misconceives the point of

the exercise, namely, to determine whether those costs were in fact excessive. Blaming collective bargaining for what are *assumed* to be excessive costs, imposes, with respect, the appearance of an ideologically driven conclusion on what is intended to be a principled methodology based on a distinction between committed and forecast costs, not between costs which are collectively bargained and those which are not.

[159] I recognize that the Board has wide discretion to fix payment amounts that are "just and reasonable" and, subject to certain limitations, to "establish the . . . methodology" used to determine such amounts: O. Reg. 53/05, s. 6, *Ontario Energy Board Act, 1998*, s. 78.1;. That said, once the Board establishes a methodology to determine what is just and reasonable, it is, at the very least, required to faithfully apply that approach: see *TransCanada Pipelines Ltd. v. National Energy Board* (2004), 319 N.R. 171 (F.C.A.), at paras. 30-32, per Rothstein J.A. This does not mean that collective agreements "supersede" or "trump" the Board's authority to fix payment amounts; it means that once the Board selects a methodology for itself for the exercise of its discretion, it is required to follow it. Absent methodological clarity and predictability, Ontario Power Generation would be left in the dark about how to determine what expenditures and investments to make and how to present them to the Board for review. Wandering sporadically from approach to approach, or failing to apply the methodology it declares itself to be following, creates uncertainty and leads, inevitably, to needlessly wasting public time and resources in constantly having to anticipate and respond to moving regulatory targets.

[160] In disallowing $145 million of the compensation costs sought by Ontario Power Generation on the grounds that the utility could reduce salary and staffing levels, the Board ignored the legally binding nature of the collective agreements and failed to distinguish between committed compensation costs and those that were reducible. Whether or not one can fault the Board for failing to use a particular methodology, what the Board can unquestionably be analytically faulted for, is evaluating all compensation costs fixed by collective agreements as being amenable to adjustment. Treating these compensation costs as reducible was, in my respectful view, unreasonable.

[161] I would accordingly dismiss the appeal, set aside the Board's decision, and, like the Court of Appeal, remit the matter to the Board for reconsideration in accordance with these reasons.

Appeal allowed, ABELLA J. *dissenting.*

Solicitors for the appellant: Stikeman Elliott, Toronto.

Solicitors for the respondent Ontario Power Generation Inc.: Torys, Toronto; Ontario Power Generation Inc., Toronto.

Solicitors for the respondent the Power Workers' Union, Canadian Union of Public Employees, Local 1000: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the respondent the Society of Energy Professionals: Cavalluzzo Shilton McIntyre Cornish, Toronto.

Solicitors for the intervener: Jay Shepherd Professional Corporation, Toronto.

4

Case Name:

ATCO GAS SOUTH (Re)

ATCO GAS SOUTH
Removal of Carbon Related Assets from Utility Service

2010 LNAUC 457

[2010] A.E.U.B.D. No. 522

Decision No. 2010-496

Application

No. 1579086; Proceeding ID No. 87

Alberta Utilities Commission

Panel: Willie Grieve, Chair; Moin A. Yahya, Commissioner; Tudor Beattie, Q.C., Commissioner

Decision: October 19, 2010.

(256 paras.)

DECISION

Contents

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1 INTRODUCTION

1 The Alberta Utilities Commission (AUC or Commission) received an application on July 11, 2008 (Application) from ATCO Gas South (ATCO or AGS), a division of ATCO Gas and Pipelines Ltd., requesting that the Commission to set aside Order U2005-133,[1] and Decisions 2005-063[2] and 2007-005[3] of the Alberta Energy and Utilities Board (EUB or Board). ATCO requested the Commission grant a new order implementing the findings of the Alberta Court of Appeal in a decision issued May 27, 2008[4] (Carbon Appeal Decision). The Carbon Appeal Decision dealt with the Carbon natural gas storage facility and associated gas producing properties (collectively, Carbon) owned and operated by ATCO that had been included within the regulated rate base of ATCO.

2 Notice of the Application was issued on July 15, 2008 indicating that any party who wished to intervene in the proceeding (Proceeding) must submit a Statement of Intent to Participate (SIP) to the Commission by July 28, 2008.

3 SIPs were received from the Office of Utilities Consumer Advocate (UCA), BP Canada Energy Company, The City of Calgary (Calgary) and the Public Institutional Consumers of Alberta (PICA).

4 The Commission held a Pre-hearing Conference on December 16, 2008 to hear oral argument and reply argument to assist the Commission in determining the final scope of the Proceeding.

5 This Decision is the fourth in a series of decisions relating to the Application. The first three decisions are summarized in Section 2, "Background" of this Decision.

6 Following a lengthy written process, which involved a number of scheduling delays, the Commission notified registered parties on May 28, 2010 that an oral hearing would be held. The hearing was held on June 28, 2010 in the AUC's Edmonton hearing room.

7 The record for this portion of the proceeding closed on July 21, 2010 with the filing of a revision by the UCA to its Argument. The Division of the Commission assigned to hear the proceeding was W. Grieve (Chair), and Commissioners Dr. M. A. Yahya, and T. Beattie Q.C.

2 BACKGROUND

8 Carbon has had a long history as a regulated utility asset. The Carbon storage facility was originally a natural gas production field which was acquired by Canadian Western Natural Gas Company Limited (now ATCO) in 1957 for the purpose of developing a utility source of gas for production and delivery as peaking gas supply to its customers in the Calgary area. In 1967 the Carbon gas field was converted into a storage reservoir. Approval was granted by the Oil and Gas Conservation Board in 1967 for the conversion of the natural gas production field into a natural gas storage facility. Certain production wells which were not required for storage cycling operations remained as gas production assets, and have remained so to this day. Throughout the period during which Carbon was employed by ATCO in providing regulated services it was variously used to produce natural gas for utility customer consumption, store natural gas for utility customers, provide utility revenue through the leasing of excess storage capacity to third parties and for operational and system load balancing requirements. At present, the entire storage facility is leased to an affiliate of AGS, ATCO Midstream Ltd. (ATCO Midstream) and is used for merchant storage capacity. A detailed historical overview of the development and regulation of the Carbon facilities can be found in Appendices 6, 7 and 8 of this Decision. Appendix 5 of Decision 2007-005 contains a map of the Carbon facilities.

9 The Proceeding for this Application also has a protracted history which is briefly described below.

10 Following the release of the Carbon Appeal Decision, the Application was filed and the Commission issued Order U2008-213.[5] This Order suspended the following three ATCO rate riders and charges related to Carbon effective July 1, 2008 until such time as the Commission might provide further direction:

* Company Owned Production Rate Rider (COPRR) -- Rider "G" applicable to AGS's Low Use and High Use rate groups,
* Company Owned Storage Rate Riders (COSRRs) -- Rider "H" applicable to AGS's Low Use and High Use rate groups,
* Rider "I" (Irrigation) applicable to the AGS's Irrigation rate group, and
* Carbon Production and Storage Charge (P&SC) paid by all AGS's customers.

11 The Commission provided Notice of the Application on July 15, 2008.

12 On September 9, 2008, the Commission requested comments from all parties in respect of an appropriate process to deal with the Application.

13 On September 29, 2008, the Commission suspended the Proceeding in response to a submission from Calgary. The Commission determined that consideration of the Application would be premature in light of the Utility Asset Disposition Proceeding, Proceeding ID. 20,[6] a generic proceeding applicable to all utilities that had recently been initiated by the Commission. In suspending the Application the Commission referred to the potential overlap of issues relating to the disposition of utility assets and the interpretation and application of the Supreme Court of Canada's Calgary Stores Block Decision (Stores Block Decision).[7]

14 On November 13, 2008, the Commission issued Decision 2008-113[8] in respect of ATCO's 2008-2009 general rate application (GRA). This decision recognized that Rate Riders "G", "H" and "I" and the Carbon P&SC had been suspended and that there was a proceeding under way (this Proceeding) to address the Carbon Appeal Decision. In accordance with Decision 2008-113 ATCO submitted a compliance application in which it "removed the revenues, costs, assets and liabilities related to the Carbon Storage and Production assets (Carbon Assets) from the 2008/2009 revenue requirement forecasts..."[9] The amended revenue requirement was ultimately approved in the GRA compliance Decisions 2009-109[10] and 2010-025.[11]

15 On November 28, 2008 the Alberta Court of Appeal released two decisions granting ATCO leave to appeal the Harvest Hills[12] and the Salt Caverns Letters decisions[13] of the EUB and the Commission. In granting leave, the Court suggested that the Commission's Utility Asset Disposition Proceeding might benefit from the Court's guidance. As a consequence, the Commission suspended the process for the Utility Asset Disposition Proceeding and resumed the process dealing with this Application. At the same time the Commission laid out a procedural schedule that included an oral hearing that was to commence March 16, 2009

16 In order to facilitate and potentially expedite this Proceeding the Commission called an oral Pre-Hearing Conference for December 16, 2008. Following the conference, the Commission issued its Pre-Hearing Conference and Scoping Decision, Decision 2009-004[14] on January 9, 2009. This Decision included the Final Issues List and made a determination that a unilateral removal of assets, like Carbon, from rate base by a utility was a "disposition" requiring approval of the Commission under section 26(2) of the *Gas Utilities Act* (the Disposition Issue).

17 Following a round of information requests, on February 9, 2009, the Commission received a motion by the UCA to instruct ATCO to provide further and better information responses and included a request to suspend the February 12, 2009 date for the submission of intervener evidence. On February 10, 2009, Calgary submitted a similar motion. In a letter dated February 10, 2009 the Commission denied the requested suspension for the filing of intervener evidence.

18 Calgary filed a review and variance motion on February 12, 2009 with respect to the Commission's February 10th decision not to suspend the deadline of February 12 for intervener evidence. On February 13, 2009 the Commission denied the motion. However, the schedule was adjusted such that intervener evidence became due March 3rd and the date of the oral hearing delayed until March 17, 2009.

19 On February 20, 2009 the Commission provided its ruling with regard to the UCA and Calgary motions requesting ATCO to provide better information responses. ATCO was directed to provide certain supplemental information responses by February 24, 2009.

20 On February 27, 2009 the UCA submitted a motion, again requesting the Commission to direct ATCO to provide further and better information responses.

21 On March 6, 2009 the Commission issued a letter confirming the March 17, 2009 hearing had been cancelled and set a schedule to receive written argument and reply argument on three Preliminary Questions posed in the letter's attachment.

22 On June 26, 2009 the Commission issued Decision 2009-067,[15] in respect of three Preliminary Questions. In brief the Commission decided:

* October 10, 2006 would be the Adjustment Date to reflect all necessary rate adjustments for the removal of the Carbon assets from rate base.
* Amounts included in approved revenue requirements prior to the Adjustment Date in respect of depreciation or net negative salvage on the Carbon assets should not be refunded to customers.
* As costs for Carbon were prepared on a forecast basis and storage revenues from Carbon were collected and credited to customers on an actual basis, the Commission determined that the amount to be collected from customers to reflect the Adjustment Date should be calculated using the same methods.

This decision also ruled on the outstanding UCA motion in respect of ATCO IR responses.

23 On July 3, 2009 the Commission received a letter from ATCO which included a request for Commission approval to enter into a negotiated settlement with respect to the outstanding matters related to the Application. This request was granted by the Commission on July 31, 2009 and the Proceeding was again suspended.

24 On August 6, 2009 the Commission issued a letter advising parties that the Commission was initiating a review and variance proceeding, Proceeding ID. 281, in light of the Court of Appeal's recent Salt Caverns Decision[16] which determined that a utility may unilaterally withdraw an asset from rate base without prior Commission approval. The review and variance proceeding was initiated with respect to the Disposition Issue decided in Decision 2009-004 and with respect to the Adjustment Date decided in Decision 2009-067. The review and variance proceeding was then suspended to permit settlement negotiations to proceed.

25 ATCO advised the Commission on September 21, 2009 that settlement negotiations had been terminated.

26 The Commission resumed the review and variance proceeding and on December 16, 2009 the Commission issued Decision 2009-253.[17] The Commission varied its finding in Decision 2009-004 that the consent of the Commission was required before a utility could remove an asset from rate base. It also varied the Adjustment Date determined in Decision 2009-067 from October 10, 2006 to April 1, 2005, being the date that ATCO indicated that Carbon was no longer used or required to be used to provide utility service.

27 On December 17, 2009 the Commission recommenced the process in this Proceeding using the new Adjustment Date of April 1, 2005 and directed ATCO to file by January 6, 2010, an update to the proposed Carbon recovery rate rider calculations assuming a start date of April 1, 2010 and to finalize any remaining placeholder amounts relating to the lease or operations of Carbon by ATCO Midstream until the Adjustment Date.

28 On January 6, 2010 ATCO filed the required Supplemental Evidence.

29 On January 15, 2009 the Commission issued a procedural letter and a schedule to complete review of the Application in writing concluding with concurrent written Reply Argument on May 21, 2010.

30 Following a round of information requests on the January 6, 2010 Supplemental Evidence, ATCO filed revised Carbon cost of service calculations for the years 2005-2009 on February 22, 2010.

31 On February 26, 2010 the UCA submitted a motion requesting the Commission allow additional information requests on the additional information filed by ATCO on February 22, 2010 and requested the Commission to direct ATCO to provide further and better information responses. Given the procedure to receive comment from parities regarding a motion, the existing schedule was again suspended.

32 On March 3, 2010 the Commission issued a ruling allowing interveners to direct additional information requests to ATCO on the recently filed evidence.

33 The Commission provided its ruling on the UCA motion with respect to deficient ATCO information request responses on March 30, 2010 and ATCO provided the supplemental responses as directed on April 7, 2010.

34 On April 20, 2010 the Commission issued Decision 2010-167[18] which approved on an interim basis, the collection of Carbon related rate riders intended to partially collect amounts that would be due to ATCO as a result of adjusting revenue requirement and related riders to reflect the removal of Carbon from utility rate base and rates as of the Adjustment Date. The rate riders applied for were approved on an interim and refundable basis given that the final determination of the amounts to be recovered from ratepayers was left to be completed in this Proceeding.

35 On May 12, 2010, the Court of Appeal dismissed the application for Leave to Appeal filed by Calgary and the UCA in respect of Decision 2009-253 in *Calgary (City) v. Alberta (Utilities Commission)*, 2010 ABCA 158.(Carbon R&V[19] Appeal Decision).

36 Following receipt of information request responses to additional Commission information requests of the UCA, Calgary and ATCO, the Commission issued a letter on May 28, 2010 scheduling an oral hearing for June 28, 2010. A one day oral hearing was held on June 28, 2010 with ATCO presenting a witness and the UCA and Calgary sitting a combined panel of witnesses.

37 Written Argument was filed on July 9, 2010 and Reply Argument on July 16, 2010. The UCA filed an amendment to its Argument on July 21, 2010.

3 THE APPLICATION

38 In the Application, ATCO requested the following approvals:

* the Carbon related assets should be removed from AGS's rate base and distribution service rates effective April 1, 2005;
* with respect to the lease to ATCO Midstream, the placeholder lease rate of $0.45/GJ for utility purposes should be made $0/GJ effective April 1, 2005;
* AGS should be allowed to recover all amounts it was directed to provide to customers through Riders G, H, and I on and after April 1, 2005; and
* interest should be applied to the net amounts owed to AGS consistent with AUC Rule 23.

39 ATCO stated these requested approvals were required to implement the Court of Appeal's findings in the Carbon Appeal Decision. ATCO asserted that it was entitled to be returned to the position it would have been in but for the directions of the Board set out in Order U2005-133 and Decisions 2005-063 and 2007-005.

40 ATCO indicated that the net impact to its customers to the end of 2009 (including amounts that would be recovered in the year 2010) would be a recovery of $21.4 million. This amount was subsequently updated and revised in ATCO's January 6, 2010 Supplementary Evidence filing to $48.2 million and further updated in AUC-AGS-10 filed on February 17, 2010 and the Updated Appendices to the Application filed by ATCO on February 22, 2010 to $50.3 million.

41 It its Application ATCO proposed that the recovery would be accomplished as follows:

> ATCO Gas proposes that it would develop and file the final rider for the year 2009 once a decision on this Application has been issued by the Commission. Changes related to additional amounts billed through the Riders and Production and Storage charge as a result of unbilled amounts and billing adjustments and related interest calculations will be incorporated in the final 2009 rider calculations. A compliance application would be filed with the Commission finalizing the amount of the 2009 rider for each rate groups prior to the implementation of the final rider on (assumed to be) January 1, 2009. In October 2009 ATCO Gas would then file an application calculating the final rider for the year 2010. That filing would incorporate final billing adjustment impacts related to Riders G, H and I and the production and storage charge, final interest calculations and an updated throughput forecast for the year 2010 into the rider calculations for that year.

42 On January 6, 2010 ATCO filed Supplemental Evidence that revised the proposed recovery period as follows:

> ATCO Gas has updated the recovery rate rider calculations within Appendix A (attached) to reflect a recovery period of April 1, 2010 to December 31, 2011. ATCO Gas proposes to use a deferral account to record differences between the amounts actually recovered and what is approved for recovery. ATCO Gas also proposes to file an updated calculation of the 2011 rider for approval of the Commission prior to its implementation on January 1, 2011. The updated rider will take into account actual changes to the interest rate and calculations, and an updated throughput forecast for 2011. Any amounts remaining in the deferral account after December 31, 2011 will be addressed by ATCO Gas at the next application filed to adjust its rates.[20]

43 In the January 6, 2010 Supplemental Evidence ATCO also provided the following comments on the status of placeholders:

8. There are no outstanding placeholder amounts related to the Carbon assets prior to the Adjustment Date of April 1, 2005. In EUB Decision 2004-022, at page 20, the EUB approved a final lease rate of $0.45/GJ for the 2004/2005 storage year. There is no discussion in the Decision of that rate being a placeholder rate.
9. On November 22, 2004, the EUB issued correspondence in the 2005/2006 Carbon Storage Plan Application No. 1357130. A copy of that correspondence can be found in Appendix E attached. That correspondence confirms that the $0.45/GJ lease rate was to be treated as a placeholder commencing April 1, 2005. That determination was re-iterated by the Board in EUB Order U2005-133, at page 2, Directive (5).
10. As such, there are no outstanding placeholders related to the Carbon assets prior to the Adjustment Date of April 1, 2005.

4 ISSUES

44 The Final Scope for this Proceeding was determined in Decision 2009-004 to be as follows:

1. Verification of Carbon related accounts.
2. Update to Application with respect to Carbon-related Capital expenditures.
3. Date from which adjustments to rate base and revenue requirement should be made should Carbon be removed from rate base.
4. Required adjustments to distribution revenue requirement and regulatory accounts to reflect the removal of the Carbon assets from regulated service and the revenue associated therewith, including without limitation, the proper treatment of depreciation amounts and net negative salvage amounts and other monies previously collected through rates in respect of future liabilities in respect of the Carbon assets.
5. With respect to any amounts to be recovered from ratepayers, the calculation of interest, if any, the methodology to be employed in determining rates and the period during which any amounts to be recovered from ratepayers will be collected.

45 Issue 3 was addressed in Decision 2009-067 and varied by Decision 2009-253. The Adjustment Date was determined to be April 1, 2005.

46 Issue 4 has been partially addressed. In Decision 2009-067 the Commission determined that amounts included in approved revenue requirements prior to the Adjustment Date for depreciation or net negative salvage on the Carbon assets should not be refunded to customers. The Commission also determined that since costs for Carbon were prepared on a forecast basis and storage revenues from Carbon were collected and credited to customers on an actual basis, amounts to be collected from customers as of the Adjustment Date should be calculated using the same methods.

47 The remaining matters to be decided in this Decision relate to the verification of Carbon related accounts and capital related expenditures and the calculation of the amounts, including interest, to be collected from each AGS rate class over a defined period. In addition this Decision will address related matters that arose during the course of the Proceeding.

48 Before the Commision is able to address the remaing matters noted above, the Commission will address the implication of the Carbon Appeal Decision on this proceeding.

49 In reaching its determinations set out within this Decision, the Commission has considered all relevant materials comprising the record of this proceeding, including the submissions provided by each party. Accordingly, references in this Decision to specific parts of the record are intended to assist the reader in understanding the Commission's reasoning relating to a particular matter and should not be taken as an indication that the Commission did not consider all relevant portions of the record with respect to that matter.

4.1 Impact of Carbon Appeal Decision

50 The parties disagreed with respect to the impacts of the Carbon Appeal Decision on the ability of the Commission to adjust rates as of the Adjustment Date and on the need for a new approval under subsection 26(2) of the *Gas Utilities Act* in respect of the lease of the Carbon storage capacity to ATCO Midstream.

51 Interim Order 2005-133 was issued to preserve the status quo at the time relating to Carbon. The Order provided:

> (1) The Carbon Storage facility and the Carbon producing properties and all associated property and assets in the AGS 2004 rate base, adjusted in the ordinary course as required, shall continue in AGS' rate base until such time as the Board may otherwise determine.
>
> (2) AGS shall continue to include in revenue requirement all operating expenses, working capital, depreciation, taxes, return, and other related costs and shall continue to account for applicable revenue credits, in respect of the Carbon related assets in the same manner as it does presently, with any necessary adjustments, until such time as the Board may otherwise determine.

(3) AGS may apply for new capital additions to rate base in respect of the Carbon related assets in the ordinary course during the time period that this Interim Order is in effect.

(4) AGS is given approval to lease the entire storage capacity of the Carbon storage to ATCO Midstream for the 2005/2006 storage year and for each subsequent storage year until such time as the Board may otherwise determine.

(5) On November 22, 2004, the Board issued direction with respect to a placeholder of $0.45/gigajoule to be used commencing April 1, 2005 in respect of the fee to be paid by ATCO Midstream in the 2005/2006 storage year in respect of a storage year lease of the entire storage capacity of the Carbon facility. The Board continues to consider that the use of such a placeholder is appropriate and amends the previous order by directing AGS to reflect such placeholder in its 2005 revenue requirement and in the revenue requirement of each subsequent year until such time as the Board may otherwise determine.

(6) The Riders G, H and I will continue in effect and the current process to establish their value on a monthly basis will continue until such time as the Board may otherwise determine.

(7) This Interim Order is effective as of the date hereof and shall remain in effect until such time as it is terminated or otherwise modified by the Board.

52 In Decision 2007-005 the Board made the interim directions set out in Order U2005-133 final stating:

> Given the above conclusions, the Board considers that Order U2005-133 should continue to remain in place on a final basis. Accordingly all Carbon related amounts approved by Decisions 2006-004, 2006-083 and 2006-133, (other than lease fee amounts payable by Midstream for the 2005/2006 storage year and subsequent years) that were subject to reconsideration following the outcome of the Board's determination with respect to the Board's jurisdiction over Carbon are hereby finalized. The amount of the lease payment would remain a placeholder until completion of a Part 2 Module.[21] (footnotes omitted)

53 As a result of Decision 2007-005 ATCO Gas was directed to maintain Carbon in rate base and revenue requirement and to lease the entire storage capacity to ATCO Midstream until such time as the Board may otherwise determine.

54 In the Carbon Appeal Decision the Court determined that the Board erred in law or jurisdiction when it included Carbon in rate base as an asset used or required to be used to provide service to the public when the only function of the Carbon facilities was to generate revenue.[22] The Court did not address the three additional question on which leave to appeal had been granted[23] stating that the other questions:

> ...were predicated on its conclusion that the Carbon storage facility could be kept in rate base as a revenue generation asset. Our conclusion to the contrary undermines the assumption on which the Board answered these remaining questions, and the basis on which leave to appeal was granted. In the circumstances, it is neither necessary nor advisable to answer the remaining questions at this time.[24]

55 The Court then stated: "[T]he appeals are allowed and the matter is remitted to the Alberta Utilities Commission to be dealt with in a manner consistent with these reasons."[25]

56 The Carbon Appeal Decision raises three issues for consideration in this Decision:

(a) Can the Commission adjust rates as of the Adjustment Date to reflect the findings of the Court as interpreted by the Commission in Decision 2009-253 or would such an adjustment constitute retroactive or retrospective ratemaking?

(b) Is the effect of the Carbon Appeal Decision to invalidate or vacate the approvals provided by Order U2005-133 and Decision 2007-005 of the lease of the storage capacity to ATCO Midstream?

(c) If the prior approvals have not been invalidated or vacated by the Carbon Appeal Decision, are additional approvals still required with respect to the lease to ATCO Midstream given that the approvals were provided in the context of Carbon remaining in service and rate base?

57 The Commission will address each of these questions in turn.

4.2 Retoactive or Retrospective Ratemaking

(a) Can the Commission adjust rates as of the Adjustment Date to reflect the findings of the Court as interpreted by the Commission in Decision 2009-253 or would such an adjustment constitute retroactive or retrospective ratemaking?

Views of the Parties

Calgary

58 Calgary submitted that adjustments such as those requested by AGS in this proceeding raise the issue of intergenerational inequity. It is clear from the record of this proceeding that the customers of AGS on April 1, 2005 are not the same as the customers today. As set out in the Calgary evidence the number of customers has risen by over 13 percent.[26] Calgary submitted that the inequity issues are obvious. A collection starting in 2010 retroactive to April 1, 2005 would involve on the order of 75,000 customers who were not customers at the time of the retroactive date. Calgary submitted that the fact that there was growth of customers during that period of time indicates that not all those customers received or paid the storage and production rider nor were they all charged the cost of service associated with the Carbon assets for that full period. This is what gives rise to the intergenerational equity. ATCO is seeking to have customers in 2010 and beyond pay it the requested amounts when it is clear just from the growth that they are not necessarily the same customers, even without taking into consideration the turnover of rate payers.

59 Calgary noted that ATCO justified its proposal to violate the principle of intergenerational equity with the concept of impracticality. Calgary submitted that impracticality is not the issue nor should it even be a significant consideration. The issue is fairness and equity. Calgary argued that the regulatory process should not allow ATCO to avoid the rigors that would be necessary to recover these funds in the usual manner by a non regulated entity seeking to recover 'overpayments.'[27]

60 In the oral hearing Commission Member Yahya questioned the witnesses for Calgary/UCA as to the source of the principle that intergenerational inequity is to be avoided.[28] In Argument Calgary indicated that the source for the principle is found in both the legislation and the case law dealing with retroactive ratemaking. Calgary suggested that the Alberta *Gas Utilities Act*, like the other utility statutes in Alberta provides for rate setting on a prospective basis, except for the year in which the proceeding is initiated.[29] One of the primary reasons for that, as has been acknowledged by the Supreme Court[30] and the Alberta Court of Appeal,[31] is to avoid imposing shortfalls, or surpluses, on current customers of a utility created by previous generations of consumers. That is, to maintain intergenerational equity.[32]

61 Calgary argued that retroactive ratemaking is prohibited in rate regulation except where the rates are expressly specified to be interim.[33] Where rates are not interim the Commission cannot retroactively change those rates even where the rates charged were less than what was fair and reasonable. Calgary submitted that that the April 1, 2005 rates are in no way "interim," and there are no deferral account considerations. The rates were finalized in 2007-063 and not subject to adjustment.[34]

62 Calgary submitted that TELUS Communications Inc. v. Canada (Radio-television and Telecommunications

Commission), [2005] 2 F.C.R. 388 (TELUS Decision) does not apply to these proceedings. Calgary stated that in the TELUS Decision, the Canadian Radio-television and Telecommunications Commission (CRTC) had, unintentionally, altered the rates for different type of conduit in British Columbia. Telus appealed the decision to vary the order. Calgary summarized the findings of the Federal Court of Appeal as follows:

1) A decision rendered without jurisdiction is a nullity. However, once the nullity is addressed, the CRTC was still under a statutory duty to make a correct decision and ought to be allowed to fulfill its duty.

2) The CRTC, in revisiting its original order, was not engaged in setting rates and as a result was not engaged in retroactive ratemaking.[35]

63 Calgary submitted that the Federal Court of Appeal found that where the CRTC was not engaged in setting rates a decision to remedy a previous error is not retroactive ratemaking, even if that is the effect. That circumstance is distinguished from the Carbon case as the Commission was engaged in setting rates and did set rates in U2005-133 and 2007-005. Consequently, the TELUS Decision is not relevant to the situation before the Commission in this proceeding.[36]

PICA

64 Given the extent of the intergenerational inequity that would arise if the recovery/refund were imposed on an across the board basis, PICA recommended that the Commission approve one of the approaches to recover/refund recommended by the UCA[37] in order to reduce the intergenerational inequity. PICA recognized this may entail a relatively high cost for implementation.

UCA

65 The UCA expressed concern about the retroactive recovery of the amounts claimed by ATCO from customers who were non participants in the storage and production rider revenues:

> Thus there are at least a total some 62,573 customers who either in whole or in part did not participate in the activities occurring during the [ATCO] proposed recovery period of the Carbon revenue credits. From a ratepayer perspective, it would not appear to be either fair or reasonable to impose the full cost of these activities on them based upon their respective level of participation. Again, we are dealing with history and actual billings, both for cost and revenue credits. This intergenerational inequity must be recognized. Failure to do so imposes a penalty on numerous customers who were non participants in the events which [ATCO] seeks to redress.[38]

66 The UCA recommended the following methods of recovery, which it considered were more equitable than the one proposed by ATCO:

> The starting point is to understand that the Carbon revenue credits are line items on customer's bills. Thus each customer knows the amount that they received under the Carbon revenue Credit throughout the entire time period. From both an equity and intergenerational point of view, it would be completely appropriate to prorate the Carbon revenue recovery based on a proportional amount in relationship to the amount the customer received by month over the time frame. A second alternative would be to apportion each individual year recovery based upon the amounts the customer received in a given year. A third alternative would be to apportion the total amount of the recovery based upon the total amount of revenue credit each customer received over the

> time frame. All of these methods recognize the amounts actually received and in turn would recover the return of the revenue credit in some proportion to the amount received. Additionally, all these methods would in whole or in part recognize the intergenerational issues of imposing the recovery of the Carbon revenue credit claw back on customers who did not participate in whole or in part in the revenue credits. If the objective is to restate history and remove Carbon effective April 1, 2005, then only those customers who benefited from the revenue credit should be compelled to refund the credit.[39]

The foundation of the UCA proposals is to treat ratepayers in the fairest manner possible, in proportion to the benefits received and the costs paid assuming that the requested refund from customers is not deemed to be retroactive.[40]

67 In the event the Commission directs that a refund be paid by AGS ratepayers, the UCA submitted that "the method of repayment proposed by AGS and currently in effect is not consistent with Bonbright's 'Attributes of a Sound Rate Structure' nor would it be consistent with 'the desirable characteristics of utility performance'. Although not perfect, the UCA's first alternative is the fairest of the three alternatives proposed by the UCA and will still result in full recovery of the amount, if any, determined to be owed by the Commission."[41] This recovery mechanism provides three superior results.

> 1. It recovers the Carbon revenue credits from customers on a basis, as close as possible, to which they were received by customers.
> 2. It recognizes that some customers were receiving revenue credits for the entire period and others for only part of the period.
> 3. It completely eliminates any imposition on those customers who came on the system on or after July 1, 2008 when the Carbon riders were effectively suspended. Under this methodology the ultimate level of fairness and equity is achieved.[42]

68 The UCA submitted that the Court remitted the matter back to the AUC "... to be dealt with in a manner consistent with these reasons." None of the "reasons" indicate or suggest in any way the manner in which the error should be corrected and, in particular, that there should be a retroactive adjustment to rates previously paid by customers. Similarly, it did not provide any guidance as to whether there should be an Adjustment Date and, if so, whether it should be a date which preceded the issuance of the Court's decision on May 27, 2008. With regard to the latter point, the UCA argued that the Commission will note that the Alberta Rules of Court (Regulation AR 390/68) provides that, absent a direction to the contrary "Every judgment and order takes effect from (a) the date of pronouncement..."[43][44]

69 The UCA submitted that although the Commission approved an Adjustment Date (i.e. April 1, 2005) that preceded the effective date of the Court's decision, being May 27, 2008, it did not address the implications of and its authority to impose retroactive rates.[45] The UCA submitted that the issue of retroactivity is a primary concern in this proceeding.

70 The UCA referred to the DGA [deferred gas account] Appeal Decision and submitted that the only exception to the rules against retroactive ratemaking relates to rates which have been determined to be and clearly understood by ratepayers to be "interim." There can be no support for any suggestion that "final" rates can be retroactively adjusted even if they resulted from an error on the part of the Board.[46]

71 The UCA also argued that ATCO ignored the subsequent and very important comments of the Alberta Court of Appeal in the recent DGA Appeal Decision which refused ATCO's application to recover outstanding amounts in its Deferred Gas Accounts. ATCO completely ignores the specific comments of the Court:

> Utility regulators cannot retroactively change rates (*Stores Block* at para. 71) because it creates a lack of certainty for utility consumers. If a regulator could retroactively change rates, consumers would never be assured of the finality of rates they paid for utility services.[47]

The majority of the Court also stated:

> Even though this was not prohibited ratemaking *per se*, the long delays gave rise to inter-generational equity issues which lie at the heart of the prohibition against retrospective ratemaking." [Emphasis added by the UCA.][48]

72 The UCA argued that irrespective of how AGS's Application is characterized, if approved, it will, by definition, constitute retroactive ratemaking in the sense that benefits previously received, in the form of revenue requirement offsets (going back to April 1, 2005), will be refunded by current and future customers. A substantial number of these customers did not receive any benefit from the revenue offset and may well be concerned when they are directed to participate in any refund.[49]

73 The UCA referred to the Stores Block Decision where the Supreme Court referenced the question of rate refunds generally:

> The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established through out the various provinces that utility boards do not have the authority to retroactively change rates.[50] [Emphasis added.]

74 The UCA also argued that the comments of the Supreme Court of Canada should also be taken in the context of section 40(a) of the *Gas Utilities Act.* This section provides that in "fixing just and reasonable rates, tolls or charges" the Commission is limited to consideration of the revenues and costs of the owner (i.e. AGS) that are applicable to the fiscal year of the owner in which the proceeding is initiated and a subsequent, consecutive, fiscal year. This would suggest that the Commission has "no power," to use the terms employed by the Supreme Court of Canada, to consider revenues and costs for any period prior to AGS's 2009 fiscal year.[51]

75 The UCA submitted that there is absolutely no suggestion by the Board that the rates approved in the Order U2005-133 would be changed on a retroactive basis.[52]

76 In Decision 2007-005 the Board confirmed its position that Riders G, H and I were intended to have been approved as final rates in the following words:

> Given the above conclusions, the Board considers that Order U2005-133 should continue to remain in place on a final basis. Accordingly all Carbon related amounts approved by Decisions 2006-004, 2006-083 and 2006-133, (other than lease fee amounts payable by Midstream for the 2005/2006 storage year and subsequent years) that were subject to reconsideration following the outcome of the Board's determination with respect to the Board's jurisdiction over Carbon are hereby finalized. The amount of the lease payment would remain a placeholder until completion of a Part 2 Module.[53] [Emphasis added.]

77 The UCA submitted that customers were entitled to assume that Riders G, H and I would not be changed unless and until the Board approved a change in the fee payable by ATCO Midstream. This did not occur.[54] Similarly, in the Board's decision in ATCO Gas' 2005-2007 GRA, Phase II, dated April 26, 2007, the Board stated "Accordingly, the rates for 2005 and 2006 are hereby made final."[55] The UCA submitted that the Commission has no authority to retroactively change rates, particularly those which have been determined to be "final."[56]

78 The UCA submitted that ratepayers should be treated in the same fashion as ATCO. The concept of like treatment in terms of fairness, reasonableness and parity should be the guiding lights for the return of the Carbon revenue riders. There is a fundamental inequity that a ratepayer who first came on the system on June 1, 2008 is currently being required to refund amounts that occurred in April 2005. The UCA submitted that its Option 1 is by far the most fair and equitable method of charging ratepayers.[57]

79 The UCA also cited Laycraft J.A. in the *Coseka Resources Ltd. Decision* in addressing interim rates as an exception to the prohibition against retroactivity:[58]

> 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.[59] [Emphasis added].

80 The UCA also submitted that the TELUS Decision can be distinguished and is of little, if any, support for ATCO's position. In reaching this decision, the Court went on to acknowledge the CRTC's conclusion that "...as a matter of regulatory policy, rates approved on a final basis should not generally be subject to adjustment... ."[60] It also stated with regard to the setting of rates retroactively or retrospectively that "...the CRTC, in revisiting Order 2000-13, was not engaged in an exercise of retrospective rate setting, [and] there is no need to address this issue."[61][62]

ATCO

81 ATCO argued that every filing for Riders "G", "H", and "I" that ATCO was required to make under compulsion of Order U2005-133 clearly identified that the filings were being made over the objections of ATCO regarding the jurisdiction of the Commission to issue the orders and decisions related to Carbon that were the subject of the successful appeals.[63]

> Order U2005-133 for the bulk of the refund period was an interim order. It was under appeal throughout its existence and even after it was made final. Furthermore, the riders used to provide to customers the revenues related to the Carbon assets were and continue to be subject to deferral account treatment. The use of placeholders to address matters outside of a General Rate Application has become common place, and is a well known practice. This is the proceeding which finalizes the Carbon placeholders. There is nothing retroactive occurring. The effect of the Court order is to require the Commission to correct its error now in order that tolls may be just and reasonable.[64]

82 ATCO submitted that refunding ATCO Gas back to April 1, 2005 does not constitute retroactive or retrospective ratemaking. ATCO referred to Decision 2009-067 at paragraph 32 and Decision 2009-253 at page 15 for support for this statement.[65]

83 ATCO Gas noted that the Court of Appeal in the Carbon R&V Appeal Decision also has upheld Decision 2009-253 which established the effective date of the Carbon adjustments as April 1, 2005 stipulating that the date was the correct interpretation of the Carbon Appeal Decision.[66]

84 In the response to AUC-UCA-6, the UCA has suggested three alternative methods for recovery of the amounts owed to ATCO Gas as of April 1, 2005. Each of the alternative methods would require ATCO Gas to not only identify the customers who received the revenue credits in previous years back to April 1, 2005, but to also total the amount received by each customer by month, year and for the full period in question. ATCO Gas submitted that there are a number of issues with regard to these recommendations which make them impractical:

> First, it should be noted that the payment of the riders to customers over the period in question did not necessarily coincide with the timing of the payment of the cost of service related to the Carbon assets. Due to regulatory lag, ATCO Gas' delivery rates in any given year will often include amounts related to approved revenue requirements for previous years. [This] would still not address the intergenerational effects that the UCA is concerned about.
>
> Second, ATCO Gas is not responsible for the final billing of customers. That is the responsibility of retailers and the default supply provider. ATCO Gas provides billing information to retailers

> and the default supply provider based on site IDs. While ATCO Gas maintains some limited historical distribution billing information on its billing system by site ID, it does not track billing information by customer. The administration of the alternatives suggested by the UCA would therefore fall to the retailers and the default supplier. ATCO Gas does not know how administratively difficult or costly this would be for retailers or if it even could be done at all.
>
> Third, ATCO Gas currently has an interim rider in effect as of April 1, 2010 which has commenced recovery of a portion of the Carbon amounts owed to it. The UCA has not indicated what would occur with respect to that interim rider, but based on the three alternatives posed by the UCA, it would appear that ATCO Gas would have to perform a refund of the interim rider on some basis, which would add to the administrative cost and complexity associated with the UCA's proposals.
>
> Finally, ATCO Gas notes that it is not aware of being required to perform a recovery or refund of amounts on a customer specific basis in its past history. The UCA also acknowledged that it is unaware of any past decisions by the regulator in Alberta that required the implementation of the types of alternatives proposed by the UCA. The AUC recently issued Decision 2010-102 related to the 2003 - 2007 Benchmarking and ATCO I-Tek Placeholders True-up proceeding. That Decision impacted the revenue requirement of ATCO Gas required to perform a customer specific adjustment related to the finalization of those placeholder amounts back to the year 2003.67 (footnote omitted)

85 ATCO also noted that none of Calgary, UCA or PICA even considered section 29 of the *Alberta Utilities Commission Act.* That section has direct application here. That section requires the Commission on a direction back from the Court to effect the requested changes. ATCO submitted that what all three interveners miss, in particular, is that the rates struck on and after April 1, 2005 are not just and reasonable to the extent they thereafter include the costs of Carbon and its operations. That is the effect of the Court's decision. There can be no retroactivity when the initial rates subject to adjustment were found not to be just and reasonable. Rather, ATCO argued that the Commission is obliged to now make the decision it failed to do earlier - to determine just and reasonable rates excluding Carbon in accordance with the directions of the Court.[68]

86 ATCO also noted that the UCA acknowledged that it is unaware of any past decisions by the regulator in Alberta that required the implementation of the types of rate alternatives proposed by the UCA. ATCO noted that the AUC recently issued Decision 2010-102[69] related to the 2003-2007 Benchmarking and Placeholders True-Up proceeding, which impacted the revenue requirement of ATCO even further back than the Carbon Compliance proceeding does. ATCO argued that there appears little concern on the part of the UCA or Calgary for intergenerational issues related to a refund to the DGA on the part of ATCO with respect to the potential adjustment arising from the DGA Appeal Decision. Given the long history of making such adjustments to all customers' rates, customers can be said to have been on notice and come to expect that refunds and recoveries would be handled in this manner.[70]

87 ATCO submitted that the presence or absence of an interim toll, in the present context, is irrelevant. What is relevant, particularly when interpreted in connection with section 29 of the *Alberta Utilities Commission Act*, is:

> (a) the original decisions and orders are not final and did not set just and reasonable rates since these decisions and orders were made without jurisdiction.
>
> (b) the Commission's obligation to determine just and reasonable rates is unfulfilled until it complies with the Court's directions to remove Carbon costs and revenues from rates and issue new rate orders accomplishing that result.

The TELUS Decision, therefore, is consistent with the approach advocated by the ATCO.[71]

88 ATCO argued that if the Court of Appeal is powerless to correct for an erroneous decision other than on a going forward basis, that would be equivalent to saying there was no Court decision at all. Such an interpretation of the enabling legislation, therefore, begs why then, the Legislature would bother to permit appeals on questions of law and jurisdiction in the first place.[72]

Views of the Commission

89 Calgary referred to the recent decision of the Alberta Court of Appeal in the DGA Appeal Decision as confirmation for the proposition that retroactive ratemaking is prohibited and that rates once established can not be changed except in the case of interim rates or deferral accounts. Calgary takes the position that Carbon related rates made interim by Order U2005-133 were made final in Decision 2007-005. Consequently, rates can not be adjusted back to the Adjustment Date even if a rate adjustment would be required in order to reflect the findings of the Court in the Carbon Appeal Decision. Calgary stated:

> In Calgary's submission the principle of prospective ratemaking, and the prohibition against retroactive, or retrospective, ratemaking confirmed by the Court of Appeal, leads to the conclusion that the Commission cannot start adjusting rate transactions that were made in the past even if the Court's decision leads to the conclusion that those rates were too low (at that time) due to the inclusion of Carbon in rate base. While ATCO may consider that including Carbon in rate base after April 1, 2005 resulted in rates which were too low the legislation, and the case law, provides that no retroactive rate adjustment can be made.[73]

90 The UCA agreed with Calgary that the adjustments sought by ATCO would constitute retroactive or retrospective ratemaking. In addition to U2005-133 and Decision 2007-005 the UCA refers to several other decisions of the Board including Decision 2007-026[74] and Decision 2007-063[75] where the rates for 2005, 2006 for 2007 were made final, other than with respect to certain placeholders including the amount of the lease payment to be paid by ATCO Midstream for the use of Carbon storage capacity. The UCA submitted that the Commission has no authority to retroactively change rates which have been determined to be "final."

91 The UCA concluded that there is no judicial authority, including the Carbon Appeal Decision to "suggest that, because the Board erred in law, the rules against retroactivity were suspended or did not apply."[76]

92 ATCO submitted that the ability to adjust rates back to the Adjustment Date (considered at that time to be October 10, 2006) has already been decided by the Commission in Decision 2009-067. In Decision 2009-067 the Commission stated:

> 32. An Adjustment Date of October 10, 2006 is also consistent with Order U2005-133. As referenced above, Order U2005-133, Decision 2006-004 and Decision 2007-005 all contain language which anticipates adjustments to revenue requirement upon resolution of the jurisdictional issues relating to Carbon. The jurisdictional issues requiring resolution related to whether or not Carbon was used or required to be used for either load balancing or revenue generation. The issue with respect to load balancing was resolved by Decision 2006-098 as of October 10, 2006. The Carbon Appeal Decision resolved the revenue generation issue as of May 27, 2008. As already stated, only operational uses were determined to be valid uses for utility assets by the Carbon Appeal Decision. Accordingly, only October 10, 2006 should be considered as a date for adjustments to revenue requirement. Given the adjustments to revenue requirement contemplated by Order U2005-133, Decision 2006-004 and Decision 2007-005, an Adjustment Date of October 10, 2006, the date of Decision 2006-098, would not be retroactive ratemaking.[77]

93 ATCO referred to subsection 29(14) of the *Alberta Utilities Commission Act* which requires the Commission to vary or rescind a decision or order in accordance with a judgment of the Court of Appeal or the Supreme Court of Canada. In ATCO's submission interveners were ignoring the requirements of the legislation in suggesting that adjusting rates back to the Adjustment Date as a result of the Carbon Appeal Decision was retroactive or retrospective ratemaking.[78] ATCO further submitted:

> There can be no retroactivity when the initial rates subject to adjustment were found not to be just and reasonable. The Commission is obliged to now make the decision it failed to do earlier -- to determine just and reasonable rates <u>excluding Carbon</u> in accordance with the directions of the Court.[79]

94 Parties were also asked by the Chair for their views in argument on whether the Federal Court of Appeal's decision in TELUS Communications Inc. v. Canada (Radio-television and Telecommunications Commission), [2005] 2 F.C.R. 388 (TELUS Decision) had any bearing on this proceeding. In that Decision the Court found that the Canadian Radio-television and Telecommunications Commission (CRTC) had, unintentionally, altered the rates for a certain types of conduits in British Columbia in a decision in 2000. Three years later in Telecom Decision CRTC 2003-54, the CRTC varied its original decision by restoring the previous rates in place effective as of the date of the original decision. Telus appealed the CRTC decision to vary the original order submitting that the variation of final rates amounted to retroactive or retrospective ratemaking. The Federal Court of Appeal denied the appeal stating:

> With respect, I believe the appellant misapprehends and therefore misstates what legally occurred in the case at bar in Telecom Decision CRTC 2003-54. The CRTC did not retroactively or retrospectively set rates as the appellant contends. Rather, it varied its decision by setting aside that part of its decision which was rendered in the absence of any evidence to support it and, therefore, in excess of jurisdiction and in violation of the fundamental duties imposed upon it by the Act. The effect, as it appears from paragraph 54 of its decision, was simply to restore the *status quo ante* which the invalid decision had altered. There was no setting of rates in Telecom Decision CRTC 2003-54.[80]

95 The Court went on to determine that in varying its earlier decision "the CRTC simply acknowledged or recognized the nullity of part of its Order,"[81] the part relating to the subject conduits. The Court determined that "a Decision rendered in the absence of evidence, like a decision rendered without jurisdiction, is a nullity."[82]

96 Calgary submitted that the Federal Court of Appeal found that where the CRTC was not engaged in setting rates a decision to remedy a previous error is not retroactive ratemaking, even if that is the effect. Calgary submitted that the Board was engaged in setting rates in Order U2005-133 and in Decision 2007-005 and therefore the TELUS Decision did not apply to the present proceeding.

97 The UCA points to the conclusion of the Federal Court of Appeal that in overturning its earlier decision the CRTC was not setting rates, merely restoring the status quo ante. Given that ATCO is requesting the Commission to set new rates as of the Adjustment Date, the UCA submitted the TELUS Decision does not apply.[83]

98 ATCO referred to its argument dated March 30, 2009 filed in connection with the preliminary questions process that lead to Decision 2009-067. At page 12 of that Argument the ATCO Utilities referred to the TELUS Decision and stated:

> Accordingly, Interim Order U2005-133 and the subsequent Decision 2007-005 finalizing that Order, are now of no effect. They have been rendered nullities.

99 The EUB decisions that approved the Carbon-related portions of the AGS rates, to the extent they did so, must be considered as a nullity from and after the Adjustment Date in accordance with the Carbon Appeal Decision and the TELUS Decision. As a consequence, rate adjustments in the form of rate collection riders are required prospectively to reflect the accounting corrections resulting from the removal of Carbon from ATCO's revenue requirements and rates effective as of the Adjustment Date. These rate adjustments are necessary to fulfill the direction of the Court of Appeal. As a result the Carbon-related portion of the AGS rates and riders in place since the Adjustment Date (whether previously declared final or not) are not valid. This finding is based on section 29(14) of the *Alberta Utilities Commission Act* and the finding of the Court of Appeal in the Carbon Appeal Decision that the Board lacked the jurisdiction to retain Carbon in utility service, revenue requirement and rates on the basis that it performed a revenue generation function.

100 Parties addressed the ways in which the rate adjustments necessary to fulfill the direction of the Court of Appeal could be implemented. ATCO proposed that all current customers would be responsible to reimburse ATCO for the under collections. The UCA expressed concerns that ATCO's approach would result in some customers who did not benefit in the past being required to reimburse ATCO for benfits they did not receive. The UCA proposed three alternatives each of which would require ATTCO to identify which of its current customers received the benefit of the lower rates in the past. It would only be those customers who would be called upon to reimburse ATCO. The UCA made it clear that ATCO would be entitled to recovery of the full amount.[84] The Commision disagrees with the UCA's approaches.

101 The Commission understands that intergenerational equity issues will arise when adjusting for the prior jurisdictional error which required ATCO to charge rates lower than it would be otherwise entitled to charge had the jurisdictional error not been made. All three of the UCA's approaches and ATCO's approach to implement the necessary adjustments raise intergenerational equity challenges. In order to comply with the Carbon Appeal Decision and permit ATCO to recover all of the amounts to which it is entitled, the Commission must choose an option that necessarily creates some degree of intergenerational inequities. Given the constantly changing makeup of customers, all of the UCA approaches would require those remaining customers who received the benefit of lower rates in the past to reimburse ATCO today for more than the benefit they received. ATCO's approach would require all present customers to share in the reimbursement thereby spreading responsibility for the reimbursement over the largest possible group of customers. The Commission has chosen to adopt the ATCO approach in order to minimize the cost and complexity of implementing the Carbon Appeal Decision, and rejects the UCA's approach given the potential of those approaches to result in some customers being responsible for relatively large reimbursement payments.

102 For the reasons stated above Order U2005-133, Decision 2005-063 and Decision 2007-005 are hereby varied in accordance with the directions of the Court of Appeal in the Carbon Appeal Decision so as to exclude Carbon from utility service, utility rate base and utility rates as of the Adjustment Date. The Commission will address the rate riders that are required to reflect the accounting corrections resulting from a removal of Carbon from regulated utility service as of the Adjustment Date later in this Decision.

4.3 Status of Storage Capacity Lease

> **(b) Is the effect of the Carbon Appeal Decision to invalidate or vacate the approvals provided by Order U2005-133 and Decision 2007-005 of the lease of the storage capacity to ATCO Midstream?**

4.3.1 Order U2005-133

103 The EUB included the following related to the storage lease in the Order section of Order U2005-133:

> THEREFORE, IT IS ORDERED THAT:
>
> (2) AGS shall continue to include in revenue requirement all operating expenses, working capital, depreciation, taxes, return, and other related costs and shall continue to account for applicable revenue credits, in respect of the Carbon related

assets in the same manner as it does presently, with any necessary adjustments, until such time as the Board may otherwise determine.

(4) AGS is given approval to lease the entire storage capacity of the Carbon storage to ATCO Midstream for the 2005/2006 storage year and for each subsequent storage year until such time as the Board may otherwise determine.

(5) On November 22, 2004, the Board issued direction with respect to a placeholder of $0.45/gigajoule to be used commencing April 1, 2005 in respect of the fee to be paid by ATCO Midstream in the 2005/2006 storage year in respect of a storage year lease of the entire storage capacity of the Carbon facility. The Board continues to consider that the use of such a placeholder is appropriate and amends the previous order by directing AGS to reflect such placeholder in its 2005 revenue requirement and in the revenue requirement of each subsequent year until such time as the Board may otherwise determine.

(7) This Interim Order is effective as of the date hereof and shall remain in effect until such time as it is terminated or otherwise modified by the Board.

104 Order U2005-133 was made in response to correspondence from ATCO Gas South described in the first paragraph of Order U2005-133 as follows:

> The Alberta Energy and Utilities Board (Board) received correspondence from ATCO Gas South (AGS), dated March 8, 2005, which purports to withdraw "all plans, proposals or options previously filed by it in this proceeding pursuant to the Board's orders, including Direction #5 in Decision 2004-022." The letter also confirms at page 5 statements made by AGS in its submissions on the Board's Preliminary Questions dated January 24, 2005 and February 7, 2005 referring to "management's decision not to include any Carbon-related costs or revenues in connection with the 2005/2006 storage operation in its jurisdictional rates for distribution service, effective April 1, 2005." At page 6 "...AGS provides notice that all related riders (Riders G, H, I) will be discontinued effective April 1, 2005."

105 The Board described Order U2005-133 as an Interim Order and included the following regarding how long it was to remain in place:[85]

> This Interim Order shall remain in place until such time as the Board determines that there has been a final disposition of:
>
> (a) the matters presently before the Court of Appeal;
> (b) the matters being considered by the Board relating to Carbon;
> (c) any additional matters relating to Carbon that the Board may be required to decide as a result of subsequent filings of AGS or an intervener; and
> (d) any additional matters resulting from any direction from the Court of Appeal.

4.3.2 Decision 2007-005

106 The following summary is from the first paragraph of Decision 2007-005:

> In this Decision the Board has determined that the Carbon storage and associated production assets are used or required to be used for purposes of generating revenue to offset customer rates. This finding was made following a review of the unique history and evolution of Carbon which the Board determined has included revenue generated from its substantial excess capacity as an integral aspect of its utility utilization. Accordingly, it is appropriate for the Carbon assets to

> remain in regulated rate base subject to the Board's jurisdiction. The Board will conduct a further Part 1B Module process to determine if it is appropriate that 100% or some lesser portion of these assets and their associated revenue should continue to be used to offset customer rates.

107 The Board also finalized the interim Orders granted under Order U2005-133 in Decision 2007-005 stating:

> Given the above conclusions, the Board considers that Order U2005-133 should continue to remain in place on a final basis. Accordingly all Carbon related amounts approved by Decisions 2006-004, 2006-083 and 2006-133,74 (other than lease fee amounts payable by Midstream for the 2005/2006 storage year and subsequent years) that were subject to reconsideration following the outcome of the Board's determination with respect to the Board's jurisdiction over Carbon are hereby finalized. The amount of the lease payment would remain a placeholder until completion of a Part 2 Module.[86]

108 AGS included the following as part of this Application:[87]

> ATCO Gas is filing this Alberta Court of Appeal Compliance Application requesting the Board formally set aside Order U2005-133 and Decisions 2005-063 and 2007-005 and grant a new Order implementing the Court of Appeal Decision as directed, restoring the effect of what ATCO Gas outlined in its March 8, 2005 letter. On that basis, the Carbon related assets should be removed from ATCO Gas' distribution service rates effective April 1, 2005; the placeholder lease rate of $0.45/GJ for utility purposes should be made $0/GJ effective April 1, 2005; ATCO Gas should be allowed to recover all amounts it was wrongly directed to provide to customers through Riders G, H, and I on and after April 1, 2005, and interest should be applied to the net amounts owed to ATCO Gas consistent with AUC Rule 23. These actions are required to implement the Court's determination that the Board's Order and Decisions were made without legal authority. ATCO Gas is entitled to be returned to the position it would have been in but for the impugned Order and Decisions.

Views of the Parties

109 AGS indicated that the Commission has repeatedly affirmed that its Decisions and Orders would be adjusted depending on the outcome of the jurisdictional review. AGS added that this is what is happening now under the direction of the Alberta Court of Appeal. AGS submitted that it is the Commission, not AGS, which must reverse its prior directions to reflect in just and reasonable rates the removal of the Carbon related costs which it unlawfully included in rates. AGS argued that that the current one-year lease was validly entered into under direction and with approval of the Commission and that it should not now be voided.[88]

110 Calgary indicated that while the Carbon Appeal relating to Order U2005-133, Decisions 2005-063 and 2007-105 consisted of four questions, the Court of Appeal considered only the first: "Did the Board err in law or jurisdiction when it included the Carbon facilities in the rate base as an asset used or required to be 'used to provide service to the public within Alberta' when the only function of those facilities is to generate revenue?"[89]

111 Calgary added that the Carbon Appeal Decision does not address the approval of the lease to ATCO Midstream and that, while having Carbon remain in rate base is never stated as a condition of the approval of the lease in Order U2005-133, the crediting of lease revenue however, is.[90] The lease from AGS to ATCO Midstream was not in the ordinary course of business of AGS. As a result the only authority for the lease from AGS to ATCO Midstream is section 26 of the *Gas Utilities Act*.[91]

112 AGS replied that the plain wording of Order U2005-133 approved the act of leasing Carbon capacity to ATCO Midstream effective April 1, 2005 to the present. AGS stated that the lease rate was a placeholder as of April 1, 2005 to be reviewed once the jurisdictional questions were finally resolved. AGS submitted that whether a section 26 approval may be required or not is irrelevant to removing Carbon from rates and restoring AGS to the position it would have been in had the jurisdictional error not been made.[92]

113 The UCA indicated that the Carbon Appeal was initiated by ATCO to the Alberta Court of Appeal, in which ATCO requested the Court to address five questions.[93] The UCA noted that the Court found it necessary to address only the first question and concluded that the Board had erred in law or jurisdiction "when it included the Carbon facilities in rate base..." It then "remitted" the matter to the Commission "...to be dealt with in a manner consistent with these reasons." The UCA submitted that the Court did not provide any direction as to how this should be done and, specifically, did not make any reference to an "Adjustment Date" or whether AGS was entitled to a refund of all or any portion of the amounts credited to customers under Riders G, H and I.[94]

114 The UCA indicated that of the seven issues addressed in Order U2005-133, only the first three related to retaining the Carbon facilities in rate base. The UCA added that the next three issues addressed in Order U2005-133 related to approval of the leasing arrangement to ATCO Midstream, the determination of a placeholder of $0.45/GJ and the continuation of Rate Riders G, H and I. The UCA submitted that these are all concerned with the section 26 approvals granted by the Board which is quite independent and distinct from any question as to whether these assets should or should not be in rate base.[95]

115 The UCA argued that these leasing arrangement issues were not considered by the Alberta Court of Appeal, nor were they held to be invalid.[96] The UCA stated that similarly, the other two "impugned" Decisions, those being 2005-063 and 2007-005, address a number of issues not directly or indirectly related to the Board's decision to continue the inclusion of the Carbon facilities in rate base. The UCA submitted that as a result, Order U2005-133, Decision 2005-063 and Decision 2007-105 have not been "vacated" nor is this term used in the Court's Decision.[97]

116 In its Reply Argument, Calgary indicated that it is somewhat confused by the ATCO position on Order U2005-133. Calgary added that at the outset of AGS' Argument, the utility submitted that Order U2005-133 was issued without authority and confirmed that AGS applied to have Order U2005-133 set aside. However, Calgary stated that in another section of AGS' Argument, the utility appeared to be arguing that the approval of the lease contained in Order U2005-133 is valid. Calgary submitted that if Order U2005-133 is invalid, or a nullity as is often referred to by AGS, then so is the approval of the lease to ATCO Midstream.[98]

117 In its Reply Argument, the UCA stated that from a purely legal standpoint, the Court did not suggest that the three impugned decisions were vacated, overturned, of no further force and effect vacated, or made without legal authority, as suggested by AGS.[99]

118 The UCA added in Reply Argument that the revenue credits received by customers, and which form the basis for the refund claimed, were paid pursuant to leasing arrangements with ATCO Midstream which were approved by the Board pursuant to its section 26(2) authority. The UCA added that these leasing arrangements have not been challenged and remain in full force and effect today. The UCA submitted that in the absence of a Court determination that these leasing approvals were made without authority, the Application is premature.[100]

Views of the Commission

119 The parties disputed the need for an approval for the current leasing arrangements between ATCO Gas and ATCO Midstream under section 26(2) of the *Gas Utilities Act.* Section 26(2) provides:

> 26(2) No owner of a gas utility ... shall ...
>
> (d) without the approval of the Commission,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them, or

...

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

120 The present lease arrangements with ATCO Midstream originally arose from the Uncontracted Capacity Agreement dated December 15, 1999 which is an addendum to the Gas Storage Services Agreement dated February 20, 1998 between Canadian Western Natural Gas Limited and ATCO Gas Services Ltd. (now ATCO Midstream).[101]

121 Decision 2004-022[102] approved a storage plan for the 2004/2005 storage year (April 1, 2004 - March 31, 2005). The storage plan included a lease to ATCO Midstream of the storage capacity of Carbon in excess of 16.7 petajoules at a rate of $0.45/gigajoule..

122 In a letter dated November 22, 2004 on Application 1357130 the Board confirmed approval for a lease of the entire storage capacity to ATCO Midstream for the 2005/2006 storage year (April 1, 2005 - March 31, 2006) at a placeholder rate of $0.45/ gigajoule. This direction was confirmed in a Board ruling dated December 23, 2004 on the same application.

123 ATCO has leased the entire storage capacity of Carbon to ATCO Midstream under a one year contract every year since Order U2005-133 was issued.[103]

124 Parties were asked by the Chair at the oral hearing for their views on whether the Carbon Appeal Decision vacated the entirety of Board Decisions U2005-133, 2005-063 and 2007-005 or only the portions of those decisions related to the retention of Carbon in utility service and rate base solely for revenue generation purposes.

125 Calgary stated in argument that the Carbon Appeal Decision did not address the portion of the decision relating to the lease to ATCO Midstream. Calgary stated:

> The question posed, and answered by the Court of Appeal in Carbon addresses only the inclusion of Carbon in rate base -- the first of the determination in Order U2005-133 and the determination in Decision 2007-005. It does not address the approval of the lease to ATCO Midstream.[104]

126 The UCA took a similar position stating: "...the Order and the two Decisions have not been 'vacated' nor is this term used in the Court's Decision."[105]

127 Ms. Wilson, witness for ATCO commented as follows on the validity of the Board approvals of the lease to ATCO Midstream in light of the Carbon Appeal Decision in an exchange with Commission Counsel:

> Q I'm interested in knowing if ATCO has a position on the validity of the Board approvals in respect of the lease to Midstream given ATCO's position that the Court of Appeal overturned Order U2005-133 and Decisions 2007-005, which, as we just went through, approved the lease on an interim basis and then it was made final?

> A MS. WILSON: Well, I think we're talking here about a chicken and an egg kind of situation; which has come first, Mr. McNulty. I would note, though, that I have [not] seen anything from the Commission that actually relieves ATCO Gas from having to comply with Order U2005-133, and I think that's the piece that's missing for us still.
>
> Q Okay. And so in the event that the Commission were to in its decision try to address your request to have those decisions formally set aside, what is it you want the Commission to do in respect of the lease?
>
> A MS. WILSON: Well, I don't think that we can undo what has already occurred to date. We can't go back in time, Mr. McNulty. The asset is nonutility as of April 1st, 2005, but we had to enter into the lease under compulsion of the order. It's -- we are where we are at this point.
>
> Q And is ATCO seeking from -- anything from the Commission in this application with respect to approval of the lease from Midstream on -- either in the past or on a go-forward basis?
>
> A MS. WILSON: I don't think that we're here to talk about on a go-forward basis, Mr. McNulty. I think that's something that ATCO Gas will likely have to address perhaps through some other filing to the Commission once the decision on this proceeding has been issued. However, I think we do require a decision from the Commission that recognizes the fact that we entered into that lease over the period in question under compulsion of Order U2005-133, and given where we are, we can't, in effect, undo that lease.[106]

128 On the basis that revenue generation was not a valid utility function, the Commission considers that the findings of the Court in the Carbon Appeal Decision have no bearing on the question of the ATCO Midstream lease or to any portion of Order U2005-133, Decision 2005 063 or Decision 2007-005 not relating to the inclusion of Carbon in utility service or utility rates. No other portion of the decisions under appeal was made without jurisdiction so as to render it a nullity. Other than acknowledging that the AGS revenue requirements and rates should not have included either Carbon costs or Carbon related revenues effective as of the Adjustment Date and approving the consequent prospective rate riders necessary to adjust for the removal of Carbon costs and revenues as of the adjustment date, no other action is necessary on behalf of the Commission to comply with the Carbon Appeal Decision. Likewise, no other action is required to address the matters otherwise approved or disallowed by the Board in the impacted decisions.

4.4 Lease Approvals and Section 26

> **(c) If the prior approvals have not been invalidated or vacated by the Carbon Appeal Decision, are additional approvals still required with respect to the lease to ATCO Midstream given that the approvals were provided in the context of Carbon remaining in service and rate base?**

Views of the Parties

Calgary

129 Calgary acknowledged that there has been no "sale" of Carbon although there is a lease of Carbon. Section 26(1)(d)(i) specifically includes the "lease" of the property of an owner of a gas utility as a disposition requiring prior Commission approval.[107]

130 Calgary submitted that the question posed, and answered by the Court of Appeal in Carbon addressed only the inclusion of Carbon in rate base -- the first of the determination in Order U2005-133 and the determination in Decision 2007-005. It does not address the approval of the lease to ATCO Midstream. That Carbon must remain in rate base is never stated as a condition of the approval of lease in Order U2005-133, the crediting of lease revenue however, is. The lease from AGS to ATCO Midstream was not in the ordinary course of business of AGS. As a result the only authority for the lease from AGS to ATCO Midstream is section 26 of the *Gas Utilities Act.*[108]

131 Calgary submitted that Order U2005-133 is not a nullity. The Court of Appeal found that the Commission erred in keeping Carbon in rate base, the first determination of Order U2005-133. It did not address the lease to ATCO Midstream. That lease was approved. The only authority for that approval is section 26 of the *Gas Utilities Act.* The approval was conditioned by the Commission, all within its authority.[109]

PICA

132 PICA agreed with Calgary's submission that the leasing of the Carbon assets to ATCO Midstream, the ending of the flow of lease benefits in the amount of $0.45 per GJ to regulated utility customers and the removal of carbon assets from rate base, effective April 1, 2005 indicated there was an effective disposition of the Carbon assets requiring section 26 approval by the Commission. PICA also submitted that there is nothing to indicate the lease, itself, which was approved in U2005-133, was overturned by subsequent decision.

UCA

133 The UCA argued that by requesting that the Commission reduce the lease rate to $0/GJ, effective April 1, 2005, ATCO appeared to acknowledge the Board's authority in granting the section 26 approvals and is simply asking that the conditions of approval be changed retroactively and refund of amounts previously directed by the Board to be paid to the benefit of customers. The UCA submitted that there is no justification for suggesting that there should be a refund of amounts paid pursuant to a section 26 approval.[110]

134 The UCA submitted that all of the historical leasing arrangements of the Carbon facilities have been acknowledged not to be in the ordinary course of business and were approved by the Board pursuant to and in accordance with its section 26 authority. These leasing arrangements were conditional upon receipt by CWNG and, subsequently, ATCO Gas, of an amount which eventually became $0.45/GJ of capacity. None of those approvals have ever been challenged or held to have been made without authority. It also appears that these leasing arrangements continue through to the present day.[111]

135 The UCA submitted that there are no Court decisions which provide exceptions or limit the Board's authority pursuant to section 26. In fact, in the Stores Block Decision, the Supreme Court of Canada made it quite clear that the Board could attach conditions to the approval of a sale and outlined several options available to it.[112] It stated:

> This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.[113][114]

136 The UCA submitted that the various section 26 approvals were validly made and remain in full force and effect and apply to the Carbon assets whether in rate base or not. The approvals remain in force and there is nothing which would justify ATCO Gas in receiving a refund of the amounts previously directed to be paid to the benefit of customers.115

137 ATCO stated, without support in the UCA's view that "Annual leasing, however, does not constitute retirement." The UCA submitted that the issue is not "retirement"; it is the disposition of assets which require Board/Commission approval pursuant to section 26 whether in rate base or otherwise and irrespective of the term of any lease. If one-year leases were held to be an exception, it would provide an opportunity for utilities to avoid the section 26 restrictions.

138 The UCA submitted that Order U2005-133 and Decisions 2005-063 and 2007-005 have not been "vacated" nor is this term used in the Court's Decision.[116] Irrespective of how this ATCO Midstream fee is categorized, there is nothing in the Court decisions which would suggest or imply that it should be changed or that the approvals of these leasing arrangements were made without authority.

ATCO

139 ATCO submitted that Order U2005-133 has not yet been rescinded. ATCO took the position that its historical practice of one-year leasing of some or all of the Carbon storage is maintaining the status quo with regard to the assets, as ATCO Gas was directed to do. Section 26 approvals were not required in past storage years nor should they be required now. ATCO indicated that a future long-term lease or sale, however, may require a Section 26 approval, but that is not within the scope of this proceeding.[117]

140 ATCO submitted that from and after April 1, 2005, Carbon was leased in accordance with historical practice to maintain the status quo as directed by the Board. White the UCA indicated that the lease to ATCO Midstream has been acknowledged not to be in the ordinary course of business, ATCO noted that no reference for this supposed acknowledgement was provided provided. Further ATCO submitted that there is also no "new economic data" as the term was used in the Stores Block Decision as suggested by PICA.[118]

141 ATCO argued that the UCA is also wrong to say that section 26 approvals have been required for the regular annual leasing over the past twenty years. While the pricing of the uncontracted capacity leases was subjected to prudency review under the broad ratemaking provisions of the *Gas Utilities Act*, section 26 approvals were never requested nor received by the regulator.[119]

142 ATCO argued that the UCA's interpretation of historical practice with respect to the Board action respecting the Uncontracted Capacity Agreement cannot be reconciled with the facts before the Commission in the Jurisdictional Review or in the Carbon Compliance process. Whether a section 26 approval may be required or not is irrelevant to removing Carbon from rates and restoring ATCO Gas to the position it would have been in had the jurisdictional error not been made.[120]

143 ATCO submitted that the historical practice maintained by ATCO Gas as part of the status quo included entering into one-year deals. They were not renewed automatically. The maintenance of the status quo reflected the practice long associated with selling uncontracted Carbon capacity (in varying amounts) over time.[121] The terms and conditions of the Lease were never formally approved prior to Interim Order U2005-133, only the prudence of the price. The leasing activity was conducted annually. It was not a continuous long term lease.[122]

Views of the Commission

144 Calgary submitted that the approval of the lease to ATCO Midstream provided by Order U2005-133 and Decision 2007-005 were granted in circumstances where Carbon was directed to remain in utility service and the revenues generated under the lease would be included in the determination of ATCO's revenue requirement.[123] In AUC --CAL-1(a) Calgary stated:

> A disposition to ATCO Midstream through a lease where the revenue is not going to customers has never been approved under section 26.

145 Calgary submitted, supported by PICA, that a new subsection 26(2) *Gas Utilities Act* approval is necessary in respect to the lease to ATCO Midstream.[124] The UCA submits that the prior subsection 26(2) approvals remain valid but that they were conditional on receipt of lease payments by ATCO Midstream for the benefit of ratepayers. This condition can not now be retroactively removed and the monies refunded to ATCO.[125] The Commission does not agree. The existing approvals are sufficient for the lease of Carbon to ATCO Midstream from the Adjustment Date up until the end of the current one year term of the lease. The refund to ATCO of amounts credited to customers in respect of the lease fee payments made since the Adjustment Date by ATCO Midstream does not, in the circumstances, invalidate these approvals because it does not result in a harm to customers and aligns with the findings of the Court of Appeal in the Carbon Appeal Decision that the Commission lacked the jurisdiction to compel ATCO to retain Carbon in utility service and rate base for revenue generation purposes.

146 In Decision 2009-004 the Commission considered the question of harm to customers and the need for a subsection 26(2) approval for the removal of Carbon from rate base. The Commission found no harm to customers and accordingly would have granted a subsection 26(2) approval for the removal of Carbon from rate base had it been requested to do so. In Decision 2009-004 the Commission stated:

> With respect to Carbon, the Commission determined above that an increase in rates resulting from the permanent removal of Carbon from rate base is not a valid financial harm to customers and, accordingly, the removal of Carbon will not harm customers. Customers are not legitimately harmed by the removal of Carbon because Carbon has been previously determined by the Commission to have no valid operational purpose and because revenue generation has been determined by the Court of Appeal to be an invalid reason to maintain Carbon in utility service. Therefore, had the Commission been requested in the Application to consider the removal of Carbon from rate base under section 26(2) of the GUA and section 101(2) of the PUA, it would have provided its approval, subject to the appropriate adjustments to revenue requirement and the resolution of the other matters on the Final Issues List approved in this Decision.[126]

147 The Commission determined in Decision 2009-004 that customers would not be harmed by the withdrawal of Carbon from rate base. The Commission also sees no harm to customers with respect to a lease of the Carbon storage capacity to ATCO Midstream for the period from the Adjustment Date to the end of the current one-year term.

148 Given the continuing validity of the existing approvals of the lease to ATCO Midstream, no other subsection 26(2) *Gas Utilities Act* approvals are required with respect to the lease of the storage capacity of Carbon to ATCO Midstream for the period from the Adjustment Date to the end of the current one-year term. The Commission does not intent to review the terms and conditions, including the lease fee, in respect of the lease to ATCO Midstream for the period of time from the Adjustment Date to the end of the current term despite the fact that the current provisions have not been reviewed or approved by the Board. Such a review at this time would be pointless given the conclusion of the Commission that the removal of Carbon from utility service and rate base as of the Adjustment Date does not harm customers.

149 While no additional approvals are required at this time, any new disposition of Carbon beyond the current one year term of the lease will require a new approval pursuant to subsection 26(2) of the *Gas Utilities Act.* In this respect the Commission notes the following findings in Decision 2010-025 with respect to the continued applicability of subsection 26(2) of the *Gas Utilities Act* to the disposition of non-utility assets by a designated owner of a gas:

> 30. With regard to AG's request for the Commission's written concurrence with AG's position that AG "is free to dispose of [the] non-utility property without further application to the Commission," the Commission considers that in light of the express language of section 26 of the *Gas Utilities Act*, the Commission cannot simply allow AG to dispose of the asset. Subsection 26(2)(d) of the *Gas Utilities Act* requires that an application be filed with the Commission for approval when a designated gas utility seeks to "sell, lease, mortgage or otherwise dispose of or encumber its property" outside of the ordinary course of business. The Supreme Court in Stores Block explained that the reason for this requirement is "to ensure that the asset in question is indeed non-utility, so that its loss does not impair the utility function or quality." [8]

> [8] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, para 44: "It is interesting to note that s. 26(2) does not apply to all types of sales (and leases, mortgages, dispositions, encumbrances, mergers or consolidations). It excludes sales in the ordinary course of the owner's business. If the statutory scheme was such that the Board had the power to allocate the proceeds of the sale of utility assets, as argued here, s. 26(2) would naturally apply to all sales of assets or, at a minimum, exempt only those sales below a certain value. It is apparent that allocation of sale proceeds to customers is not one of its purposes. In fact, s. 26(2) can only have limited, if any, application to non-utility assets not related to utility function (especially when the sale has passed the "no-harm" test). The provision can only be meant to ensure that the asset in question is indeed non-utility, so that its loss does not impair the utility function or quality.

150 For several years prior to the Adjustment Date ATCO requested approval for a lease of a portion of the storage capacity at Carbon to ATCO Midstream in connection with the approval of its annual storage plans. While the request for leasing approval were not couched in terms of the requirements of subsection 26(2), approvals of the annual lease to ATCO Midstream were granted by the Board in conjunction with the approval of annual storage plans. Given this history, the leasing of Carbon on a one year basis can not be considered an activity carried out in the ordinary course of business as submitted by ATCO[127] so as to exclude the need for a subsection 26(2) approval from the Commission. Accordingly, any new or extended lease to ATCO Midstream, or other disposition of Carbon beyond the current one year term of the lease would require a new approval pursuant to subsection 26(2) of the *Gas Utilities Act.*

151 Further, subsection 26(2) is applicable to any other future disposition of Carbon in whole or in material part, whether in rate base or not. This includes the sale of the unproduced natural gas reserves used as base gas or any portion thereof. Any such disposition would require a prior subsection 26(2) approval from the Commission.

4.5 Alberta Regulation 546/63

152 The *General Instructions to the Canadian Gas Association Uniform Classification of Accounts for Natural Gas under the Jurisdiction of the Public Utilities Board of the Province of Alberta* (Alberta Regulation 546/63 or the Regulation) prescribes a uniform system of accounting for gas utilities to record transactions in accordance with accepted accounting procedures. It also provides account numbers for every account in the general ledger in which transactions are assembled for balance sheet purposes.

153 The parties to this proceeding disputed the interpretation and application of the Alberta Regulation 546/63 to the removal of Carbon from utility service, rate base and rates as of the Adjustment Date.

Views of the Parties

Calgary

154 Calgary submitted that the removal of the Carbon assets from Account 100 "Gas Plant in Service" with the addition of the assets to Account 110 "Other Plant" is a "retirement." Calgary noted that the regulations states:

> When a plant unit is retired from gas operations the ledger value shall be credited to the appropriate plant accounts. If the plant being retired is classified as depreciable, the ledge value les the net salvage value and/or insurance, if any, recovered shall be charged to accumulated depreciation. In the case where the insurance recovery and salvage exceeds the ledger value, and the amount of the excess is material, the total credit to the accumulated depreciation account shall not exceed the ledger value. Any such excess, if material shall be credited to account No. 351, "Profit from Sale of Plant".[128]

155 Calgary submitted that it is clear that the only way to remove depreciable gas plant from gas operations is via a retirement. For non-depreciable plant the regulations allow a transfer; however, for depreciable plant they require a retirement to be recorded. A detailed breakdown indicates that virtually all of the Carbon facilities are depreciable gas plant.[129]

156 Alberta Regulation 546/63 defines "ordinary retirement" and "extraordinary retirement" but does not provide the underlying definition of "retirement." Calgary submitted that the underlying definition of retirement is 'the removal or withdrawal of property from utility service.'[130] That definition is consistent with the definition of retirement in other regulatory situations, and with the ordinary meaning of retirement, as applied to a regulatory system which allows one legal entity to have both regulated and unregulated business.[131] Calgary submitted that the definitions available, from various sources, agree.[132] The removal or withdrawal of property from regulated or utility service is a retirement. Calgary submitted that:

> Alberta Regulation 546/63, and the NEB [National Energy Board] and the FERC [Federal Energy Regulatory Commission] accounting rules, all provide for the procedures to be followed upon a retirement. These are:
>
> (1) the book value is removed from the plant account,
> (2) the book value less (if negative) or plus (if positive) the salvage value is charged to accumulated depreciation, and
> (3) if the retirement is considered ordinary, [31] the amount would be left in accumulated depreciation,
> (4) if the retirement is considered extraordinary i.e. not contemplated in the depreciation, then because such retirement either unduly inflates (positive salvage) or deflates (negative salvage) the balance in the accumulated depreciation account it is then transferred to account the appropriate account [sic]. As noted in the Regulation "gains, if any, as a result of extraordinary retirements shall be credited to account No. 351, 'Profit from Sale of Plant' or account No. 355, 'Loss from Sale or Retirement of Plant', as applicable". [32][133] (emphasis deleted)
>
> [31] An ordinary retirement is the retirement of plant that results from causes reasonably assumed to been anticipated or contemplated in prior depreciation or amortization provisions SOR/83-190 section 39 which is similar to the language in AR 546/63 section 8.
>
> [32] AR 546/63; the NEB and the FERC use a similar concept however the account numbers and names are different.

157 Calgary argued that a retirement is different from a sale, and that there must be an accounting of the profit or loss from that retirement.[134] Calgary submitted that the value of the base gas or cushion gas and the producing wells included in Carbon represents significant positive salvage value[135] that must be addressed in the retirement of Carbon, as it is an extraordinary retirement.[136]

158 Calgary further submitted that the nature of the lease with ATOC Midstream is not relevant to the treatment of that lease under Alberta Regulation 546/63.[137] The treatment for leases is different than that for retirements such that it would appear clear that a lease is not a retirement under Alberta Regulation 546/63. Calgary submitted that the removal of Carbon from rate base is an extraordinary retirement within the meaning of Alberta Regulation 546/63 and should be treated as such.[138]

159 Calgary submitted that where there is a conflict between legislation and a Court decision, the legislation prevails.

Consequently, as the Supreme Court did not address, or interpret Alberta Regulation 546/63, Calgary argued that it cannot be considered to "trump" the legislation. Where there is an "outright conflict" between legislation and judge-made law, the rules of statutory interpretation are clear: the legislation prevails.[139]

PICA

160 PICA submitted that pursuant to Alberta Regulation 546/63 accounting for the disposition of significant assets, including salvage, should take place within the regulatory books even where the transfer of assets takes place as a result of the cessation of operational use in the utility.[140]

161 PICA argued that the notional proceeds of the disposition should be held in the regulated books of ATCO until the Commission grants permission under section 26 of the *Gas Utilities Act* for ATCO to dispose of the Carbon assets. At that time, the Commission could also determine the appropriate disposition of the proceeds of sale, including allocation of the salvage and carrying costs on the proceeds of sale, from the time of sale until the date the section 26 approval is obtained.[141]

162 In the event the Commission is not persuaded there was a disposition requiring section 26 approval, PICA submitted that salvage value should be recognized in the regulated books pursuant to Alberta Regulation 546/63. In PICA's submission, such an approach would be consistent with the Stores Block Decision, paragraph 81, which allows the Commission to consider, in setting rates, any new economic data anticipated as a result of the transaction. PICA submitted the accounting for salvage pursuant to Alberta Regulation 546/63 is not precluded in any manner by the Salt Cavern Appeals Decision. Such an approach is also consistent with existing depreciation accounting practice where the negative or positive salvage from an asset is reflected in the accumulated depreciation and, consequently, in future rates.[142]

163 PICA noted that when an asset is removed from gross plant in service, usually at the end of its service life or, prematurely, due to obsolescence or disposition or change in use, the accounting entries involved are the same and are referred to as asset retirement entries. Accordingly, as noted in PICA's Argument, the accounting entries must conform to Alberta Regulation 546/63, whereby any salvage associated with the retirement should be determined and recorded.[143]

164 PICA submitted that it would be appropriate to leave the amounts collected from customers respecting the future liability of retiring the Carbon assets in excess of the estimates as of April 1, 2005, in the regulatory books. These amounts were collected in the past from customers and in consideration of future obligations, which are determined to be in excess of future obligations as of April 1, 2005. These amounts would constitute part of the salvage required to be recorded upon retirement of the assets from the regulated books. The data relevant to these determinations is provided in CAL.AG-2.[144]

165 In addition, any accumulated depreciation amounts in excess of the estimates for same as of April 1, 2005, based on useful life estimates, should continue in the regulatory books. In PICA's submission, accumulated depreciation is a reserve account. Consequently, it is understood to be subject to change (as opposed to a liability account which is for a sum certain). The accumulated depreciation reserve balance that moves to the non regulated books must be consistent with the accumulated depreciation reserve requirements as of the date of transfer. The recording of excess accumulated depreciation in the regulated books would be part of the accounting for retirement of the assets from regulated service, pursuant to Alberta Regulation 546/63.[145]

UCA

166 The UCA generally supported PICA's arguments on this issue.[146]

167 The UCA also submitted that the Court in the Stores Block Decision did not consider the Regulation nor did it make any determination as to the appropriate accounting treatment which should be applied to retirement of the Carbon assets.[147]

ATCO

168 ATCO submitted that the Alberta Regulation 564/63 provides specific accounts (110. Other Plant) for the recording of "plant used in operations which are non-utility in nature." The Uniform Classification of Accounts does not indicate that a retirement must first occur in order to recognize non-utility plant in Other Plant.[148] ATCO noted that Ms. Wilson also confirmed that ATCO has accounted for the transfer of the Carbon assets out of utility service consistent with the Alberta Regulation 564/63.[149]

169 ATCO noted that Calgary chose not to quote from the Uniform System of Accounts (USA) for electric utilities in Alberta[150] which specifically addresses the transfer of utility property. In Electric Plant Instruction 13 (Transfers of Property), the USA indicates the following:

> When property is transferred from one electric plant account to another, from one Utility department to another, such as from electric to gas, from one operating division or area to another, to or from Accounts 1010, Electric plant in service, 104, Electric plant leased to others, 105. Electric plant held for future use, and 121. Non-utility property, the transfer shall be recorded by transferring the original cost thereof from the one account, department, or location to the other. Any related amounts carried in the accounts for accumulated provision for depreciation or amortization shall be transferred in accordance with the segregation of such accounts.[151] [emphasis omitted]

170 ATCO argued that assets which remain in physical service under lease cannot be considered "retirements." Carbon on April 1, 2005 was under lease and in physical service. No sale, no buyer and no proceeds came into existence at that date. Carbon continued since that time to be under lease and remains in physical service to this day.[152] ATCO submitted that its ordinary practice, in this regard, involved entering into a one year lease of the storage facility.

171 ATCO submitted that Calgary has fabricated certain accounting entries based upon a fictitious sale of the Carbon assets as set forth in its response to AUC-CAL-1(b). The hypothetical accounting entries put forward by Calgary and the fictitious transactions are contrived. ATCO argued that Calgary was not able to identify anything in the Uniform Classification of Accounts that would require ATCO Gas to recognize such accounting entries.[153][154] ATCO submitted that the effect of what Calgary recommends is the circumvention of the proper accounting entries required when an asset actually is sold outside the ordinary course of business. The appropriate application of the Regulation to gains or losses on the sale of assets outside the ordinary course of business was part of the Stores Block process, which determined that shareholders are entitled to those gains and losses. ATCO submitted that the Board, the Courts and ATCO have all recognized and upheld that effect. ATCO submitted that the Regulation and the Stores Block Decision are consistent.[155]

172 ATCO submitted that Calgary's attempts to manufacture a "retirement", or a "sale", and to invent sale proceeds, and to thereby create "positive salvage" are the wrong accounting treatment for the gain on sale of a surplus asset pursuant to the Regulation.[156] ATCO noted that the Commission previously rejected Calgary's positive salvage approach in Decision 2009-067.[157]

173 ATCO argued that the interveners contend there has been a "disposition" in the nature of a sale. Accordingly, they then "deem" proceeds and positive salvage by virtue of the removal of Carbon from regulation under a one-year lease with ATCO Midstream despite the absence of any provision in the Regulation requiring, this to be done. ATCO submitted that this seeks to overturn the Court of Appeal decision in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2009 ABCA 171 (Harvest Hills Appeal Decision). The Harvest Hills Appeal Decision struck down an attempt to record in a utility account a gain on sale outside the ordinary course of business to be carried forward to a subsequent rate case for disposition. The Court of Appeal struck down that condition. It was the condition itself which was found offensive even in the absence of the actual allocation to customers of the balance in the account. For present purposes the Harvest Hills Appeal Decision is indistinguishable from what Mr. McNulty and Mr. Johnson discussed at Transcript, page 229, lines 9-25 to page 230, lines 1-13.[158]

174 Further, ATCO argued that Alberta Regulation 546/63 was enacted under the authority of the then Public Utilities Board to require certain accounts to be kept, under what is now section 35(c) of the *Gas Utilities Act.* It is improper to suggest that a regulation enacted under this provision could impliedly allow the Commission to override the general principle of law relied upon in Stores Block Decision and confer a jurisdiction not found to exist under the enabling legislation. In any event ATCO submitted Alberta Regulation 546/63 and the Stores Block Decision do not conflict. No issue of one overriding the other arises.[159]

175 ATCO submitted that there is no significance to Carbon's regulatory status. The Carbon assets may be transferred to a non-utility account but it is not retired.[160] ATCO indicated that this treatment was consistent with other regulatory jurisdictions and is fully consistent with shareholders realizing the gain on sale of surplus assets outside the ordinary course of business, a proposition affirmed in the Stores Block Decision.[161]

176 ATCO referred to Section 4.2.4 of Decision 2009-004 as indicating that the value of an individual asset withdrawn from utility service is not "revenue" to the utility which should be considered in determining just and reasonable rates. ATCO submitted that the Commission already decided that "value" to be attributed to Carbon in connection with removal from rate base "is the value presently attributed to the Carbon assets in revenue requirement."[162] The Commission previously rejected Calgary's positive salvage approach in Decision 2009-067.[163]

177 ATCO submitted that Alberta Regulation 546/63 can not override the statute which the Courts have found repeatedly does not provide any authority for the confiscation of proceeds of sale from, or the revenues generated by assets not required for operational utility use (Stores Block Decision, Carbon Appeal Decision, Harvest Hills Appeal Decision, Salt Caverns Appeal Decision and Carbon R&V Appeal Decision). ATCO referred to paragraph 30 of the Carbon Appeal Decision:

> [30] Regulation of the gas utility does not give the end customers an ownership interest in the assets of the utility: Stores Block at paras. 63-68. The end customers are entitled to service, not assets. The service that they are entitled to is the delivery of gas on reasonable and just terms, not revenue generation. Just as the end customers have no ownership interest in the assets of the utility, they have no interest in the profits, unregulated revenues, or unregulated businesses of the utility. The value of economic assets is often largely determined by the revenues they can generate, and if the end customers are not entitled to any ownership interest in the assets, they are likewise not entitled to any interest in the cash flow generated by those assets: Stores Block at para. 78. The end customers are entitled to receive gas delivery services from the utility, not revenue-generating services or gas rate subsidization. ... (Carbon Appeal; emphasis omitted)

Commission Finding

178 The issue underlying the arguments advanced by parties with respect to the interpretation of Alberta Regulation 546/63 and its application to Carbon can be summarized into the following question: Do the retirement or salvage provisions of the Alberta Regulation 546/63 apply so as to require an accounting of the value of Carbon for the benefit of ratepayers upon its removal from utility service and rate base?

179 The Commission considers the answer to the question to be a straightforward "no". The courts have interpreted the operative provisions of the *Gas Utilities Act*, the *Public Utilities Act* and the *Alberta Energy and Utilities Board Act* and have made it clear that there are very narrow circumstances where the value (liability) associated with an asset being removed from utility service can be attached for the benefit (detriment) of ratepayers. The assets employed in the provision of utility service belong to the utility and upon their disposition or other removal from utility service, the value of the assets, in the absence of customer harm, belongs to the utility shareholders. The Supreme Court in the Stores Block Decision stated:

> Thus, can it be said, as alleged by the City, that the customers have a property interest in the utility? Absolutely not: that cannot be so, as it would mean that fundamental principles of corporate law would be distorted. Through the rates, the customers pay an amount for the regulated service that equals the cost of the service and the necessary resources. They do not by their payment implicitly purchase the asset from the utility's investors. The payment does not incorporate acquiring ownership or control of the utility's assets. The ratepayer covers the cost of using the service, not the holding cost of the assets themselves: "A utility's customers are not its owners, for they are not residual claimants": MacAvoy and Sidak, at p. 245 (see also p. 237).[164]

180 The Alberta Court of Appeal affirmed and applied these reasons in a several decisions including the Carbon Appeal Decision, the Harvest Hills Appeal Decision and the Salt Cavern Letters Appeal Decision.

181 The Supreme Court in the Stores Block Decision also referred at paragraph 50 to *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, (Bell Canada Decision) where the Supreme Court stated at page 1756:

> 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.

182 In the Stores Block Decision the Supreme Court concluded that the Board did not have the power under its enabling statutes to attach the proceeds of disposition upon sale of a utility asset. The Supreme Court stated:

> The interpretation of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), the *Public Utilities Board Act*, R.S.A. 2000, c. P-45 ("PUBA"), and the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA") (see Appendix for the relevant provisions of these three statutes), can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. The Board's seemingly broad powers to make any order and to impose any additional conditions that are necessary in the public interest has to be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The limits of the powers of the Board are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system.[165]

183 The ability of Commission to attach conditions to a sale of a utility asset in the event of a finding of harm was explored by the Alberta Court of Appeal in the Harvest Hills Decision. In that Decision the Court stated:

> In our view, the harm contemplated by the Supreme Court must be harm related to the transaction itself.[166]

The Court further stated:

> In our view, a more reasonable interpretation of the Supreme Court's words would permit the Board to impose a condition if there was a close connection between the sale of the asset and the immediate resulting need to replace it.[167]

184 In the present case the Commission has already determined that the removal of Carbon from utility service will not result in harm to customers and therefore the possibility of attaching the value of Carbon in order to offset harm to customers is not at issue. In Decision 2009-004 the Commission stated:

> With respect to Carbon, the Commission determined above that an increase in rates resulting from the permanent removal of Carbon from rate base is not a valid financial harm to customers and, accordingly, the removal of Carbon will not harm customers. Customers are not legitimately harmed by the removal of Carbon because Carbon has been previously determined by the Commission to have no valid operational purpose and because revenue generation has been determined by the Court of Appeal to be an invalid reason to maintain Carbon in utility service. Therefore, had the Commission been requested in the Application to consider the removal of Carbon from rate base under section 26(2) of the GUA and section 101(2) of the PUA, it would have provided its approval, subject to the appropriate adjustments to revenue requirement and the resolution of the other matters on the Final Issues List approved in this Decision.[168]

185 The Commission has determined that the removal of Carbon from utility service will not harm customers and therefore there is no basis to attach the value of Carbon for the benefit of ratepayers under the provisions of the *Gas Utilities Act* as interpreted by the Courts. Calgary and the UCA now urge upon the Commission an interpretation of the Alberta Regulation 546/63 which, if adopted, could result in the very outcome rejected by the courts.

186 Calgary, supported by the UCA and PICA, suggest that the removal of Carbon from utility service constitutes a "retirement", specifically an "extraordinary retirement" under section 8 of the Alberta Regulation 546/63. An extraordinary retirement is defined as a retirement which "results from causes not reasonably assumed to have been anticipated or contemplated in prior depreciation or amortization provisions." Section 8 requires the utility to account for a gain or loss resulting on an extraordinary retirement "comprised of the difference between plant ledger value plus cost of removal less salvage and insurance recoveries and the related depreciation or amortization determined in a equitable manner." Calgary submitted that these provisions require ATCO to account for either the salvage value or the fair market value (if the lease to ATCO Midstream is both an extraordinary retirement and a disposition) of the asset upon its removal from utility service. This "gain" upon the extraordinary retirement of the assets would then be credited to Account 351 "Profit from Sale of Plant" under the Alberta Regulation 546/63. Account 351 is a Retained Earning Account with entries requiring the prior consent of the Commission. The Commission could then determine in a subsequent process how to dispose of this gain, including whether to employ this gain for the benefit of customers. Mr. Johnson, witness for Calgary discussed the Calgary position at the oral hearing with Commission Counsel in the following terms:

> Q If I understand you correctly, you're saying that that gain should be somehow used for the benefit of ratepayers, whether it's offsetting returns or whether it adds to the accumulated depreciation or in some other way reduces rates for customers over the long run; is that right?
>
> A MR. JOHNSON: That would be my recommendation. But at this stage all I'm suggesting is that the amount should be recorded as a gain, and then it would be up to the Commission to have a proceeding to deal with whether that gain -- how that gain should be treated.
>
> Q And it would be your recommendation it would be for the benefit of ratepayers; is that right?
>
> A MR. JOHNSON: It would be to reflect that gain as part of the, in all likelihood I think, as part of the fair return that ATCO is entitled to.[169]

187 Calgary, the UCA and PICA also submitted that the fact that the Alberta Regulation 546/63 was not argued before the courts and that it was not addressed by the courts in the Stores Block Decision and subsequent cases. This they submitted was a material consideration, with Calgary stating that "the Regulation would prevail if there was an outright conflict, any implied conflict cannot be said to have the decision prevail over the Regulation."[170]

188 The Commission can not accept the premise put forward by Calgary as supported by the UCA and PICA. As noted in the Bell Canada Decision quoted above, the powers of an administrative tribunal must be stated in the "enabling statute" or exist by necessary implication. Powers not provided for in this matter can not be bestowed by regulation Additional authority for this principle is referred to by ATCO in its Reply Argument where they cite the following passage:

> Unless the enabling Act so provides, delegated legislation cannot override any Act -- and certainly not the enabling Act itself. Indeed it is taken not to be impliedly authorized to override any rule of the general law.[171]

189 In the Stores Block Decision, the Supreme Court clearly indicated that the Board had not been provided with the statutory authority to attach the proceeds of disposition of a utility asset in the absence of harm for the benefit of customers. It also indicated that such a power can not be inferred by the doctrine of jurisdiction by necessary implication.[172] The Carbon Appeal Decision clearly held that the revenues generated by utility assets not required for operational utility use can not be attached by customers.

190 The Commission also notes the wording of the Supreme Court in the Stores Block Decision that a "potentially confiscatory legislative provision ought to be construed cautiously so as not to strip interested parties of their rights without the clear intention of the legislation."[173]

191 Regardless of whether or not the Alberta Regulation 546/63 could technically be interpreted in a manner that would identify the need to record a regulatory gain upon the removal of Carbon from regulatory service as the result of an "extraordinary retirement", the Alberta Regulation 546/63, as subordinate legislation, can not be interpreted in such a manner that would extent to the Commission a jurisdictional authority to allocate asset value to customers, where such authority has not been expressly bestowed by the enabling statute or otherwise available to the Commission by way of the doctrine of jurisdiction by necessary implication. The Alberta Regulation 546/63 can not be interpreted in such a manner so as to overrule the Supreme Court in the Stores Block Decision with respect to the powers of the Commission under its enabling statutes. The Alberta Regulation 546/63 can not be seen as creating a regulatory gain subject to the discretionary disposition of the Commission, a discretion that could be exercised by allocating the gain to the benefit of customers, thus allowing customers to appropriate the value of Carbon upon its removal from utility service. Therefore the deeming under the Alberta Regulation 546/63 of a gain upon removal of Carbon from utility service would be to no purpose as the utility shareholder is entitled to retain the value of its assets upon the removal of those assets from regulated service.

192 ATCO takes the position that the removal of Carbon from utility service is not an extraordinary retirement and that it can fully comply with the Alberta Regulation 546/63 without the need to consider whether the Alberta Regulation 546/63 provides the Commission with authority not already provided for in the underlying statutes. Ms. Wilson confirmed in her testimony that the proposed methodology for the adjustment of the ATCO Gas utility regulatory accounts as of the Adjustment Date as described in AUC-AGS-1 is in accordance with the provisions of the Alberta Regulation 546/63.[174] These proposed adjustments credit the Original Cost to Account 100 "Gas Plant in Service" and debit Account 110 "Other Plant" which includes non-utility assets. Similar debit adjustments will be made to Account 105 "Accumulated Depreciation - Gas Plant" and credit Account 111 "Accumulated Depreciation -- Other Plant." ATCO submitted that the transfer of the Carbon assets from a utility plant account to the non-utility portion of the Other Plant account does not require a retirement of the asset.

193 ATCO submitted that there is no "retirement" of Carbon and that it continues to operate and to generate revenues as a non-utility asset.[175] ATCO considered that there is no conflict between the provisions of the Alberta Regulation 546/63 and the interpretation of the enabling statutes by the courts. Compliance with the Alberta Regulation 546/63 does not involve an extraordinary retirement with the creation of a gain to be disposed of with the consent of the Commission.

194 A review of *Sullivan on the Construction of Statutes* indicates authority for a presumption that regulations and statutes are meant to work together. The author states:

> The presumption of coherence applies with respect to regulations as well as 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, normally the statutory provision prevails.[176]

195 The Commission considers that ATCO's proposed accounting methodology set out in AUC-AGS-1(a) upon the removal of Carbon from utility service as of the Adjustment Date complies with the Alberta Regulation 546/63 in a manner that allows the Alberta Regulation 546/63 to work together with the enabling statutes. The Commission considers this to be a reasonable interpretation of the Alberta Regulation 546/63 and accepts the proposed accounting treatment.

196 The interpretation of the Alberta Regulation 546/63 put forward by the interveners leads to the creation of a gain related to the value of the Carbon assets, the disposition of which would be at the discretion of the Commission with the possibility that it could be allocated in whole or in part for the benefit of customers. The courts have repeatedly found that that the Commission does not have the authority under its enabling statutes, absent harm, to allocate the value of a utility's assets to customers once the asset ceases to be employed in the provision of utility services. The interveners' interpretation of the Alberta Regulation 546/63 does not fit with the presumption that the Alberta Regulation 546/63 and the enabling statutes are meant to work together, leading to a conflict with the statutes and the courts with respect to the authority of the Commission to allocate the value of utility assets to customers. The Commission rejects the interveners' interpretation of the Alberta Regulation 546/63.

4.6 Determination of Amounts to be Recovered

197 A primary purpose of this Proceeding was to determine the amount that ATCO will be permitted to recover from its customers in its south service territory in order to properly account for the withdrawal of Carbon from regulated service effective as of the Adjustment Date. The amount will be affected by consideration of a number of points that will be reviewed in the following sections.

4.6.1 Verification

198 The Commission must determine if ATCO has satisfied the burden of proof necessary to justify the Carbon related reimbursement it is seeking from its customers.

199 In attempting to document the amounts owed, ATCO has reviewed its Calgary related accounts and identified the accounts related to rate base in Appendix B to the Application. ATCO also included all amounts from its operating accounts 610 - 619 and 650 - 659 as being related to Carbon. In addition, ATCO assumed that the following amounts relate to the Carbon assets:

1. Environmental audit costs and
2. Overhead rates of 57 percent for the years 2005-2007 and 60 percent for the years 2008 and 2009, which were applied against labor costs to determine administrative costs.

   The overhead rates were consistent with the rates that were being used by ATCO in its affiliate service agreements and included amounts for fringe benefits, inter-affiliate charges from ATCO I-Tek and insurance costs related to the Carbon assets.

200 ATCO identified the accounts related to rate base in Appendix B to the Application.

Views of the Parties

Calgary

201 The purpose of this proceeding is to determine the matters that the Court did not -- how the removal of Carbon from rate base is to be treated from a regulatory perspective, how the accounting is to be undertaken, what is owed to ATCO, who is to pay what amounts. In short, how the rates will be affected.[177]

202 Calgary submitted that there are problems with the reliability of the amounts for which ATCO is requesting recovery from customers. Calgary contended that ATCO did not provide sufficient information that would allow verification of the amounts concerned. Calgary cited an example using Exhibits 150.01 and 179 from which it observed that ATCO used internal calculations for reconciliation purposes, which were not apparent on the face of the information provided. Calgary submitted that all amounts being sought by ATCO should be clear, obvious and verifiable. Consequently, because of the uncertainty involved, Calgary recommended that an independent auditor be engaged to verify the amounts ATCO seeks to recover.[178]

203 Calgary was also concerned with the amounts ATCO claimed to have been paid by its customers as it contended that there was no method to substantiate the claims. Calgary noted that there were two amounts that customers paid at various times: the cost of service for Carbon that was included in rates from 2005 to August 31, 2007 and the production and storage charge on consumption that was in effect from September 1, 2007 to June 30, 2008. Calgary submitted that ATCO did not give customers credit for amounts paid by them for a period from January 1, 2008 to June 30, 2008. Therefore the amount that ATCO seeks to collect is overstated by the amounts paid by customers during that time.[179]

204 Calgary submitted that ATCO did not provide justification or support for the 'trust us' approach it has taken nor did it provide sufficient justification for its proposed method of recovery, which Calgary contended was not fair and reasonable. Calgary asserted that ATCO has not discharged the onus of burden of proof and, accordingly, allowing its requests for recovery of Carbon related amounts from customers will result in rates that are not just and reasonable, as required by the *Gas Utilities Act.*[180]

205 In addition to the issue of verification, Calgary contested ATCO's right to recover the Carbon related amounts. Calgary submitted that the Carbon Appeal Decision, did not establish an entitlement to refunds but instead only determined that the Commission erred in keeping Carbon in rate base when its use was revenue generation. Calgary considered that the Court made no comment on the results of that determination, did not determine that there would be a refund, and left the determination of the results of the removal of Carbon from rate base to the Commission.[181]

206 Calgary asserted that in order to comply with the Alberta Regulation 546/63 ATCO should record a retirement in a manner consistent with those regulations and the regulations of other regulators.

207 Calgary also stated that ATCO appears to agree that the "value presently attribute[d] to Carbon assets in revenue requirement" is what should be the value used for the Carbon assets. Calgary submitted that this value would be the present value of the net revenue stream, which would approximate the fair market, if that this value is higher than the value of the gas both base and in the producing wells.[182]

UCA

208 The UCA noted ATCO's claims that it does not have the same information that the ratepayers have on their monthly bills with respect to consumption and the resulting billing amounts based upon the Rate Riders in effect for the billing period. The UCA thus submitted that there is no foundation upon which the Commission or Interveners can verify the amount which ATCO seeks to recover. This amount exceeds $77 million, net of the Cost of Service amount resulting in approximately $50 million to be recovered from customers. The UCA considered that the entire amount is substantiated only by an allegation that the amount is what was billed, which from a ratepayer's perspective, would be unacceptable. The UCA submitted that the data proffered by ATCO was not supported by billings actually made to ratepayers.[183]

209 The UCA also noted that all of ATCO's customers were billed by ATCO's default supply provider, and natural gas retailers commencing in May 2004. As ATCO did not provide any billing information from these sources, the UCA considered that there was a data source from which the ratepayer was billed, which is not on the record in this proceeding.[184]

ATCO

210 ATCO submitted that the Carbon accounts have been verified and that the related issues to be determined are the validity and symmetry of the data used by it in the determination of the amounts owed to it; and certain matters related to the interest calculation. ATCO further submitted that it demonstrated and provided required information to support the appropriateness for approval for the recovery of the $50 million owed to it from customers.[185]

211 ATCO submitted that its methodology for determining the revenues to be returned to it and the costs to be returned to customers was completely consistent with the Commission's ruling of March 30, 2010, which confirmed that the recovery of the Carbon costs by ATCO was based on forecasts costs, and forecast throughput, and that ATCO took the forecast risk related to the recovery of those amounts, as it does for most aspects of its revenue requirement. ATCO also submitted that the billing of customers based on their actual usage is one of the forecast risks that ATCO Gas absorbs, because the actual volume will never exactly match the forecast volume. ATCO suggested that it demonstrated this point with the calculation it provided showing the effects of throughput difference for the years 2005-2007 on the Carbon revenue requirement forecast, which indicated that if the Carbon revenue requirements were adjusted for this difference, customers would actually owe an additional $1.1 million to ATCO.[186]

212 ATCO explained that it was unable to provide information for throughput volume that can be multiplied by the approved rider rates each month to come to the amounts actually paid because the rider rates changed each month and ATCO's customer information billing system does not trace and report throughput information by the different rates in place for each billing cycle. ATCO noted that it avoided costly programming, reporting and data storage costs associated with the tracking of this type of information, as it considered the information was not necessary. ATCO submitted that a review of the volumes and rates that resulted in the rider revenues paid to was not required to confirm the appropriateness of those revenues. ATCO stated that it provided detailed information requested by the Commission and a reconciliation of the Rider amounts shown on Schedule I with the amounts reported in its audited financial statements for the years 2006 and 2007 in the response to CAL-AG-8(b and c), which confirmed the validity of the Rider amounts.[187]

213 ATCO submitted that no party to this proceeding has been able to demonstrate that the Rider amounts reflected on Schedule I do not reconcile to what was actually billed by ATCO Gas (and ATCO Pipelines with regard to Rate 13 customers for a period of time). Neither the actual consumption billed nor the approved rider rates are at issue in this proceeding.[188]

Views of the Commission

214 As referred to in paragraph 198 above the Commission must determine whether or not ATCO has satisfied the burdon of proof in properly verifying the amounts to be collected from rate payers. The applicable burdon of proof is the balance of probabilities on the evidence presented. In assessing whether ATCO has satisfied its burdon of proof, the Commission will consider the extent to which ATCO has complied with accounting standards, provided evidence to demonstrate the cost of service incurred, amounts collected from rate payers in total and the amounts credited to rate payers in total given the data available to it. The Commission is satisfied that ATCO has satisfied its burdon of proof by way of the additional information provided below.

215 ATCO indicated that the total amount owed to it was shown on Schedule I of Appendix A of Exhibit 150.01 is

$50,008,349. This is comprised of $43,727,482 plus interest of $6,280,867. Exhibit 150.01 is a supplemental information response for UCA-AG-34. The composition of the $43,727,482 is as follows:[189]

* $13,821,766 (Rider G after April 1, 2005)
* $63,139,047 (Rider H after April 1, 2005)
* $590,668 (Rider I)
* ($33,824,000) Cost of Service for the Carbon assets from April 1/05 to December 31/07.

216 ATCO filed backup for the calculations of the cost of service figures as part of the Initial submission (Exhibit 1). ATCO filed updated cost of service calculations in Exhibit 60 and the same cost of service calculations were filed in Exhibit 110. The cost of service calculations for the period of April 1, 2005 to December 31, 2007 included on Schedule I of Appendix A of Exhibits 60 and 110 totaled ($35,632,000). As part of its review of the updated Cost of Service calculations, the Commission identified a concern it had with the return on debt and debt expense calculations for the period of April 1, 2005 to December 31, 2009. These concerns were included in the information requests sent to ATCO on February 1, 2010.[190] In response to these information requests,[191] ATCO indicated that it had determined that not deducting the return on debt from the net income before tax was an oversight that overstated the income tax expense related to the Carbon assets. Subsequent to this, ATCO filed another updated cost of service calculation on February 22, 2010.[192] The cost of service calculations for the period of April 1, 2005 to December 31, 2007 included on Schedule I of Appendix A of Exhibit 136 totaled ($33,824,000). This same cost of service calculation figure is reflected on Exhibit 150.01 as well.

217 Regarding the amounts shown for Riders G, H and I shown on Schedule I of Appendix A of Exhibit 150.01, the Commission issued an information request to ATCO on May 4, 2010[193] in which ATCO was requested to provide more information and documentation about these Rider amounts. ATCO's response was filed on May 18, 2010[194] and a supplemental response was filed on June 4, 2010.[195] Included in the information ATCO submitted were listings for each month from April, 2005 to December, 2009 of the amounts for Riders G, H and I. In addition, ATCO submitted copies of ATCO-CIS [customer information system] billing reports for each month from April, 2005 to December, 2009 that show the rider revenues in total for each of Rider G, H and I. The Commission verified that the totals for each of Rider G, H and I on these monthly ATCO-CIS billing reports were included in the monthly total figures that are included on Schedule I of Appendix A from Exhibit 150.01.

218 The Commission notes that ATCO provided a list, including account numbers used for recording purposes, of Carbon assets that were included in rate base, which amounted to $37.021 million (excluding construction work in progress)[196] at December 31, 2009. The Commission also notes that this amount equals the net differnce on the Property, Plant and Equipment Schedule[197] provided by ATCO in respect of disclosing its net property, plant and equipment at that date both including and excluding Carbon. The Commission accepts that ATCO has demonstrated that it appropriately accounted for the Carbon assets.

219 From a practical standpoint the Commission would be unable to verify that ATCO has used the Alberta Regulation 546/63 without conducting an audit of ATCO's financial records. The Commission does not consider that such an audit would be reasonable, nor cost effective, under the circumstances. The Commission accepts ATCO's explanation that it was unable to provide information for throughput volume because ATCO's customer information billing system does not trace and report throughput information by the different rates in place for each billing cycle. While this type of billing information could not be made available the Commission accepts that ATCO's reconciliations for the revenue and expense amounts are sufficiently reasonable under the circumstances to support the net amounts it has claimed for recovery from customers.

4.6.2 Mid-year Convention

220 ATCO employed the mid-year convention in the determination of the Carbon accounts and the amounts to be collected from rate payers in accordance with its traditional accounting practices. The interveners took issue with the mid-year convention in the circumstances of this Application.

221 The mid-year convention refers to the practice of using an arithmetical average of the previous year-end balance and the current year-end balance to establish an annual value.

Views of the Parties

Calgary

222 Calgary noted that although the revenue and operating expenses associated with Carbon are being adjusted as of April 1, 2005, the owning costs, return, depreciation and income taxes are not adjusted until July 1, 2005, resulting in customers being charged owning costs on an asset that is no longer in service yet being deprived of the benefits of that asset for three months. Calgary submitted that the application of the mid-year convention means that customers pay twice and ATCO earns twice. Accordingly, Calgary submitted that the mid-year convention, which would allow ATCO to double recover amounts from customers for three months of one year, does not properly apply in the unique circumstances of Carbon.[198]

223 Calgary observed that the mid-year convention is merely a tool, which is neither mandated by legislation nor the Court, and that the Court recognized that it was a reasonable, not perfect, tool for the Commission to apply where it was reasonable to do so. Calgary considered that as ATCO was requesting customers to pay approximately $50 million, the approach it used in its determinations should be one that is just and reasonable rather than one that is merely not unreasonable.[199]

224 Calgary submitted that symmetry and fairness would indicate that the customers should benefit from the revenue for the period from April 1, 2005 to June 30, 2005 period. Calgary considered that asking the rate payer to pay a return to ATCO and at the same time be asked to pay back the revenue received from the asset for the same period of time is unjust and unreasonable.[200] Calgary argued that the use of the mid-year convention does not provide a fair representation of the owning and operating costs associated with the removal of the Carbon assets on April 1, 2005.[201]

PICA

225 PICA supported Calgary's recommendation to include the Carbon assets in the calculation of return, taxes, etc., for only three months (January 2005 to March 2005). PICA submitted that Calgary's recommendation was consistent with the accounting principle of matching revenues with costs related to producing those revenues (matching principle). In particular, PICA considered that the matching principle should override the mid-year convention where there is a monthly calculation of revenue being matched against the corresponding costs.[202]

ATCO

226 ATCO submitted that the use of the mid-year convention in the determination of the 2005 rate base for the Carbon assets is reasonable and appropriate. ATCO viewed the mid-year convention issue as being identical to the Commission's prior decision regarding requested adjustments to the approved forecast for net negative salvage in that the mid-year convention is a feature of the approved revenue requirement forecast for the year 2005, which inappropriately included the Carbon assets. ATCO argued that Calgary unsuccessfully appealed the use of the mid-year convention in 2005 rates in *Calgary (City) v. Alberta (Energy and Utilities* Board*)*, 2010 ABCA 94 (Working Capital Appeal Decision) which upheld that aspect of the approved rate forecast methodology for 2005. Calgary should not be permitted to re-litigate that matter again. ATCO clarified that the mid-year convention has only been applied to the determination of the utility income and the income taxes related to the utility income.[203]

227 ATCO noted that the amount of the inventory used in the storage working capital calculation that was the subject of the denied appeal was $98.4 million for a period of three months and the Court of Appeal concluded that the mid-year convention did not lead to an unreasonable determination of rate base and fair return. ATCO further noted that the 2005 Carbon rate base used in the current proceeding is $42 million, for a period of nine months, which indicates that the use of the mid-year convention in the current Proceeding also does not lead to an unreasonable determination of rate base and fair return.[204]

228 ATCO submitted that Calgary ignored the Carbon Appeal Decision when it asserted that customers should be entitled to revenue generation over the period April 1, 2005 to June 30, 2005 because ATCO has not changed the principles that were used in the derivation of the approved 2005 revenue requirement forecast that relates to the Carbon assets. ATCO asserted that the Court of Appeal said revenue generation is not a valid utility service and therefore Calgary was wrong in law.[205]

229 ATCO submitted that revenues and operating costs are not determined using the midyear convention and, therefore, introduction of a new convention in this Proceeding would be inappropriate. Notwithstanding, ATCO noted that Calgary recommended that only revenues should be adjusted, whereas application of any new convention would also have to consider the effect on operating costs.[206]

230 ATCO argued that fairness requires that parties know not only what the rules are in advance but also that those rules will not be changed on an ad hoc basis, at the whim of one party or another. ATCO submitted that the consistent use of the same principles, such as the mid-year convention, ensures fairness to all parties over time.[207]

231 ATCO disagreed with PICA that Calgary's position that not using the mid-year convention was consistent with the accounting principle of matching of matching revenues with costs related to those revenues. ATCO submitted that PICA overlooked that the use of the mid-year convention to determine rate base related costs is consistent with the matching principle, because it recognizes that not all expenditures or retirements of capital assets occur on January 1 or December 31.[208]

232 ATCO submitted that it derived the amounts of the Carbon revenue requirement that needed to come out of its total revenue requirement forecast, which was based on the mid-year convention. Accordingly, ATCO also submitted that, use of the mid-year convention in the derivation of the Carbon amounts was reasonable.[209]

Views of the Commission

233 The Commission accepts ATCO's use of mid-year convention. Notwithstanding that the owning costs, return, depreciation and income taxes were not adjusted until July 1, 2005, the mid-year convention has been the norm that has been applied in recognizing rate base transactions and its continued application in these circumstances is consistent with the findings of the Court of Appeal in the Working Capital Appeal Decision. The Commission does not consider that the circumstances surrounding the timing of the removal of Carbon from utility service warrants a change to the application of this established regularory practice.

4.6.3 Carrying Charge

234 ATCO proposed that interest should be applied to the net amounts owed to it based on AUC Rule 023: *Rules Respecting Payment of Interest* (Rule 023).[210] Carrying charges in this Decision, represent an award of interest to be recovered or paid by ATCO in its rates in respect of the adjustments as approved by the Commission for Carbon related amounts

Views of the Parties

Calgary

235 Calgary asserted that ATCO did not include a calculation of interest on amounts owing to customers on account of the overpayment of the Production and Storage charge for the period January 1, 2008 to June 30, 2008, but did include interest on the amounts owed ATCO. Calgary argued that fairness and transperancy required interest to be applied simetrically.

PICA

236 PICA submitted that the inclusion of interest on the $3.418 million working capital adjustment, effective April 1, 2005, is inconsistent with the logic of interest calculations used by ATCO for other amounts. Accordingly, PICA submitted that ATCO should be directed to reduce the interest amount to reflect the calculation of interest on the $3.418 million working capital adjustment effective as and from when the Board/Commission approval was received for the refund/collection of this amount.[211]

UCA

237 The UCA considered that there were two fundamental issues regarding the amount of interest that ATCO is seeking to recover in this Proceeding.

a) First, there are amounts related to the Carbon revenue riders which appear to have occurred prior to April 1, 2005 on which ATCO is seeking to recover the related interest, and

b) Second, during the period January 1, 2008 through June 30, 2008 the Carbon Cost of Service was recovered through a dedicated rate rider, which effectively removed the cost of Carbon from base rates and treated the Carbon Cost of Service as a stand-alone cost center.[212]

ATCO

238 ATCO noted that that neither Calgary nor the UCA took the position that ATCO should not be entitled to recover interest on the amounts owed to it in accordance with Rule 023.[213]

239 ATCO disagreed with the UCA that there are amounts related to the Carbon revenue riders which occurred prior to April 1, 2005 which are being included in the interest calculations. ATCO argued that it had made appropriate adjustments to remove the effect of these riders.[214]

240 ATCO argued that the 2008 Production and Storage Charge has already been returned to customers in the manner approved by the Commission through the 2008-2009 GRA compliance process.[215]

241 ATCO disagreed with PICA that ATCO should reduce the interest calculation in respect of the $3.418 million working capital adjustment to reflect the time when it was approved for recovery. ATCO submitted that this reduction was shown in Exhibit 150.01.[216]

Views of the Commission

242 The Commission agrees that Rule 023 applies to the determination of carrying charges. With respect to the interest on the Production and Storage Charge the Commisssion agrees with ATCO that the interest has been handled correctly. With respect to the interest on the necessary working capital adjustment the Commisssion will permit ATCO's recovery of interest on the necessary working capital adjustments as determined by ATCO as shown on Exhibit 150.01, Schedule I.

4.7 Other Matters

4.7.1 Miscellaneous Carbon Related Adjustments

243 On September 11, 2009 ATCO filed additional evidence with the Commission in the current proceeding related to certain additional adjustments that are required with respect to the removal of the Carbon assets from utility service.

ATCO is seeking approval in this proceeding to make the adjustments to the Direct Energy Regulated Services' (DERS) South Gas Cost Flowthrough Rate (GCFR) and the ATCO's South load balancing deferred account (LBDA).

244 ATCO explained that prior to October 1, 2008 (when ATCO implemented Retailer Service), DERS was responsible for balancing ATCO's distribution system through its GCFR. The impact of the change in procedure for the period November 1, 2006 to September 30, 2008 is a refund to DERS's GCFR in the amount of approximately $106,000. For the period October 1, 2008 to June 30, 2009, ATCO was responsible for balancing its distribution system. The adjustment that is required to ATCO's South LBDA for the period October 1, 2008 to June 30, 2009 is a charge in the amount of approximately $47,000.

245 ATCO reiterated its request in its supplementary evidence submitted on January 6, 2010 and summarized that it was seeking approval to make a refund to DERS's South GCFR in the amount of approximately $106,000, and to charge an amount of approximately $47,000 to the ATCO South LBDA. These adjustments are related to the removal of the impact of the Carbon production FSR [firm service -- receipts] account from the south FSU [firm service -- utility] account of ATCO.

246 The Commission received no objections from interveners to ATCO's proposal and after consideration of the evidence accepts the necessity for the adjustments in the amounts applied for. The Commission therefore approves ATCO's request as submitted.

4.7.2 Disposition of Application No. 1506285

247 Given that this Proceeding will be closed as of this Decision, the Commission will also close the process for Application No. 1506285, ATCO Gas South Carbon Facilities Part 1B Module, which had been adjourned by the EUB's letter of April 13, 2007 pending the the conclusion of related litigation. This Proceeding has rendered the Part 1B Module redundant.

4.8 Riders and Collection Period

248 In its Argument, AGS indicated that the final amount owed to it including simple interest based on AUC Rule 023 is approximately $50 million. AGS referenced Appendix A provided in Exhibit 150.01 as the backup for the approximate $50 million figure and indicated that this figure is premised on AGS being able to recover all amounts owed to it by December 31, 2011.[217] The total amount owed to AGS shown on Schedule I of Appendix A of Exhibit 150.01 is $50,008,349. This is comprised of $43,727,482 plus interest of $6,280,867. The Commission, in Section 4.6.1 of this Decision, has approved the $43,727,482. The interest amount of $6,280,867 has not been modified by the Commission as provided below because the interest amount is dependent upon the collection period and the final riders approved.

249 The Commission considers that the riders designed to collect the outstanding amount owed to AGS should be calculated with the end date of December 31, 2011, weighed against their overall impact on rates. On Schedule J of Appendix A of Exhibit 150.01, AGS included calculations of what the resulting riders for 2011 would be based on the 2011 forecast throughput as well as how much would be recovered through requested interim riders assumed to be in place for the period of May, 2010 to December, 2010. AGS included the following requested interim riders for the applicable period in 2010 on Schedule J of Appendix A of Exhibit 150.01:

- Low Use & High Use $0.254 per GJ (Rider 'H')
- Irrigation $0.470 per GJ (Rider 'I')

250 The Commission approved the interim riders shown above in Decision 2010-167 (as amended by an Errata)[218] for the period of May-December 31, 2010. Given the timing of the release of this Decision, the Commission has decided to terminate, effective October 31, 2010, the interim riders originally scheduled to expire on December 31, 2010 and replace them with final riders applicable to the period from November 1, 2010 to December 31, 2011. The Commission's calculation of these final riders is included in Appendix 3 of this Decision. In calculating these final riders the Commission has used the forecast throughput figures for November 1, 2010 to December 31, 2011 included on Schedule I of Appendix A of Exhibit 150.01 since these are the most recent throughput forecasts on the record of this proceeding. The resulting final riders calculated by the Commission are as follows:

- Low Use & High Use $0.283 per GJ (Rider 'H')
- Irrigation $0.566 per GJ (Rider 'I')

251 As shown in Appendix 4 of this Decision, the total interest amount is $6,271,973. The effect of rounding the final rider amounts to only three decimal places results is a forecast under collection by AGS of $61,923. Given the significance of the approved pre-interest amount owed to AGS of $43,727,482 and the inherent difficulty in accurately forecasting natural gas throughput, especially for a long period of time (which in this case is from May 1, 2010 to December 31, 2010) there is the possibility that the actual amount of money AGS collects through these interim and final riders will be different than the approved amounts. Therefore, the Commission directs that AGS file an application no later than three months after the final riders expire on December 31, 2011 which includes details of the actual amounts recovered through the interim and final riders. This application should include actual information in tabular format similar to the following:

Table 1. Low Use & High Use

Month	Opening Balance (A)	Interest (Bank of Canada Actual + 1.5%) (B)	Actual Recoveries (C)	Closing Balance (A)+(B)+(C)
May, 2010	$43,253,837	XXX	(YYY)	
June, 2010				
July, 2010				
Each Month Separately for August, 2010 to December, 2011				
Grand Total				

Table 2. Irrigation

Month	Opening Balance (A)	Interest (Bank of Canada Actual + 1.5%) (B)	Actual Recoveries (C)	Closing Balance (A)+(B)+(C)
May, 2010	$473,645	XXX	(YYY)	
June, 2010				
July, 2010				
Each Month Separately for August, 2010 to December, 2011				
Grand Total				

Table 3. Total

Month	Opening Balance (A)	Interest (Bank of Canada Actual + 1.5%) (B)	Actual Recoveries (C)	Closing Balance (A)+(B)+(C)
May, 2010	$43,727,482	XXX	(YYY)	
June, 2010				
July, 2010				
Each Month Separately for August, 2010 to December, 2011				
Grand Total				

The actual grand totals recovered should be compared to the forecast approved amounts (including interest) of $49,457,873 for Low Use & High Use and $541,581 for Irrigation (as shown in Appendix 4 of this Decision) and the differences should be reported in the application, along with AGS' recommendations on how these differences should be treated. Any amount of over/under collection shall be addressed in the application by a further rate rider to ensure that only the amounts awarded under this Decision are refunded to AGS.

252 The final rider of $0.283 per GJ for the Low Use & High Use category is an increase of $0.029 per GJ from the interim rider of $0.254 per GJ approved in Decision 2010-167. This is a percentage increase of approximately 11.5 percent. The impact of the interim rider amount was brought up in Decision 2010-167 and was commented on by AGS as follows:

> In reply to the UCA's argument that the proposed rider would constitute a 26.8 percent increase in the commodity (variable) rate, AGS stated that, for an average customer consuming 120 GJ annually, the requested interim rider (Rider "G") would result in an increased costs of approximately $15 in 2010 or an increase of approximately 4 percent in distribution service costs for an average customer in 2010.[219]

253 Decision 2010-167 stated:

> ... The Commission also accepts as reasonable AGS's calculation that the proposed rate Rider "G" will cost the average Low Use consumer about an additional $15 in 2010, which for the average customer would constitute about a 4 percent increase in distribution costs for the year.[220]

254 For an average customer consuming 120 GJ annually in 2011, the resulting increase in the commodity cost will be approximately $34.[221] Adding this to the total distribution services costs for 2010 of $375[222] before the final rider (assuming no increase in any other costs in 2011) results in a total of $409 for distribution services costs for an average customer in 2011. The resulting percentage increase in 2011 as a result of the final rider is approximately nine percent.[223] The Commission does not consider a nine percent increase amounting to $34 over the entire year 2011 to constitute rate shock in the circumstances of this proceeding. Consequently, the Commission considers the collection period designed for the final rider of November 1, 2010 to December 31, 2011 to be reasonable.

255 The rate schedules for Rate Riders 'H' and 'I' which are effective from the date of this Decision until December 31, 2011 are attached in Appendix 5.

5 ORDER

256 IT IS HEREBY ORDERED THAT:

(1) Rider "H" as approved in Decision 2010-167 errata in the amount of $0.254/GJ to be applied to the Low Use and High Use Delivery Service Rates during the period May 1, 2010 to December 31, 2010 will now be effective only for the period of May 1, 2010 to October 31, 2010.

(2) Rider "I" as approved in Decision 2010-167 in the amount of $0.470/GJ to be applied to the Irrigation Delivery Service Rate during the period May 1, 2010 to December 31, 2010 will now be effective only for the period of May 1, 2010 to October 31, 2010.

(3) Rider "H" is revised and approved in the amount of $0.283/GJ to be applied to the Low Use and High Use Delivery Service Rates during the period November 1, 2010 to December 31, 2011.

(4) Rider "I" is revised and approved in the amount of $0.566/GJ to be applied to the Irrigation Delivery Service Rate during the period November 1, 2010 to December 31, 2011.

(5) ATCO Gas South shall file an application no later than three months after December 31, 2011 in which it will provide details of the actual amounts recovered through Riders "H" and "I", and provide for a reconciliation mechanism for any over/under collection as described in this Decision.

Dated on October 19, 2010.

ALBERTA UTILITIES COMMISSION

(original signed by)
Willie Grieve
Chair

(original signed by)
Moin A. Yahya
Commissioner

(original signed by)
Tudor Beattie, Q.C.
Commissioner

* * * * *

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EB-2013-0186

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

AND IN THE MATTER OF a proceeding to set rates pursuant to section 78 of the *Ontario Energy Board Act, 1998;*

AND IN THE MATTER OF a proceeding commenced by the Board on its own motion pursuant to section 19(4) of the *Ontario Energy Board Act, 1998;* and

AND IN THE MATTER OF section 21(4) of the *Ontario Energy Board Act, 1998*.

BEFORE: Marika Hare
Presiding Member

DECISION ON MOTION AND ORDER

April 25, 2013

INTRODUCTION

In its Decision and Order regarding Burlington Hydro's 2013 rate application (EB-2012-0110), the Board issued a draft Tariff of Rates and Charges effective May 1, 2013, which included a Smart Metering Entity ("SME") charge for the Residential and General Service < 50kW customer rate classes.

On April 8, 2013, Burlington Hydro Inc. ("Burlington Hydro") filed a letter stating that in its Decision and Order (EB-2012-0081) dated June 21, 2012, the Board approved the disposition and recovery of its smart meter deployment costs effective July 1, 2012 which included a projection of costs to be paid to the SME from appropriate customer rate classes.

Burlington Hydro requested direction from the Board regarding the accounting procedure it should follow in order to avoid an over recovery of SME costs.

The Board has determined that it will initiate a review on its own motion of the Decision and Order in EB-2012-0081.

<u>Boards Power of Review</u>.

The Board's power of review on its own motion is provided in section 43.01 of its *Rules of Practice and Procedure* which states the following:

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

The Board's powers are quite broad under Rule 43.01. There is no language in Rule 43.01 which limits the rationale for initiating a Motion to Review on the Board's own motion.

In this case Burlington raised the issue regarding the collection of SME costs in the EB-2012-0081 proceeding. Burlington filed a letter setting out this collection. The Board reviewed the letter and determined that there could possibly be an error in the Decision in EB 2012-0081. The Board determined that it would review this issue and initiated this Motion.

BACKGROUND

The Board's *Guideline G-2011-0001: Smart Meter Funding and Cost Recovery – Final Disposition* ("Guideline G-2011-0001"), issued on December 15, 2011, outlines the Board's filing instructions in relation to the funding and recovery of costs associated with smart meter activities conducted by Ontario electricity distributors. In accordance with Guideline G-2011-0001 and the legislation, specifically O. Reg 426/06, distributors are eligible to recover from their customers the costs to deploy smart meters and to comply with the enrolment requirements and technical interface requirements of the Smart Metering Entity, subject to a prudence review and approval by the Board. Distributors are not eligible to recover the costs of meter data management/repository ("MDM/R") functions that are the responsibility of the Smart Metering Entity[1].

The Board also notes that Guideline G-2011-0001 states on page 17 that:

> Cost recovery for ongoing costs of the Smart Metering Entity should not be included in any smart meter cost recovery application, until such time as the Board establishes a cost recovery mechanism. To date, the Board has disallowed requests for either cost recovery or the establishment of a deferral account to track these costs.

The IESO, in its capacity as the SME, applied to the Board on March 23, 2012 for approval, among other things, of a SME charge for the Residential and General Service <50kW customer rate classes.

On March 28, 2013, the Board approved a SME charge of $0.79 per month for Residential and General Service < 50kW customers for those distributors identified in the Board's annual Yearbook of Electricity Distributors. This charge will be in effect from May 1, 2013 to October 31, 2018.

[1] O.Reg. 426/06 s. 2 (1) states that:No distributor shall recover any costs associated with meter data functions to be performed by the Smart Metering Entity.

SME COSTS INCLUDED IN BURLINGTON HYDRO'S SMART METER COSTS APPLICATION

Burlington Hydro applied to the Board on February 28, 2012 for permission to increase its delivery charges beginning May 1, 2012 to reflect the recovery of costs for deployed smart meters. The application was filed under section 78 of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c.15 (Schedule B) in conformance with Guideline G-2011-0001. The Board assigned File No. EB-2012-0081 to this application.

The Board's Decision in EB-2012-0081 was issued on June 21, 2012, approving separate rate riders for the Residential, GS <50 kW and GS >50 kW rate classes served by Burlington Hydro. In that application, Burlington Hydro sought, and received approval of a Smart Meter Disposition Rider ("SMDR") for the recovery of net deferred revenue requirement for installed smart meters, as well as a Smart Meter Incremental Revenue Requirement Rate Rider ("SMIRR") for recovery of ongoing capital-related and operating costs until Burlington Hydro's next cost of service application. The approved rate riders had an effective date of May 1, 2012 and an implementation date of July 1, 2012. The SMDR and SMIRR rate riders for the three affected rate classes were based on a total Net Deferred Revenue Requirement of $934,936 and a total Incremental Revenue Requirement for 2012 of $2,503,458.

Burlington Hydro's application to recover smart meter costs was supported by written evidence and the completion of the Board's model to document smart meter costs and calculate the SMDR and SMIRR. In accordance with the O.Reg. 426/06 and Guideline G-2011-0001, the Board's model does not contain a cost category for recovery of the ongoing SME costs.

At Page 19 of the Manager's Summary, the evidence states:

> No cost is included for which the Smart Meter Entity has exclusive authority to act pursuant to O. Reg. 393/07.

However, by letter dated April 24, 2013, Burlington Hydro informed the Board that the SME costs had been included in the model within the category of "WAN Maintenance" under the heading of "2012 and Later Forecast Costs". The total amount included in the model was $555,660.

BOARD FINDINGS

The issue that the Board needs to address is the potential for an over recovery of costs relating to the Smart Metering Entity.

The Board is of the view that Burlington Hydro misled the Board by stating that no cost for which the SME has exclusive authority to act pursuant to O. Reg. 393/07 was included in the EB-2012-0081 proceeding. In other words, had the Board known that these costs were included in the application, the Board would have disallowed recovery consistent with prior decisions for other distributors on this particular matter and Guideline G-2011-0001.

The Board therefore finds that this is grounds for a nullity with respect only to the costs related to the recovery of the SME charge, and will exercise its power under section 43.01 of the *Rules of Practice and Procedure*. Accordingly the Board is cancelling the SMIRRs approved in the EB-2012-0081 proceeding.

The Board has recalculated the SMIRRs that will be effective May 1, 2013 by adjusting the final models in Burlington Hydro's smart metering application by removing the $555,660 from WAN Maintenance. The adjusted models are attached to this Decision as Appendix B. The resulting impacts on Burlington Hydro's Revenue Requirement and SMIRR rate riders are shown in the following table:

	WAN Maintenance		2012 Revenue Requirement		SMIRR Rate Riders		
	EB-2012-0081 Approved	Adjusted	EB-2012-0081 Approved	Adjusted	EB-2012-0081 Approved	Adjusted	Variance
Residential	$522,782	$16,086	$2,049,875	$1,536,278	$2.90	$2.17	$0.73
GS <50 kW	$45,441	$1,398	$407,993	$363,351	$6.63	$5.91	$0.72
GS >50 kW	$5,078	$156	$45,590	$40,601	$4.18	$3.72	$0.46
Total	$573,301	$17,640	$2,503,458	$1,940,230			

The Board therefore finds that effective May 1, 2013 Burlington Hydro shall revise its SMIRR rate riders for the Residential, GS <50 kW and GS >50 kW rate classes in accordance with the rate riders calculated in the attached smart meter models, and reflecting the following SMIRR rates:

Customer Class	Rate	Recovery Period
Residential	$2.17	In effect from May 1, 2013 until the effective date of Burlington Hydro's next cost of service based rates.
GS < 50 kW	$5.91	
GS > 50 kW	$3.72	

Burlington Hydro shall also calculate the amount of SME revenue received, based on the variances shown in the above table multiplied by Burlington Hydro's actual monthly customer numbers in each of the affected rate classes for the period May 1, 2012 to April 30, 2013. Burlington Hydro shall include these recoveries on a rate class specific basis in separate sub-accounts of Account 2425, Other Deferred Credits. Interest carrying charges should apply to the monthly opening balances in the sub-accounts (exclusive of accumulated interest) for the period from July 1, 2012 to the month prior to disposition of their balances in rates. The carrying charges should be recorded in a separate sub-account of Account 2425. These amounts shall be brought forward for disposition in Burlington Hydro's next cost of service application, scheduled to be for 2014 rates.

DETERMINATION TO DISPOSE OF THIS PROCEEDING WITHOUT A HEARING

The Board has made its determination of this matter in accordance with its authority under Section 19(4) of the Act.

The Board has determined that no person will be adversely affected in a material way by the outcome of this proceeding, since this Decision eliminates the potential over recovery of SME costs from Burlington Hydro's Residential, GS <50 kW and GS >50 kW rate classes. Therefore, in accordance with section 21(4)(b) of the Act, the Board has disposed of this matter without a hearing.

IMPLEMENTATION

Attached to this Decision and Order are a draft Tariff of Rates and Charges, incorporating the 2013 IRM rates approved in EB-2012-0110 and the revised SMIRR rate riders approved in this proceeding (Appendix A) and Revised Smart Meter Models for each of the three affected rate classes (Appendix B).

THEREFORE, THE BOARD ORDERS THAT:

1. Burlington Hydro's new distribution rates shall be effective May 1, 2013. The draft tariff of Rates and Charges issued in this proceeding supersedes and replaces the draft Tariff of Rates and Charges issued in EB-2012-0110.

2. Burlington Hydro shall review the draft Tariff of Rates and Charges set out in Appendix A and the revised smart meter models attached as Appendix B. Burlington Hydro shall file with the Board a written confirmation assessing the completeness and accuracy of the models and draft Tariff of Rates and Charges, or provide a detailed explanation of any inaccuracies or missing information within **7 days** of the date of issuance of this Decision and Order.

3. If the Board does not receive a submission from Burlington Hydro to the effect that inaccuracies were found or information was missing pursuant to item 2 of this Decision and Order, the draft Tariff of Rates and Charges set out in Appendix A of this Decision and Order will become final, effective May 1, 2013, and will apply to electricity consumed or estimated to have been consumed on and after May 1, 2013. Burlington Hydro shall notify its customers of the rate changes no later than with the first bill reflecting the new rates.

4. If the Board receives a submission from Burlington Hydro to the effect that inaccuracies were found or information was missing pursuant to item 2 of this Order, the Board will consider the submission of Burlington Hydro and will subsequently issue a final Tariff of Rates and Charges.

5. Burlington Hydro shall file with the Board a draft Accounting Order within **7 days** of the date of the issuance of this Decision and Order to establish sub-accounts of Account 2425, Other Deferred Credits, to record the actual amounts recovered relating to the SME entity from the Residential, GS <50 kW and GS >50 kW rate classes for the period July 1, 2012 to April 30, 2013.

6. Board staff shall file any comments on the draft Accounting Order with the Board and forward to Burlington Hydro within **7 days** of the date of filing of the draft Accounting Order.

7. Burlington Hydro shall file with the Board responses to any comments on its draft Accounting Order within **14 days** of the date of filing of the draft Accounting Order.

8. Burlington Hydro shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

DATED at Toronto, April 25, 2013

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

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Indexed as:

Chandler v. Alberta Association of Architects

IN THE MATTER of an application for an order for prohibition;
AND IN THE MATTER of the Architects Act, being chapter A-44.1 of the Revised Statutes of Alberta, 1980, as amended;
AND IN THE MATTER of the Practice Review Board of the Alberta Association of Architects
Sheldon Harvey Chandler, S.H. Chandler Architect Ltd., Gordon Gerald Kennedy, G.G. Kennedy Architect Ltd., Brian William Kilpatrick, Brian W. Kilpatrick Architect Ltd., Peter Juergen Dandyk and Peter J. Dandyk Architect Ltd., appellants;
v.
Alberta Association of Architects, the Practice Review Board of the Alberta Association of Architects, Trevor H. Edwards, James P.M. Waugh and Mary K. Green, respondents.

[1989] 2 S.C.R. 848

[1989] 2 R.C.S. 848

[1989] S.C.J. No. 102

1989 CanLII 41

File No.: 19722.

Supreme Court of Canada

1989: January 30 / 1989: October 12.

Present: Dickson C.J. and Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Administrative law -- Boards and tribunals -- Jurisdiction -- Continuation of original proceedings -- Functus officio -- Inquiry into the practices of a firm of architects -- Board conducting a valid hearing but issuing ultra vires findings and orders -- Board's findings and orders quashed -- Board failing to consider whether it should make recommendations as *required by legislation -- Whether Board empowered to continue original proceedings -- Architects Act, R.S.A. 1980, c. A-44.1, s. 39(3) -- Alberta Regulation, 175/83, s. 11(1).*

Pursuant to s. 39 of the Architects Act, the Practice Review Board of the Alberta Association of Architects conducted a hearing to review the practices of a firm of [page849] architects which went bankrupt and issued a report. Although the hearing was intended to be a practice review, the Board, in its report, made 21 findings of unprofessional conduct against the firm and six of the architects, levied fines, imposed suspensions and ordered them to pay the costs of the hearing. The Court of Queen's Bench allowed appellants' application for certiorari and quashed the Board's findings and orders. The Court of Appeal upheld the decision holding that the Board lacked jurisdiction to make findings or orders relating to disciplinary matters or costs. Under s. 39(3) of the Act, the Board is simply responsible for reporting to the Council of the Alberta Association of Architects and for making appropriate recommendations.

The Board notified the appellants that it intended to continue the original hearing to consider whether a further report should be prepared for consideration by the Council and whether the matter should be referred to the Complaint Review Committee. The Court of Queen's Bench allowed appellants' application to prohibit the Board from proceeding further in the matter. The court found that the Board had completed and fulfilled its function and that it was therefore functus officio. The Court of Appeal vacated the order of prohibition. It held that s. 39(3) of the Act and s. 11(1) of the Regulations require the Board to consider whether or not to make recommendations to the Council or the Complaint Review Committee. The Board did not do so and therefore did not exhaust its jurisdiction.

Held (La Forest and L'Heureux-Dubé JJ. dissenting): The appeal should be dismissed.

Per Dickson C.J. and Wilson and Sopinka JJ.: The Board was not functus officio. As a general rule, once an administrative tribunal has reached a final decision in respect of the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip in drawing up the decision or there has been an error in expressing the manifest intention of the tribunal. To this extent, the principle of functus officio applies to an administrative tribunal. It is based, however, on the policy ground which favours finality of proceedings rather than on the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. Its application in respect to administrative tribunals [page850] which are subject to appeal only on a point of law must thus be more flexible and less formalistic.

Here, the Board failed to dispose of the matter before it in a manner permitted by the Act. The Board conducted a hearing into the appellants' practices but issued findings and orders that were ultra vires. The Board erroneously thought it had the power of the Complaint Review Committee and proceeded accordingly. It did not consider making recommendations as required by the Regulations and s. 39(3) of the Act. While the Board intended to make a final disposition of the matter before it, that disposition was a nullity and amounted in law to no disposition at all. In these circumstances, the Board, which conducted a valid hearing until it came to dispose of the matter, should be entitled to continue the original proceedings to consider disposition of the matter on a proper basis. On the continuation of the original proceedings, however, either party should [page851] be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter in accordance with the Act and Regulations.

Per La Forest and L'Heureux-Dubé JJ. (dissenting): When an administrative tribunal has reached its decision, it cannot afterwards, in the absence of statutory authority, alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission. In this case, the Board was functus officio when it handed down its decision. Its function was completed when it rendered its final report. The fact that the original decision was wrong or made without jurisdiction is irrelevant to the issue of functus officio.

If the Board had discretion to consider making recommendations, and chose not to do so, it should be the end of the matter. There is no authority in the Act that permits the Board to change its mind on its own initiative. Furthermore, once a board acts outside its jurisdiction it should not be allowed to rectify the infirmities of its disposition according to its own predilections. Standards of consistency and finality must be preserved for the effective development of the complex administrative tribunal system in Canada. Either a Board is compelled to act in a prescribed manner, or it is prohibited from so acting. Allowing the Board to reopen the hearing, without an explicit provision in the enabling statute, would create considerable confusion in the law relating to powers of administrative tribunals to rehear or redecide matters. Finally, as a general rule, a tribunal should not be allowed to reserve the exercise of its remaining powers for a later date. The Board could not attempt to retain jurisdiction to make recommendations once it had made a final order, as the parties would never have the security of knowing that the decision rendered has finally determined their respective rights in the matter.

If the Board had a duty to consider making recommendations which it failed to fulfill, it could, depending on the circumstances of the case, be directed to review the entire matter afresh, and could be required to conduct a new hearing. Any re-examination, however, should not be construed as a "continuation of the Board's original proceedings". It would set a dangerous precedent in expanding the powers of administrative tribunals beyond the wording or intent of the enabling statute. It would also erode the protection of fairness and natural justice which is expected of administrative tribunals. In the particular circumstances of this case, a rehearing would not be appropriate.

The Court of Appeal erred in applying the principles of mandamus to the present situation.

Cases Cited

By Sopinka J.

Referred to: In re St. Nazaire Co. (1879), 12 Ch. D. 88; Paper Machinery Ltd. v. J. O. Ross Engineering Corp., [1934] S.C.R. 186; Huneault v. Central Mortgage and Housing Corp. (1981), 41 N.R. 214; Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster (1983), 147 D.L.R. (3d) 637; Ridge v. Baldwin, [1964] A.C. 40; Lange v. Board of School Trustees of School District No. 42 (Maple Ridge) (1978), 9 B.C.L.R. 232; Posluns v. Toronto Stock Exchange, [1968] S.C.R. 330; Grillas v. Minister of Manpower and Immigration, [1972] S.C.R. 577.

By L'Heureux-Dubé J. (dissenting)

Re V.G.M. Holdings, Ltd., [1941] 3 All E.R. 417; Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292 (1964), 44 D.L.R. (2d) 463; Lewis v. Grand Trunk Pacific Railway Co. (1913), 13 D.L.R. 152; M. Hodge and Sons Ltd. v. Monaghan (1983), 43 Nfld. & P.E.I.R. 162; Huneault v. Central Mortgage and Housing Corp. (1981), 41 N.R. 214; Lodger's International Ltd. v. [page852] O'Brien (1983), 45 N.B.R. (2d) 342; Slaight Communications Inc. v. Davidson, [1985] 1 F.C. 253 (C.A.), aff'd [1989] 1 S.C.R. 1038; Grillas v. Minister of Manpower and Immigration, [1972] S.C.R. 577; Cité de Jonquière v. Munger, [1964] S.C.R. 45; Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster (1983), 147 D.L.R. (3d) 637; Lange v. Board of School Trustees of School District No. 42 (Maple Ridge) (1978), 9 B.C.L.R. 232; Canadian Industries Ltd. v. Development Appeal Board of Edmonton (1969), 71 W.W.R. 635; Karavos v. Toronto, [1948] 3 D.L.R. 294.

Statutes and Regulations Cited

Alberta Regulation, 175/83, s. 11.
Architects Act, R.S.A. 1980, c. A-44.1, ss. 9(1)(j.1) [ad. 1981, c. 5, s. 6], 39 [am. 1981, c. 5, s. 16].
Labour Relations Code, S.A. 1988, c. L-1.2, s. 11(4).
National Telecommunications Powers and Procedures Act, R.S.C., 1985, c. N-20 [formerly National Transportation Act], s. 66.
Ontario Municipal Board Act, R.S.O. 1980, c. 347, s. 42.

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Black's Law Dictionary, 5th ed. St. Paul, Minn.: West Publishing Co., 1979, "functus officio".
Jowitt's Dictionary of English Law, 2nd ed. By John Burke. London: Sweet & Maxwell, 1977, "functus officio".
Pépin, Gilles et Yves Ouellette. Principes de contentieux administratif, 2e éd. Cowansville, Qué.: Éditions Yvon Blais Inc., 1982.

APPEAL from a judgment of the Alberta Court of Appeal (1985), 67 A.R. 255, allowing respondents' appeal from a decision of the Court of Queen's Bench [Alta. Q.B., No. 8501-19113, October 8, 1985 (Brennan J.)], granting appellants' application for an order for prohibition against the Practice Review Board. Appeal dismissed, La Forest and L'Heureux-Dubé JJ. dissenting.

W.E. Code, Q.C., and B.G. Kapusianyk, for the appellants. No one appearing for the respondents.

Solicitors for the appellants: Code Hunter, Calgary.

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The judgment of Dickson C.J. and Wilson and Sopinka JJ. was delivered by

1 **SOPINKA J.**:-- The issue in this appeal is whether the Practice Review Board of the Alberta Association of Architects was functus officio after delivering a report on the practices leading to the bankruptcy of the Chandler Kennedy Architectural Group. The Alberta Court of Appeal allowed an appeal from the decision of the Alberta Court of Queen's Bench granting the appellants' application for an order prohibiting the Practice Review Board from proceeding on the grounds that the Board no longer had jurisdiction to deal with the matter and was functus officio.

Facts

2 As a result of the Chandler Kennedy Architectural Group filing for voluntary insolvency in June 1984, the Practice Review Board of the Alberta Association of Architects decided on its own initiative pursuant to s. 39(1)(b) of the Architects Act, R.S.A. 1980, c. A-44.1, to undertake a review of the practice of the Group and a number of the individual members of the Group. Hearings were commenced on August 14, 1984 and continued for a total of eighteen days. Final submissions were heard on December 17, 1984 and the report of the Board was issued on March 6, 1985.

3 The 71-page report made 21 specific findings of unprofessional conduct against the firm and several of the partners. Fines totalling $127,500 were imposed upon six members of the firm. The same six partners were also issued suspensions from practicing architecture for periods from six months to two years. As well, the appellants were required to pay the costs of the hearing, approximating $200,000.

Proceedings in the Courts Below

4 The appellants filed notice of intention to appeal the decision of the Board to the Council of the Alberta Association of Architects pursuant to s. 55 [page854] of the Architects Act. However, prior to the commencement of the appeal, the appellants brought an application before the Alberta Court of Queen's Bench for an order in the nature of certiorari to quash the findings and order of the Practice Review Board. Kryczka J. granted the order requested and held that the failure to inform the appellants that they were facing any charges or allegations of unprofessional conduct offended the principles of natural justice. Kryczka J. held that the comments of the Chairman of the Board clearly indicated that the hearings were intended to be a practice review rather than an inquiry into allegations of unprofessional conduct.

5 This decision was appealed by the Alberta Association of Architects to the Alberta Court of Appeal. In the Court of Appeal (1985), 39 Alta. L.R. (2d) 320, Prowse J.A. speaking for the court, upheld the decision of Kryczka J. but on different grounds. Prowse J.A. held that the Practice Review Board lacked jurisdiction to make findings or orders relating to disciplinary matters or costs. Disciplinary powers were said to be reserved for another body within the Alberta Association of Architects, the Complaint Review Committee. Under s. 39(3) of the Architects Act the Board is simply responsible for reporting to the Council and making whatever recommendations it feels are appropriate. Therefore, the Court of Appeal dismissed the appeal on the grounds that the Architects Act did not give to the Board the powers it purported to exercise.

6 A month after the decision of the Court of Appeal, the Practice Review Board gave notice to the appellants that it intended to continue the original hearing in order that consideration could be given to preparing a further report to the Council of the Alberta Association of Architects and consideration could also be given to referring the matter to the Complaint Review Committee.

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7 The appellants then brought an application before the Court of Queen's Bench to prohibit the Board from proceeding further with the continuation of the matter. Brennan J. held that the Board had completed and fulfilled the function for which it was constituted and it was therefore functus officio and lacked jurisdiction to continue its hearing. This decision was also appealed to the Alberta Court of Appeal.

8 The Court of Appeal (1985), 67 A.R. 255 allowed the appeal and vacated the order of prohibition. Kerans J.A. for the court held that s. 39(3) of the Architects Act and Regulation 175/83, s. 11(1) impose on the Board the duty to consider whether or not to make a recommendation. Kerans J.A. held that the Board did not consider whether to make a recommendation that the matter be referred to the Complaint Review Committee and therefore it did not exhaust its jurisdiction. Functus officio was held not to apply here as there was a failure to consider matters which were part of the Board's statutory duty. It is from this decision that the present appeal arises.

Statutory Powers of the Board

9 In order to determine whether the Board was empowered to continue its proceedings against the appellants it is necessary to examine the statutory framework within which it operates. The Act does not purport to confer on the Board the power to rescind, vary, amend or reconsider a final decision that it has made. Such a provision is not uncommon in the enabling statutes of many tribunals. See Labour Relations Code, S.A. 1988, c. L-1.2, s. 11(4); Ontario Municipal Board Act, R.S.O. 1980, c. 347, s. 42; and National Telecommunications Powers and Procedures Act, R.S.C., 1985, c. N-20, s. 66 (formerly the National Transportation Act). It is therefore necessary to consider (a) whether it had made a final decision, and (b) whether it was, therefore, functus officio.

[page856]

10 The Board on its own initiative launched an inquiry into the practices of the appellants pursuant to s. 39 of the Act which provides:

39(1) The Board

(a) shall, on its own initiative or at the request of the Council, inquire into and report to and advise the Council in respect of

(i) the assessment of existing and the development of new educational standards and experience requirements that are conditions precedent to obtaining and continuing registration under this Act,
(ii) the evaluation of desirable standards of competence of authorized entities generally,
(iii) any other matter that the Council from time to time considers necessary or appropriate in connection with the exercise of its powers and the performance of its duties in relation to competence in the practice of architecture under this Act and the regulations, and
(iv) the practice of architecture by authorized entities generally,

and

(b) may conduct a review of the practice of an authorized entity in accordance with this Act and the regulations.

(2) A person requested to appear at an inquiry under this section by the Board is entitled to be represented by counsel.
(3) The Board shall after each inquiry under this section make a written report to the Council on the inquiry and may make any recommendations to the Council that the Board considers appropriate in connection with the matter inquired into, with reasons for the recommendations.
(4) If it is in the public interest to do so, the Council may direct that the whole or any portion of any inquiry by the Board under this section shall be held in private.

11 It is apparent that s. 39 does not deal with discipline but rather with practices in the profession with a view to their improvement. If, however, in the course of the inquiry into practices it appears to the Board that a matter may require investigation by the Complaint Review Committee, provision is made for referral of that matter to that Committee. Section 9(1)(j.1) of the Act empowers the Council to make regulations:

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(j.1) respecting the powers, duties and functions of the Practice Review Board including, but not limited to, the referral of matters by that Board to the Council or the Complaint Review Committee and appeals from decisions of that Board;

12 Section 11 of Regulation 175/83 passed pursuant to s. 9(1)(j.1) provides as follows:

11(1) The Board may shall [sic] make one or more of the following directions or recommendations:

(a) make one or more recommendations to the authorized entity or licensed interior designer, the subject of a practice review, respecting desired improvements in the practice reviewed;

(b) direct that a reviewer conduct a follow-up practice review to determine whether or not the Board's recommendations have been adopted and whether they have resulted in the desired improvements being made in the practice of the entity concerned;

(c) if it considers any one or more of the following matters to be of a sufficiently serious nature to require investigation by the Complaint Review Committee, direct that the matter be referred to the Complaint Review Committee for investigation:

(i) the uncooperative manner of an authorized entity or licensed interior designer in the course of a practice review or a follow up review;

(ii) a failure to comply with the Act, Professional Practice Regulation, Code of Ethics, Interior Design Regulation or General By-laws;

(iii) a failure to adopt and implement the recommendations respecting desired improvements in the practice of the entity concerned;

(iv) any apparent fraud, negligence or misrepresentation, or any disregard of the generally accepted standards of the practice of architecture or practice of licensed interior designers;

(d) if the Board determines in the course of its practice review that the conduct of an authorized entity or licensed interior designer constitutes

(i) unskilled practice of architecture or unprofessional conduct or both, or

(ii) unskilled practice of interior design or unprofessional conduct, or both

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the Board shall deal with the matter in accordance with sections 50 to 53 of the Act;

(e) indicate that it has no recommendations to make or that the practice reviewed is satisfactory;

(f) comment on a practice maintained at a high standard and with the consent of the authorized entity or licensed interior designer concerned, publicize the high standard and the persons concerned;

(g) take recommendations to the Council with a view to the establishment of new standards related to specific or general areas of the practice of architecture.

(2) The Board shall not impose any sanction under subsection (1)(d) unless the authorized entity or professional interior designer concerned

(a) has made representations to the Board, or

(b) after a notice under section 42 of the Act has been given, fails to attend the hearing or does not make representations.

13 The Board's inquiry proceeded as an inquiry into practices in accordance with the Act. The following statements made by the Chairman during the course of the inquiry aptly describe the nature of the inquiry:

> The first thing that I would like to make very clear and I believe that you alluded to this in the beginning, that this is not a complaint review, this is a practice review, and as a result we are not dealing with a specific case of wrongdoing which I think you are alluding to and you are obviously experienced in the court. We are dealing with a review of the practice of the various authorized entities and that means a total review. So, as a result, the entire course of this Hearing has been to review the total practice. It has not been a process of reviewing specific points. The Board has been concerned to develop a full and as broad an understanding of the practice of the various entities as is humanly possible under the circumstances.
>
> As a result of the review of those authorized entities, it is our responsibility and our duty to make recommendations and to make findings and we of course are going to be doing that following this.
>
> . . .
>
> Following each and every individual, we have provided an opportunity for questioning. The Board will have to take into consideration all of the evidence that has been put before it and has been spending a great deal of time in making certain it is listening and trying to understand [page859] everything that has taken place. But again, as I said to your counsel, a few minutes ago, this is not a complaint review where we are trying to find fault or guilt on specific complaints. This is a practice review, and as a result we are given the responsibility of trying to review and understand at the fullest extent possible what has taken place, and as a result of the fullest extent of which has taken place, make findings and recommendations to the profession. [Emphasis added.]

14 Nevertheless, when it came to issue directions and recommendations, instead of proceeding under s. 39(3) of the Act as amplified by s. 11(1)(a), (b), (c), (e), (f) or (g) of the Regulation, the Board proceeded under s. 11(1)(d) of the Regulation, a provision that the Court of Appeal in the first appeal held to be ultra vires. The Court of Appeal held that ss. 50 to 53 deal with disciplinary matters which are beyond the competence of the Board. This decision of the Court of Appeal has not been challenged. Accordingly, the result of the decision of the Court of Appeal is that the Board conducted a valid hearing into the appellants' practice but issued findings and orders that were ultra vires and have been quashed.

15 In view of the fact that the Board erroneously thought it had the power of the Complaint Review Committee and proceeded accordingly, it did not consider recommendations under s. 39(3) of the Act or under s. 11(1)(a), (b), (c), (e), (f) or (g), and in particular (c), of the Regulation.

16 Kerans J.A. based his conclusion that the Board was not functus officio on the ground that the Board had a duty to consider whether to make a recommendation. He stated, at p. 257:

> While the board has, under s. 39(3) and perhaps also the regulations, a discretion whether to make any recommendation, we think that the section imposes upon the board the duty to consider whether to make a recommendation. The report does not say that the board did so. If the board did not so consider, then, contrary to the finding of the learned Queen's Bench judge, the board has not exhausted its jurisdiction.

17 In view of the inexplicable use of "may/shall" in Regulation 11(1), it is difficult to determine precisely what the Board was obliged to do. Certainly [page860] it would be strange if the Board were empowered to conduct a lengthy practice review and had no duty to consider making recommendations, either to the parties or to Council, or to consider a referral to the Complaint Review Committee. Therefore, I agree with Kerans J.A. that the Board had the duty to consider making recommendations pursuant to the Regulation and s. 39(3) of the Architects Act.

18 I am, however, of the opinion that the application of the functus officio principle is more appropriately dealt with in the context of the following characterization of the current state of the Board's proceedings. The Board held a valid hearing into certain practices of the appellants. At the conclusion of the hearing, in lieu of considering recommendations and directions, it made a number of ultra vires findings and orders which were void and have been quashed. In these circumstances, is the decision of the Board final so as to attract the principle of functus officio?

Functus Officio

19 The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in In re St. Nazaire Co. (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. where there had been a slip in drawing it up, and,
2. where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. v. J. O. Ross Engineering Corp., [1934] S.C.R. 186.

In Grillas v. Minister of Manpower and Immigration, [1972] S.C.R. 577, Martland J., speaking for himself and Laskin J., opined that the same reasoning did not apply to the Immigration Appeal [page861] Board from which there was no appeal except on a question of law. Although this was a dissenting judgment, only Pigeon J. of the five judges who heard the case disagreed with this view. At p. 589 Martland J. stated:

> The same reasoning does not apply to the decisions of the Board, from which there is no appeal, save on a question of law. There is no appeal by way of a rehearing.
>
> In R. v. Development Appeal Board, Ex p. Canadian Industries Ltd., the Appellate Division of the Supreme Court of Alberta was of the view that the Alberta Legislature had recognized the application of the restriction stated in the St. Nazaire Company case to administrative boards, in that express provision for rehearing was made in the statutes creating some provincial boards, whereas, in the case of the Development Appeal Board in question, no such provision had been made. The Court goes on to note that one of the purposes in setting up these boards is to provide speedy determination of administrative problems.

He went on to find in the language of the statute an intention to enable the Board to hear further evidence in certain circumstances although a final decision had been made.

20 I do not understand Martland J. to go so far as to hold that functus officio has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in Paper Machinery Ltd. v. J. O. Ross Engineering Corp., supra.

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21 To this extent, the principle of functus officio applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

22 Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in Grillas, supra.

23 Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See Huneault v. Central Mortgage and Housing Corp. (1981), 41 N.R. 214 (F.C.A.)

24 In this appeal we are concerned with the failure of the Board to dispose of the matter before it in a manner permitted by the Architects Act. The Board intended to make a final disposition but that disposition is a nullity. It amounts to no disposition at all in law. Traditionally, a tribunal, which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision. In Re Trizec Equities Ltd. [page863] and Area Assessor Burnaby-New Westminster (1983), 147 D.L.R. (3d) 637 (B.C.S.C.), McLachlin J. (as she then was) summarized the law in this respect in the following passage, at p. 643:

> I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision: Lange v. Board of School Trustees of School District No. 42 (Maple Ridge) (1978), 9 B.C.L.R. 232 (B.C.S.C.); Posluns v. Toronto Stock Exchange et al. (1968), 67 D.L.R. (2d) 165, [1968] S.C.R. 330. In the latter case, the Supreme Court of Canada quoted from Lord Reid's reasons for judgment in Ridge v. Baldwin, [1964] A.C. 40 at p. 79, where he said:
>
> > I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present its case, then its later decision will be valid.
>
> There is no complaint made by Trizec Equities Ltd. with respect to the hearing held on March 19th. Accordingly, while the court exceeded its jurisdiction by purporting to increase the assessments on the morning of March 17, 1982, its subsequent decision of March 19, 1982, stands as valid.

25 If the error which renders the decision a nullity is one that taints the whole proceeding, then the tribunal must start afresh. Cases such as Ridge v. Baldwin, [1964] A.C. 40 (H.L.); Lange v. Board of School Trustees of School District No. 42 (Maple Ridge) (1978), 9 B.C.L.R. 232 (S.C.B.C.) and Posluns v. Toronto Stock Exchange, [1968] S.C.R. 330, referred to above, are in this category. They involve a denial of natural justice which vitiated the whole proceeding. The tribunal was bound to start afresh in order to cure the defect.

26 In this proceeding the Board conducted a valid hearing until it came to dispose of the matter. It then rendered a decision which is a nullity. It failed to consider disposition on a proper basis and [page864] should be entitled to do so. The Court of Appeal so held.

27 On the continuation of the Board's original proceedings, however, either party should be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter in accordance with the Act and Regulation. This will enable the appellants to address, frontally, the issue as to what recommendations, if any, the Board ought to make.

28 In the result, the appeal is dismissed, but without costs. The respondents neither appeared on the argument nor filed a factum.

The reasons of La Forest and L'Heureux-Dubé JJ. were delivered by

29 L'HEUREUX-DUBÉ J. (dissenting):-- I must respectfully disagree with my colleague Justice Sopinka's disposition of this appeal.

30 The issues which arise in this appeal are:

> (1) Was the Practice Review Board ("Board") of the Alberta Association of Architects functus officio after delivering a report on the practices leading to the bankruptcy of the Chandler Kennedy Architectural Group?
>
> (2) If the Board was not functus officio, does it have the jurisdiction to continue the original hearing against the appellants to consider making recommendations to the Complaint Review Committee?
>
> (3) Did the Court of Appeal err in its consideration and application of the principles relating to mandamus?

31 The first two, closely related issues, turn on the construction of s. 39 of the Architects Act, R.S.A. 1980, c. A-44.1, and Regulation 175/83 (passed under authority of the Act), which establish the Board and define its powers.

[page865]

32 Section 39(3) of the Architects Act provides:

> (3) The Board shall after each inquiry under this section make a written report to the Council on the inquiry and may make any recommendations to the Council that the Board considers appropriate in connection with the matter inquired into, with reasons for the recommendations.

33 The disputed text is found in Regulation 175/83, s. 11(1):

> 11(1) The Board may shall [sic] make one or more of the following directions or recommendations:
>
> . . .
>
> (c) ... direct that the matter be referred to the Complaint Review Committee for investigation: ...

34 The confusion emanates from the inclusion of both the permissive, discretionary term "may", and the affirmative, mandatory term "shall", without any indication as to which prevails. However, while I shall discuss the implications of both interpretations, in my view the appeal should be allowed on either construction.

(1) Functus Officio

35 When the Board first undertook to reopen the hearing, appellants sought an order for prohibition, which was granted by Brennan J. In granting the order, the chambers judge of the Court of Queen's Bench stated:

> Unfortunately, the Practice Review Board proceeded to set itself up as having disciplinary functions and made findings and assessed penalties. Mr. Justice Kryczka declared these Findings and Orders a nullity, which decision was upheld by the Alberta Court of Appeal.
>
> In my view, the Practice Review Board has completed and fulfilled the function for which it was appointed and therefore it is functus officio. Such being the case, it had no jurisdiction to continue with any function. Accordingly, the application is granted for an Order to prohibit the Board from proceeding further against these Applicants, and in particular, the Board is hereby prohibited from proceeding with any further hearings on this matter.

36 This decision was reversed by the Alberta Court of Appeal: (1985), 67 A.R. 255. According to Kerans J.A., for the court, the Board was not [page866] functus officio, and should be allowed to "voluntarily ... do the right thing" (at p. 257):

> [T]he board, having mistaken[ly] decided that it had itself the power to deal directly and finally with discipline questions, too quickly rejected any consideration of making recommendations to other bodies. We think that the board, persuaded by its mistaken assumption of these other powers, made such an egregious error about the significance of its powers of recommendation that it cannot be said that it has exercised that jurisdiction.

37 Jowitt's Dictionary of English Law (2nd ed. 1977) defines functus officio as "having discharged his duty"; an expression applied to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted. The holding of Morton J. in Re V.G.M. Holdings, Ltd., [1941] 3 All E.R. 417 (Ch. D.), is well summarized in the headnote:

> Where a judge has made an order for a stay of execution which has been passed and entered, he is functus officio, and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal.

38 An editorial note added that:

> This is a practice point. It is well-settled that the court can vary any order before it is passed and entered. After it has been passed and entered, the court is functus officio, and can make no variation itself. Any variation which may be made must be made by a court of appellate jurisdiction.

39 Black's Law Dictionary (5th ed. 1979) defines functus officio as "a task performed":

> Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and also to an instrument, power, agency, etc., which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect.

[page867]

40 The doctrine of functus officio states that an adjudicator, be it an arbitrator, an administrative tribunal, or a court, once it has reached its decision cannot afterwards alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission (Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292 (1964), 44 D.L.R. (2d) 463 (B.C.S.C.)). "To allow adjudicator to again deal with the matter of its own volition, without hearing the entire matter 'afresh' is contrary to this doctrine" (appellants' factum, at p. 19).

41 In Re Nelsons Laundries Ltd., Verchere J. cited Lewis v. Grand Trunk Pacific Railway Co. (1913), 13 D.L.R. 152 (B.C.C.A.), at p. 154:

> The question then is, when is an award made? In my opinion, when the arbitrator has done all that he can do, namely, reduce it to writing, and publish it as his award.

In M. Hodge and Sons Ltd. v. Monaghan (1983), 43 Nfld. & P.E.I.R. 162 (Nfld. C.A.), Morgan J.A. stated that (at p. 163):

> Whether or not the trial judge was in error in the first instance in declaring the proceedings a nullity, and ordering the Writ of Summons and Statement of Claim to be struck out, is not relevant to the issue now before us. The order given was, by its very nature, final, and even if made in error it could not be amended by the judge who gave it. ... Clearly then the learned judge was functus officio and without jurisdiction to hear the matter.

42 Treatise authors dealing with administrative law issues have been surprisingly frugal in their treatment of the functus officio doctrine. Perhaps the most concise statement of the doctrine can be found in Pépin and Ouellette, Principes de contentieux administratif (2nd ed. 1982), at p. 221:

> [TRANSLATION] In the case of quasi-judicial acts, the courts have held that decisions made in due form are irrevocable. To some extent the approach taken has been that once a government body has granted or recognized the rights of an individual, they cannot be challenged by the power of review: individuals are entitled to legal security in decisions. Once the decision is made, the file [page868] is closed and the government body is "functus officio". The legislature will often also take the trouble to specify that the decision is "final and not appealable". The rule that quasi-judicial decisions are irrevocable also seems to apply to domestic tribunals. However, there may be exceptions to the rule when the initial decision is vitiated by a serious procedural defect, such as failure to observe the rules of natural justice.

43 In line with that doctrine, if the Board had discretion to consider making recommendations, and chose not to, that should be the end of the matter. The finality of the Board's decision can be ascertained from its own language when it made its orders. The actual report of the Board reveals that the hearings concluded on December 17, 1984. The Board members signed the report under the heading "Conclusions". Furthermore, given that the Council of the Alberta Association of Architects issued a notice of hearing of an appeal from the decision rendered by the Board, it too must have considered the hearing complete. In the actual findings of the Board, they imposed suspensions, effective immediately. The report is entitled "Report of the Practice Review Board", the rendering of which is the function of that tribunal. All these factors indicate that the Board had completed its function and had rendered its final report.

44 It seems to me that there is a fundamental flaw in the reasoning of the Alberta Court of Appeal. If the Board was not functus officio after handing down its decision, at what point does it become so? In this case an appeal was filed, though not heard because the original ruling was quashed. If the Board is not functus officio when the decision is handed down, it must certainly be so by the time an appeal is filed. If not, then the logical conclusion would be that the Board could sit again to redetermine a matter even after an appeal had been heard, for there is no principled basis on which to say that at some point after the decision has come down the Board becomes functus officio, and there seems no way to rationally define an exception for the rare circumstance where the Board fails to consider the exercise of a discretionary [page869] duty. In my view, this point should be fatal to the respondents.

45 If a tribunal has discretion, i.e. if it may consider making recommendations, and chooses not to, there is no authority in the Architects Act that permits it to change its mind on its own initiative. Furthermore, once a board acts ultra vires, it should not be allowed to rectify the infirmities of its disposition according to its own predilections. Standards of consistency, certainty, and finality must be preserved for the effective development of the complex administrative tribunal system in Canada. Either a board is compelled to act in a prescribed manner, or it is prohibited from so acting. Allowing the Board to reopen the hearing, without an explicit provision in the enabling statute, would create considerable confusion in the law relating to powers of administrative tribunals to rehear or redecide matters.

46 In most administrative decisions, the tribunal does not address the fact that it has considered all of its discretionary powers but has elected to invoke only a few of those powers. I agree with the holding in Huneault v. Central Mortgage and Housing Corp. (1981), 41 N.R. 214 (F.C.A.), that a tribunal should not be allowed to reserve the exercise of its remaining powers for a later date. The Board could not attempt to retain jurisdiction to make recommendations to Council once it has made a final order, as the parties would never have the security of knowing that the decision rendered has finally determined their respective rights in the matter.

47 There are, of course, exceptions to the general rule that an arbitrator who has reached a final decision becomes functus officio and cannot afterwards alter his award. For example an adjudicator may correct clerical mistakes or errors arising from an accidental slip or omission (Lodger's International Ltd. v. O'Brien (1983), 45 N.B.R. (2d) 342 (N.B.C.A.); Re Nelsons Laundries Ltd., supra). However, the Board in the present case is [page870] not seeking to correct a slip or clerical error. If it had the option to consider making recommendations, and yet chose not to, that choice does not detract from the finality of the decision.

48 When a decision is rendered with nothing to be completed, there is no doubt that the adjudicator is functus officio: any further action would be entirely without authority (Slaight Communications Inc. v. Davidson, [1985] 1 F.C. 253 (C.A.), affirmed [1989] 1 S.C.R. 1038). Hence, if the Board is seen as having discretion whether or not to consider making recommendations, and the Alberta Court of Appeal decision is left undisturbed, the doctrine of functus officio would be rendered nugatory.

49 In Lodger's International Ltd., supra, the New Brunswick Court of Appeal dealt with a series of orders by the New Brunswick Human Rights Commission. The Commission first ordered an employer to compensate two employees. When the employer did not comply, the Commission renewed the order with a time limit for payment. Section 21(2) of the Human Rights Act provided that the orders were "final". The court held that the second order was improper and that the Commission was functus officio after the first order, because s. 21 did not authorize subsequent orders. La Forest J.A. (now of this Court), writing for the court, addressed the issue of whether the Commission was empowered to make such a series of orders and concluded that (at p. 352):

> It would take strong words indeed to convince me that the legislature ever intended to give this kind of power to an administrative body, however lofty its goals and however liberally we are expected to construe the statute to facilitate the achievement of these goals.

50 Unlike the enabling statute in Grillas v. Minister of Manpower and Immigration, [1972] S.C.R. 577, where the Immigration Appeal Board had statutory jurisdiction to hold a rehearing under [page871] s. 15 of the Immigration Appeal Board Act, there is no authority in the Architects Act for the Board to hold a rehearing. Cité de Jonquière v. Munger, [1964] S.C.R. 45, also supported a policy favouring the finality of decisions unless the statute dictates otherwise. Upholding the unanimous decision of the Quebec Court of Appeal, Cartwright J., for the Court, held that (at p. 48):

> I am satisfied that the council had the right to interpret the award but not to amend it. This does not mean, however, that it did not have the right to correct a simple clerical error. Anybody having quasi-judicial powers must have such a right, otherwise the consequences of a simple slip in drafting an award might be disastrous.

51 Furthermore, I agree with the holding in M. Hodge and Sons Ltd., supra, that the fact that the original decision was wrong or made without jurisdiction is irrelevant to the issue of functus officio (at p. 163):

> The order given was, by its very nature, final, and even if made in error it could not be amended by the judge who gave it.

(2) The Board's Jurisdiction to Rehear

52 The Alberta Court of Appeal interpreted the Architects Act, and Regulation 175/83, as imposing a duty on the Board to consider whether to make a recommendation to the Governing Council or Complaint Review Committee.

53 Despite the ambiguous language, my colleague, Sopinka J., concludes that the Act imposes a duty on the basis that "it would be strange if the Board were empowered to conduct a lengthy practice review and had no duty to consider making recommendations (p. 860)". Given that "the Board conducted a valid hearing until it came to dispose of the matter" (p. 863), my colleague suggested that "[o]n the continuation of the Board's original proceedings ... either party should be allowed to supplement the evidence and make further representations which are pertinent to the disposition of the matter" (p. 864). Hence, while it would [page872] provide for the presentation of supplementary evidence, the rehearing itself would not be conducted afresh, but rather as a "continuation of the Board's original proceedings".

54 This analysis does have a certain intuitive appeal: given that a Practice Review Board does exist, and has a certain function to fulfill, it should be allowed, or rather required, to perform that function. However, the issue here is precisely that the Board did exercise that function, albeit illegally.

55 There is no dispute that when making the final orders it did, the Board clearly exceeded its jurisdiction. The Chairman of the Board himself set out the Board's functions and explicitly recognized that:

> [T]his is not a complaint review where we are trying to find fault or guilt on specific complaints. This is a practice review, and as a result we are given the responsibility of trying to review and understand at the fullest extent possible what has taken place, and as a result if the fullest extent of which has taken place, make findings and recommendations to the profession.

56 Following this introduction, the Board embarked on an adjudicatory path which the courts found to be wholly ultra vires. If it had a duty to consider whether to make a recommendation to the Complaint Review Committee, it did not do so.

57 Even though the Board was wrong in its initial decision, the question is whether that precludes the Board from now attempting to correctly carry out its function. According to my colleague, as the Board's disposition was a nullity, it amounts to no disposition at all in law: "a tribunal which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision" (p. 862) (emphasis added), relying on Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster (1983), 147 D.L.R. [page873] (3d) 637 (B.C.S.C.), where McLachlin J. (now of this Court) wrote, at p. 643:

> I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a

decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision: Lange v. Board of School Trustees of School District No. 42 (Maple Ridge) (1978), 9 B.C.L.R. 232 (B.C.S.C.); Posluns v. Toronto Stock Exchange et al. (1968), 67 D.L.R. (2d) 165, [1968] S.C.R. 330. In the latter case, the Supreme Court of Canada quoted from Lord Reid's reasons for judgment in Ridge v. Baldwin, [1964] A.C. 40 at p. 79, where he said:

> I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present its case, then its later decision will be valid. [Emphasis added.]

58 These precedents distinctly indicate that whenever special circumstances do warrant reconsideration by an administrative tribunal, such is to take place "afresh", not merely as a continuation of the tainted process now sought to be corrected.

59 Furthermore, Re Trizec dealt with a procedural error by the Court of Revision. While acting wholly within the domain of its substantive jurisdiction, the Court of Revision increased an assessment against a taxpayer before allowing the taxpayer to be heard. Two days later, at the request of the taxpayer, the court reconvened and a hearing was conducted. Hence, this case is distinguishable on at least three grounds:

> (1) the court in Re Trizec was instructed to consider the matter afresh and conduct a proper hearing; the Alberta Court of Appeal in Chandler allowed the Board to continue its original proceeding;
>
> (2) the court, acting within its jurisdiction, made a procedural error which it subsequently corrected; the Board in Chandler was not [page874] empowered at the substantive level to make any of the findings it did; and
>
> (3) the taxpayer itself requested a hearing, whereas the Board in Chandler reopened the proceedings on its own initiative.

60 The issues in Lange v. Board of School Trustees of School District No. 42 (Maple Ridge) (1978), 9 B.C.L.R. 232 (B.C.S.C.), relied upon in Re Trizec, were almost identical. A teacher was dismissed on three grounds of misconduct, yet was heard on only two of those grounds. He was then heard on the third ground and the dismissal was upheld.

61 The suggestion that the Board's original proceedings be continued is especially disturbing. It would set a dangerous precedent in expanding the powers of administrative tribunals beyond the wording or intent of the enabling statute. Furthermore, it would erode the protection of fairness and natural justice which every citizen of this country has a right to expect from administrative tribunals. The original hearing was conducted under the mistaken belief by the Board that it could make certain orders, despite the Chairman's introductory words. The Chairman's comments, reproduced above, clearly indicated that the hearings were intended to be a practice review rather than an inquiry into allegations of unprofessional conduct.

62 Kryczka J. of the Alberta Court of Queen's Bench held that, given the failure to inform the appellants that they were facing any such discipline charges or allegations, "it is difficult for me to conceive how the eventual result could be characterized as anything other than a travesty of justice". It might be that the appellants would have entered into a different course or line of defense at the hearing had they suspected that they were being investigated with respect to matters entirely outside the scope of the Board's jurisdiction. Unaware and not informed of the discipline charges that were in fact contemplated by the Board, appellants were not legally in a position [page875] to prepare a full defense to the allegations and orders ultimately made against them.

63 Appellants further contend that, if upheld, the decision of the Alberta Court of Appeal must be taken as overturning the judgment of the same court in Canadian Industries Ltd. v. Development Appeal Board of Edmonton (1969), 71 W.W.R. 635, cited with approval in Grillas, supra, at pp. 588-89. Canadian Industries dealt with a board that held a hearing without giving notice to the appellant who was entitled to such notice as an interested party. The Board then held a rehearing of which proper notice was given, and decided, after hearing submissions, that its previous order should not be changed. Johnson J.A., for the Court of Appeal held that both orders had to be set aside. The first was a nullity as the appellant was not notified. The second was a nullity as well in the absence of clear statutory authority to conduct a rehearing.

64 As mentioned previously, there is no clear statutory language enabling the Board to conduct a rehearing. If the Board has a duty which it failed to fulfill, it can, depending on the circumstances of the case, be directed to review the entire matter afresh, and can be required to conduct a new hearing. Re Trizec and Lange, supra. However, if it sets out to do one thing and winds up doing something entirely different, any reexamination should not be construed as a "continuation of the Board's original proceedings".

65 I would like to briefly address the prima facie apprehension that a direction to the Board to conduct a new hearing is tantamount to "double adjudication". That would be a valid concern if the Board is seen as having discretion. It would then be making orders subsequent to its being rendered functus officio. However, if it has an imposed duty, a rehearing would only be required if the original hearing is determined to be a total nullity, [page876] and the case so warrants. In that case, the apprehension of allowing a tribunal to make a series of orders, Lodger's International Ltd., supra, would not arise. In the particular circumstances of this case, a rehearing would not be appropriate in my view.

Mandamus

66 As the Court of Appeal twice referred to the principles of mandamus, I will address them as well. However, I agree with appellants that these principles have nothing to do with this appeal.

67 Laidlaw J.A. set out the requirements for mandamus in Karavos v. Toronto, [1948] 3 D.L.R. 294 (Ont. C.A.), at p. 297:

> Before the remedy can be given, the applicant for it must show (1) "a clear, legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced" ...; (2) "The duty whose performance it is sought to coerce by mandamus must be actually due and incumbent upon the officer at the time of seeking the relief ..."; (3) That duty must be purely ministerial in nature, "plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers"; (4) There must be a demand and refusal to perform the act which it is sought to coerce by legal remedy ....

68 Hence, mandamus appears to be a remedy that would apply against a tribunal or authority, and not one to be invoked by it. If the Board declined to exercise jurisdiction, then mandamus would lie. However, that is not the case here. Quite the contrary; the Board took it upon itself to exercise more jurisdiction than in fact it had. That alone would undermine the Court of Appeal's application of mandamus to this case. Furthermore, if we are to follow the requirements set out above, none appear to be satisfied by the facts here:

[page877]

(1) There is no clear legal right in issue.

(2) The Board may have had discretion whether or not to make recommendations.

(3) Whether or not the Regulation confers discretion upon the Board is still an open question, and if the Board has a duty to consider making recommendations, it certainly has discretion whether or not to make them, and which ones to make, if any.

(4) There has been no demand by the appellants or refusal by the Board to perform, as is required by mandamus.

Conclusion

69 On either interpretation of the ambiguous language in the Regulation, I am of the view that the appeal should succeed. If the Board had discretion, and decided to act in a certain manner, it is now functus officio. If it had an imposed duty which it did not perform, it cannot continue with a tainted hearing. For the reasons discussed above, mandamus is not a controlling factor in this appeal.

70 Therefore, I would allow the appeal, vacate the order of the Court of Appeal and restore the judgment of Brennan J. prohibiting the Board from acting any further in this matter, the whole with costs throughout.

7

Case Name:

Grier v. Metro International Trucks Ltd.

Re Grier and Metro International Trucks Limited et al.

[1996] O.J. No. 538

28 O.R. (3d) 67

133 D.L.R. (4th) 236

89 O.A.C. 36

61 A.C.W.S. (3d) 5

Court File No. 339/95

Ontario Court (General Division), Divisional Court

Mcmurtry C.J.O.C., Feldman and Macpherson JJ.

February 19, 1996

Counsel:

Murray Klein, for applicant.

Mark Geiger and Bill Anderson, for respondents.

The judgment of the court was delivered by

MACPHERSON J.:--

Introduction

1 The principle of functus officio holds that a judicial decision-maker, including an administrative tribunal, does not have the authority to reopen a decision once made. This application raises the question of whether rigour or flexibility should control the application of the principle in a situation where a tribunal's decision was based, at least in part, on a misapprehension of an important fact lying at the heart of the litigation.

Factual Background

2 On May 27, 1993, the applicant Stephen Grier, an employment standards officer ("Grier"), made an order to pay under s. 65 of the Employment Standards Act, R.S.O. 1990, c. E.14 ("ESA"), against the respondents Metro International Trucks Limited and Metro Leasing Limited (collectively "Metro"). The order to pay was in the amount of $21,893.65, representing vacation pay owing to former employees of Metro plus administration costs of $2,189.36 for a total of $24,083.01.

3 Metro applied for a review of the order to pay by way of an appeal hearing before a referee in accordance with s. 68 of the ESA. Referee Shari Novick was appointed to preside at the appeal hearing. There was no oral evidence at the hearing; it proceeded on the basis of a written statement of facts prepared by Metro's solicitors and assented to by the solicitor who represented the Ministry of Labour at the hearing.

4 The hearing before Referee Novick related to the question of whether Metro was liable for the vacation pay of certain employees of the previous employer, McCleave Truck Sales Ltd. ("McCleave"). McCleave had been wound up, and its employees were terminated, as of September 19, 1992. Metro purchased certain assets of the insolvent McCleave and commenced business two days later, on September 21, 1992. It rehired some of the McCleave employees, including those who were later the subject of Grier's order.

5 Unfortunately, the agreed statement of facts recorded the date on which Metro commenced operations as September 21, 1993, not 1992. Thus the situation presented to Referee Novick was that Metro had succeeded McCleave as employer a year and two days, rather than two days, after McCleave had been wound up.

6 Before Referee Novick, Metro conceded that it was a successor employer for the purposes of the ESA. However, it disagreed with Grier's decision that it owed the employees the vacation pay that had accrued during their employment with McCleave.

7 Referee Novick released her 12-page decision on August 30, 1994. She reversed Grier's decision. She said, in part, at pp. 9, 10-11 and 12:

> The only issue I must decide is which party should bear the responsibility of paying the amount owing -- the applicants, who have accepted that they are "successor employers" for the purpose of this hearing, or the Ministry, through the Employee Wage Protection Plan.
>
> . . . . .
>
> In my view, the proper way to approach this issue is to determine when the entitlement to the employment standard in question (vacation pay in this case) arose, and identify who the employer was at that moment in time. It follows then that the party employing an employee at the point his or her entitlement crystallized bears the liability for the amounts owing. This approach is not inconsistent with what s. 13(2) provides, and leads to an equitable result. Applying that to the case at hand, the agreed facts submitted to me established that the claimants' employment was terminated by the bank-appointed receiver in September of 1992, and that they were not hired by the applicants until they presumably began operations, approximately one year later. The right to any accrued vacation pay crystallized when their employment was terminated and did not resume with a new employer within a reasonable time afterwards.
>
> . . . . .
>
> I remain seized of the matter to determine any issues which may arise as a result of any of the above.

(Emphasis added)

8 Subsequent to the release of Referee Novick's decision, counsel for the Ministry of Labour contacted Metro's counsel and pointed out the error in the agreed statement of facts. Metro's counsel acknowledged that there was a "typo" with respect to the dates, but stated that the error had no effect on the result.

9 Counsel for the Ministry wrote to Referee Novick and requested that she reconsider her decision. Metro's counsel wrote to referee Novick and opposed this request, in part on the ground that she was functus officio.

10 On January 19, 1995 Referee Novick rendered a second decision in which she declined to reopen the matter. She agreed with Metro's submissions that she was functus officio. She said, in part, at pp. 2-3:

> The Employment Standards Act does not provide a referee hearing an application for review ... with the power to reconsider his or her decision. In the absence of such a power I am functus officio, or without jurisdiction to revisit the matter for the purpose requested. I do not dispute Ministry counsel's suggestion that the authorities support the notion that adjudicators can retain some post-decision powers even if they are not expressly provided in the enabling statute; however, these are restricted to re-opening a matter in situations where either clerical or typographical errors have been made, proper notice of hearing has not been given, or for some other reason a party has been unable to exercise their right to be heard. That is not the case here; I am effectively being asked to change my decision because one of the facts presented, upon which I relied in arriving at the decision, was incorrect.

(Emphasis added)

11 The applicant brings this application for judicial review of Referee Novick's two decisions. It seeks an order quashing those decisions and remitting the matter back to Referee Novick or another referee for determination based upon an agreed statement of facts amended to correct the inadvertent error with respect to the date Metro commenced business as successor to McCleave.

Legal Issues

12 The legal issue on this application is whether Referee Novick was correct in deciding that she could not reconsider her first decision because of the principle of functus officio.

Analysis

13 In her decision of January 19, 1995, Referee Novick decided that the principle of functus officio precluded her from reconsidering her August 30, 1994 decision. The parties agree that the January 19, 1995 decision was one relating to the limits of the referee's jurisdiction. Hence the standard of review on this application is correctness: see Dayco (Canada) Ltd. v. National Automobile, Aerospace & Agricultural Implement Workers Union, [1993] 2 S.C.R. 230, 102 D.L.R. (4th) 609.

14 Before turning to the main issue, I will dispose of two preliminary arguments advanced by Metro. Both of these arguments are to the effect that even if the principle of functus officio is not determinative of the application, the matter should nevertheless not be returned to the referee for other reasons. Two such reasons are put forward by Metro.

15 The first argument is that the matter should not be returned to Referee Novick because her decision would have been the same without the error in the agreed statement of facts. In support of this argument, Metro relies on several passages from Referee Novick's decision of August 30, 1994, all of which can be encapsulated by her statement on p. 10: "The right to any accrued vacation pay crystallized when their employment was terminated". In other words, says

Metro, when the employees were terminated on September 19, 1992 their right to vacation pay for their service with McCleave "crystallized" on that date. The fact that Metro purchased the business two days later, or a year and two days later, is irrelevant to Referee Novick's decision.

16 The short answer to this argument is that it is clear from both of Referee Novick's decisions that the error in date was a relevant and important factor in her decision on the merits of the vacation pay issue. The words quoted above from p. 10 of her first decision are in fact not a full sentence; the rest of the sentence concludes with "and did not resume with a new employer within a reasonable time afterwards". She also refers, again at p. 10, to the fact that the employees were not rehired after they left McCleave until "approximately one year later". Finally, and conclusively in my view, in her second decision Referee Novick says that the incorrect date was a fact "upon which I relied in arriving at the decision". This strikes me as a very clear statement. The word "relied" should be given its ordinary meaning; it indicates that the incorrect fact in issue here influenced her decision. It may not have been determinative of the decision; however, it did influence it.

17 The second preliminary argument advanced by Metro is a variation of the first. Metro asserts that even if the referee was influenced by the incorrect date, that is inconsequential because, as a matter of law, the only relevant date is the day on which the employees were terminated by McCleave. Since that date is September 19, 1992, it is irrelevant whether Metro stepped into McCleave's shoes on September 21, 1992 or 1993.

18 The problem with this argument is that it invites this court to interpret several important provisions of the ESA without the advantage of a decision on the merits by the referee. This court's essential role in the domain of administrative law is to perform the function of judicial review of decisions of various administrative tribunals. An ab initio judicial interpretation of provisions of the ESA, cut adrift from the anchor of a tribunal's interpretation of those provisions, would be antithetical to the rationale underlying the roles of both administrative tribunals and this court. Specialized tribunals interpret and decide; this court reviews on limited grounds. Metro's second argument ignores the two-step process that is the foundation of administrative law process in Ontario and in Canada.

19 Turning to the main issue, Metro articulates it in this fashion in its factum:

> 48. At the time of the rendering of Referee Novick's decision there was no statutory authority contained in the Employment Standards Act which permitted a Referee to reconsider, vary or amend his or her decision after it had been issued. As such, Referee Novick was functus officio, and her jurisdiction was exhausted.

In support of its argument, Metro cites several decisions of the Federal Court, including Canada (Minister of Employment & Immigration) v. Nabiye, [1989] 3 F.C. 424, 102 N.R. 390 (C.A.); Canada (Treasury Board) v. Exley, [1985] F.C.J. No. 331 (C.A.); and MTD Products Ltd. v. Tariff Board of Canada, [1987] 2 F.C. 227, 8 F.T.R. 158.

20 In my view, the leading case dealing with the principle of functus officio in the context of administrative tribunals is Chandler v. Alberta Assn. of Architects, [1989] 2 S.C.R. 848, 62 D.L.R. (4th) 577. In that case the Supreme Court of Canada permitted an Alberta tribunal to continue a hearing after it had made an extensive report in which it made findings of unprofessional conduct against several architects. The court found that the tribunal had not disposed of the matter before it and was not, therefore, functus officio. In particular, the tribunal had not decided whether to make any recommendations which it was required to do by statute.

21 In Chandler, there was nothing in the governing statute, purporting to confer on the tribunal the power to rescind, vary, amend or reconsider a final decision that it had made. Nevertheless, the majority of the court held that the tribunal was not functus. Sopinka J. said, at pp. 861-62 S.C.R., p. 596-97 D.L.R.:

> As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a

> change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in Paper Machinery Ltd. v. Ross Engineering Corp., supra.
>
> To this extent, the principle of functus officio applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in Grillas, supra.
>
> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute: see Huneault v. Central Mortgage & Housing Corp. (1981), 41 N.R. 214 (F.C.A.).
>
> In this appeal we are concerned with the failure of the board to dispose of the matter before it in a manner permitted by the Architects Act. The board intended to make a final disposition but that disposition is a nullity. It amounts to no disposition at all in law. Traditionally, a tribunal, which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision.

22 I believe that the flexibility of which Sopinka J. speaks in this passage is appropriate on the present application. Under the ESA the referee is charged with interpreting the successor rights provisions. Referee Novick purported to do this in her first decision. However, the parties accidentally placed before her an important fact which was incorrect. On the face of her first decision it is clear that this incorrect fact influenced her decision. Moreover, if there were any doubt about this, Referee Novick expressly confirmed her reliance in her subsequent decision dealing with the request for a rehearing. In these circumstances, I think that a fair conclusion is that her first decision, like the tribunal's decision in Chandler, was a nullity. She intended to make a final disposition; however, that disposition was fatally tainted by her reliance on a crucial fact which both parties agree is incorrect. She should be permitted, as was the tribunal in Chandler, "to reconsider the matter afresh and render a valid decision".

23 Another analogous case, in my view, is a decision of this court in Kingston (City) v. Ontario (Mining & Lands Commissioner) (1977), 18 O.R. (2d) 166 (Div. Ct.). In that case the court permitted a commissioner to reopen a hearing when it turned out that he had made an order which inaccurately reflected a settlement made by the parties. Southey J. said, at p. 169:

> Where an officer or tribunal like the Mining and Lands Commissioner makes an order purporting to implement a settlement agreement between the parties before it, and it subsequently turns out

> that the order, through inadvertence or negligence of one or more of the parties, or their representatives, does not accurately embody the settlement, the appropriate proceeding, in our view, is for the interested party to apply to the tribunal to have its order amended. Such an application was made to the Mining Commissioner in this case by the conservation authority; that application was dismissed in a lengthy and carefully written decision dated February 3, 1977, on the ground that the Commissioner had no authority to make the correcting order. One of the grounds for this decision was that the Commissioner was bound in these circumstances by the doctrine of functus officio and could not reopen his decision in the absence of express statutory authority. With the greatest deference to the view of the Commissioner, the doctrine of functus officio, in our judgment, does not prevent a tribunal from reopening a matter and correcting an order made by it, where a mistake has occurred of the nature alleged in this case.
>
> (Emphasis added)

24 In the present case, the parties made a mistake. The mistake influenced the decision of the referee. I can see no compelling reason for concluding that the mistake should not be corrected and the matter placed back before the referee for a new decision which would be untainted by reliance on the incorrect fact.

25 In conclusion, the flexibility in the application of the principle of functus officio articulated by Sopinka J. in Chandler permits a just resolution of the issues raised on this application. The parties are entitled to a decision on the merits based on a full and accurate statement of the facts. Accordingly, the two decisions of Referee Novick are quashed.

26 Normally, the matter would be returned to Referee Novick for the rehearing. However, Metro objects to such an order and requests that the matter be referred to a different referee. This submission is based on the final paragraph of Referee Novick's decision refusing the request for a rehearing:

> Finally, and regrettably, I note that had this matter come to my attention after the proclamation of Bill 175, the omnibus government bill which contains several amendments to the Statutory Powers Procedure Act including the provision of a reconsideration power to tribunals to be used in cases "it considers advisable", I would have been able to reconsider the matter.

27 Metro contends that the words "and regrettably" might presage that the referee intends to change her view of the merits of the case if it is returned to her with a correct agreed statement of facts. I do not read those words in this fashion; I think that the referee is expressing regret that she cannot rehear the matter in light of her understanding of functus officio. Nevertheless, the applicant does not object to the matter being referred to a different referee. It is so ordered.

28 The applicant does not seek costs. Accordingly, no order of costs is made.

8

Re

City of Kingston and Mining and Lands Commissioner et al.

18 O.R. (2d) 166

ONTARIO
HIGH COURT OF JUSTICE
DIVISIONAL COURT

HOULDEN, J.A., CORY AND SOUTHEY, JJ.

22ND AUGUST 1977.

Administrative law -- Judicial review -- Status -- Municipality seeking judicial review of decision permitting placing of fill on lands within area of conservation authority of which municipality contributing member -- Municipality affected by decision -- Municipality has standing -- R.R.O. 1970, Reg. 109, s. 4.

[Re Liverpool Taxi Owners' Ass'n, [1972] 2 All E.R. 589, apld]

Administrative law -- Boards and tribunals -- Powers -- Mining and Lands Commissioner has power to make order giving effect to settlement negotiated between parties interested to place fill on certain lands and to enlarge area if interested parties consent.

Administrative law -- Judicial review -- Mining and Lands Commissioner making order permitting placing of fill by giving effect to settlement between interested parties -- Order covering wider area than intended by one of parties -- Order to be quashed.

Administrative law -- Boards and tribunals -- Decisions -- Power to correct orders -- Mining and Lands Commissioner making order inaccurately reflecting settlement negotiated between interested parties -- Commissioner having jurisdiction to reopen proceedings to correct mistake.

APPLICATION for judicial review of a decision of the Mining and Lands Commissioner granting permission to place fill on certain lands.

D. L. Hardtman, Q.C., for applicant.

D. M. Belch, for respondent, Cataraqui Region Conservation Authority.

T. H. Wickett, Q.C., for Attorney-General for Ontario, appearing on behalf of respondent, Mining and Lands Commissioner.

T. J. Dunne, for respondent, John L. Smith.

The judgment of the Court was delivered by

SOUTHEY, J.:-- This was an application by the Corporation of the City of Kingston, originally brought by notice of motion dated April 20, 1976, for judicial review of a decision of the Mining and Lands Commissioner, dated December 24, 1975, granting permission to the respondent Smith to place fill on certain lands in the County of Frontenac. No grounds were stated in the original notice of motion, and the only persons named as respondents therein were the Mining and Lands Commissioner and G. H. Ferguson, the holder of that office.

Pursuant to leave granted by order of this Court, the applicant served a further notice of motion dated August 10, 1976, in which the name of G. H. Ferguson was deleted as respondent and the names of John L. Smith and Cataraqui Region Conservation Authority were added as respondents along with the Mining and Lands Commissioner. The second notice of motion gave as the grounds for the relief sought that the Commissioner had not made a proper decision on the facts before him, but rather had confirmed a compromise between Smith and the conservation authority and that the Commissioner's order purported to affect lands other than the lands described in the original application to place fill.

Counsel for the conservation authority adopted the position taken in the memorandum of fact and law of the respondent Smith that the applicant the City of Kingston had no status to bring these proceedings.

The City of Kingston is a member municipality in and a contributor to the Cataraqui Region Conservation Authority. The boundary between the City of Kingston and the neighbouring Township of Kingston passes through the lands covered by the decision of the Mining and Lands Commissioner. There is no question that the lands in question are within the areas in which the conservation authority has jurisdiction to grant permits for the placing of fill under s. 4 of R.R.O. 1970, Reg. 109.

In these circumstances, although the City of Kingston was not a necessary party to the proceedings before the Mining and Lands Commissioner, during the course of the hearing we ruled that the city had the status to bring an application for judicial review in respect of the decision of the Mining and Lands Commissioner. In deciding the question of status, we relied on the following passage in the decision of Lord Denning, M.R., in Re Liverpool Taxi Owners' Ass'n, [1972] 2 All E.R. 589 at p. 595:

> The writs of prohibition and certiorari lie on behalf of any person who is a "person aggrieved", and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him; but it includes any person who has a genuine grievance because something has been done or may be done which affects him ...

The Court having rejected the submission that the City of Kingston had no status to bring the motion, counsel for the conservation authority then supported the position taken by the City of Kingston on the application before us, and applied to be joined as a party applicant; we granted this application.

We find no merit in either of the grounds stated by the City of Kingston in its second notice of motion. We can see no reason why the Mining and Lands Commissioner should not make an order giving effect to a settlement negotiated between the parties interested in an application before the Commissioner. Nor can we see any reason why the Commissioner should not enlarge the area to which an application relates, where, as in this case, such enlargement was consented to by the interested parties.

The more serious ground on which the order of the Commissioner was attacked did not become apparent until several months after the second notice of motion of the City of Kingston had been served and filed. In October, 1976, the respondent Smith commenced to place fill on lands which the conservation authority believed were not covered by the settlement agreement which the Commissioner's order was intended to implement; the conservation authority took objection to this being done. The position of the conservation authority in this connection is fully supported by the relevant correspondence between the solicitor for the conservation authority and the respondent Smith both at the time the settlement was reached, and at the time that objection was made to the placing of fill.

In the absence of clear evidence that such correspondence does not accurately reflect the agreement made by the parties through their solicitors, it seems quite obvious that the order of the Commissioner covers a substantially greater area than that which the conservation authority had intended. For this reason, we believe that the order of the Mining and Lands Commissioner dated December 24, 1975, must be quashed.

Where an officer or tribunal like the Mining and Lands Commissioner makes an order purporting to implement a settlement agreement between the parties before it, and it subsequently turns out that the order, through inadvertence or negligence of one or more of the parties, or their representatives, does not accurately embody the settlement, the appropriate proceeding, in our view, is for the interested party to apply to the tribunal to have its order amended. Such an application was made to the Mining Commissioner in this case by the conservation authority; that application was dismissed in a lengthy and carefully written decision dated February 3, 1977, on the ground that the Commissioner had no authority to make the correcting order. One of the grounds for this decision was that the Commissioner was bound in these circumstances by the doctrine of functus officio and could not reopen his decision in the absence of express statutory authority. With the greatest deference to the view of the Commissioner, the doctrine of functus officio, in our judgment, does not prevent a tribunal from reopening a matter and correcting an order made by it, where a mistake has occurred of the nature alleged in this case.

The role of the Mining Commissioner on the application to amend was, no doubt, made very difficult by the fact that no affidavits were delivered in support of the motion; no viva voce evidence was offered at the hearing of the application; and the counsel who appeared were the same solicitors who had written the correspondence referred to above and had made the settlement agreement.

The matter will, therefore, be referred back to the Mining Commissioner for a fresh hearing under s. 4 of R.R.O. 1970, Reg. 109, for permission to place or dump fill on the lands in question. It will be for the Commissioner to determine, after hearing whatever evidence he considers to be appropriate, whether he shall attempt to determine the true nature of the original settlement agreement or to approach the matter afresh and determine on the merits the lands on which and the circumstances in which fill should be placed or dumped. The latter course may be appropriate in view of the fact that a year and a half have passed since the first order of the Commissioner in this matter.

The respondent Smith will be the applicant in and have carriage of the further proceedings before the Mining Commissioner. Notice of the further application will be given to both the Corporation of the City of Kingston and the Cataraqui Region Conservation Authority and they will be entitled to call further evidence, as will the respondent Smith.

We should note that the disposition that we have made of this application is the one requested of this Court by counsel for the Attorney-General of Ontario, who appeared before us on behalf of the Mining and Lands Commissioner.

In the circumstances there will be no order as to costs of this application.

Order accordingly.

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MIKE LITTLE GAS COMPANY, INC., Appellant, v. PUBLIC SERVICE COMMISSION of Kentucky, Appellee

[NO NUMBER IN ORIGINAL]

Court of Appeals of Kentucky

574 S.W.2d 926; 1978 Ky. App. LEXIS 640

December 1, 1978

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant gas company sought review of an order from the Franklin Circuit Court (Kentucky), which affirmed a decision by appellee Public Service Commission of Kentucky that amended a rate adjustment order in order to correct a clerical error.

OVERVIEW: The company applied for a rate adjustment based upon the increase in the wholesale cost of gas to the company. The Commission entered an order incorrectly stating the approved rate, resulting in a windfall to the company. The company contacted an engineer with the Commission after receiving the order. After the company began billing its customers at the newly approved rate, the Commission found that the order contained a clerical error. The Commission amended the order with retroactive effect. The company argued that the amended order was invalid as the original order was final and as the amended order repealed the original order without notice and hearing. The company also alleged the retroactive effect was inequitable as providing refunds to its customers was a hardship. On appeal, the court held that the Commission had the power to amend its orders for clerical errors. The court found inapposite that the company contacted an engineer with the Commission. The court concluded that the retroactive effect was not inequitable to the company as there was no prohibition against the company giving its customers their refunds over a period of time.

OUTCOME: The court affirmed the trial court's judgment.

CORE TERMS: clerical error, administrative agency, original order, notice, retroactive, incorrect, wholesale, customers, supplier, refund, commission's order, nunc pro tunc orders, corrected, equitable, summary judgment, rate structure, reversible error, natural gas, windfall profit, consumers', commit, invoke

LexisNexis(R) Headnotes

Administrative Law > Agency Adjudication > Review of Initial Decisions
[HN1] Administrative agencies, as well as courts, have sufficient authority to correct obvious clerical errors in their orders, so long as the mistake is plainly shown in the record.

Governments > State & Territorial Governments > Employees & Officials
[HN2] The rule is clear that a person dealing with public officials must take notice of the extent of the official's authority to act under given circumstances.

COUNSEL: [1]** William S. Howard, Linda L. Green, Howard & Howard, Lexington, Richard E. Fitzpatrick, Lexington, for appellant.

William M. Sawyer, Morris E. Burton, Frankfort, for appellee.

JUDGES: Wintersheimer, Judge.

OPINION BY: WINTERSHEIMER

OPINION

[*926] This appeal is from a summary judgment granted March 23, 1978, allowing the appellee to amend a rate adjustment order issued September 1, 1977, by a later order of November 23, 1977.

On August 8, 1977, appellant filed an application with the appellee to put into effect a purchase gas adjustment increase in the cost of gas it supplies its customers, to become effective September 1, 1977, because a wholesale supplier had increased its price of gas to the appellant, effective the same date. On September 1, 1977, the appellee issued an order approving a new rate structure. Upon receipt of the order, the president of the appellant company telephoned a research analyst for the appellee to inquire as to the contents of the order. On November 23, 1977, the appellee issued an amended order, indicating that a clerical error had occurred in its original order. Appellant unsuccessfully sought a rehearing of the appellee's amended order and then appealed **[**2]** to the Franklin Circuit Court, which affirmed the action of the appellee and dismissed the complaint. This appeal followed.

Appellant sets out the following questions:

> 1) Did the trial court commit reversible error in granting summary judgment on the basis that the original order should be treated as final and thus should not be repealed with retroactive effect without notice and hearing?
>
> **[*927]** 2) Did the trial court commit reversible error in granting summary judgment because of the inequity to the appellant of the retroactive effect of the amended order?

This Court affirms the judgment of the trial court because an administrative agency, such as the Public Service Commission, has authority to correct clerical errors.

It is well settled that [HN1] administrative agencies, as well as courts, have sufficient authority to correct obvious clerical errors in their orders, so long as the mistake is plainly shown in the record. *Bell v. Hearne*, 60 U.S. 252, 19 How. 252, 15 L. Ed. 614 (1857). This rule has been consistently applied by Kentucky courts. In *Union Light, Heat & Power Co. v. PSC*, Ky., 271 S.W.2d 361 (1954), the court said that an administrative agency has **[**3]** unquestioned authority to change its orders during the time it retains control over any question under submission to it, and has the power to correct its records by nunc pro tunc orders. The contention that the *Union Light, supra*, case has been overruled by *Phelps v. Sallee*, Ky., 529 S.W.2d 361 (1975) is incorrect. In *Phelps, supra*, the court quoted with approval from its previous holding in *Union Light, supra*. The Court in the *Phelps, supra*, decision only emphasized that the administrative agency's power must have its origin in the statute. KRS 278.390 clearly provides that the appellee commission retains authority to modify its orders until they are suspended or vacated by a court of competent jurisdiction.

The appellant's contention, that the appellee commission's action is a retroactive order effecting utility rates without notice and hearing, fails to recognize the nature of the appellee commission's order. We believe it is a nunc pro tunc order. Here, the record is clear that a clerical error appeared in the original order and was appropriately corrected by a subsequent order. Such a procedure is available not only to courts, but to administrative agencies **[**4]** as well. *Frankfort Natural Gas Co. v. Frankfort*, 276 Ky. 199, 123 S.W.2d 270 (1938). The November order was not a new rate order requiring notice and hearing under KRS 278.270.

The corrected order did not impose undue hardship on the appellant. Appellant seeks to invoke equitable relief, claiming that a refund of a portion of the money already collected under the incorrect rate structure would work an undue burden on it.

An examination of the record indicates that the appellant was seeking to obtain permission of the Public Service Commission to pass through a wholesale gas increase to retail consumers. The appellant's application to the appellee commission clearly recites the relief sought. Appellant specifically requested a rate of $3.5752 for two Mcf's of natural gas. The initial order of the appellee commission granted a rate adjustment of $3.5752 per Mcf for the first two Mcf's. Such an order gave the appellant more than he had originally requested in his application. Almost immediately upon receiving the original order, appellant contacted an employee of the appellee commission regarding the rate as stated in the order.

A member of the appellee's engineering staff **[**5]** has no authority to approve or disapprove rates contained in formal commission orders. [HN2] The rule is clear that a person dealing with public officials must take notice of the extent of the official's authority to act under given circumstances. *Dade Park Jockey Club v. Commonwealth*, 253 Ky. 314, 69 S.W.2d 363 (1934). We cannot conclude that the appellant was justified in relying on the incorrect original order.

We do not believe that an administrative agency can be prevented from correcting a mistake on so-called equitable grounds because such agencies have the public interest as an inherent responsibility. *NLRB v. Baltimore Transit Co.*, 140 F.2d 51 (4th Cir. 1941).

If the September 1, 1977 order had been permitted to stand, the appellant would have enjoyed a windfall profit at the expense of his local customers, because it would have received more than it originally **[*928]** requested and more than the increase to it from the wholesale supplier. It is difficult to understand how appellant could seek to invoke equity under such circumstances. It is equally difficult to appreciate the appellant's contention that he will lose good will if he must refund money to his customers. **[**6]** Here, it appears that the refund could be credited to the consumers' bills over a future period of time.

Here, the gas company would receive a higher rate than it requested because of a simple clerical mistake on the part of the agency. Therefore, it is the opinion of this Court that the appellee Public Service Commission has the authority to correct clerical errors in its orders, so long as the agency retains jurisdiction over the matter, and the mistake is clearly shown in the record. Equity cannot assist a natural gas supplier who would receive a windfall profit as a result of a clerical error.

Therefore, the judgment of the trial court is affirmed.

All concur.

B

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Ontario Energy Board

G-2011-0001

Guideline

Smart Meter Funding and Cost Recovery – Final Disposition

December 15, 2011

3.5 Evidence to be Filed in Support of Smart Meter Cost Recovery in a Cost of Service Application

When applying for the recovery of smart meter costs, a distributor should ensure that historical cost information has been audited including the smart meter-related deferral account balances up to the distributor's last Audited Financial Statements. A distributor may also include historical costs that are not audited and estimated costs, corresponding to a stub period or to a forecast for the test rate year. The Board expects that the majority (i.e. 90% or more) of the total program costs for which the distributor is seeking recovery will be audited. This threshold should be assessed against total program costs and not the costs in any individual application. In all cases, the Board expects that the distributor will document and explain any differences between unaudited or forecasted amounts and audited costs in its application.

At a minimum, the following information should be provided:

- a report on the status of implementation of smart meters (i.e., how many have been installed and when 100% completion is expected);
- a copy of the letter from the Fairness Commissioner, if applicable, as support that the distributor is authorized for smart metering activities. A general description of contractual arrangements with the selected vendors should be provided.
- capital and operating unit cost per installed smart meter and in total for:
    - procurement and installation of the components of the AMI system;
    - customer information system;
    - incremental operating and maintenance activities;
    - changes to ancillary systems; and
    - stranded meters;
- if applicable, a variance analysis comparing actual costs to previously approved costs;
- identification of and justification for any smart meter or AMI costs incurred to support functionality that exceeds the minimum functionality adopted in O. Reg. 425/06, as discussed in section 3.4 above;
- for any costs incurred that are associated with functions for which the SME has the exclusive authority to carry out pursuant to O. Reg. 393/07,

the basis on which recovery of those costs is allowed under applicable law; and

- a calculation of the SMDR, including the proposed cost allocation methodology.

The onus is on the distributor to support its case, and the distributor should provide any additional information necessary to understand the distributor's costs in light of its circumstances. In considering the recovery of smart meter costs, the Board also expects that a distributor will provide evidence on any operational efficiencies and cost savings that result from smart meter implementation.[10] As an example, meter reading expenses may be reduced with the activation of remote meter reading through the AMI network for residential and small general service customers.

The SMFA was calculated and applied as a uniform monthly charge collected from all metered customers. In early decisions, the SMDR and, if applicable, the SMIRR, were calculated similarly on a uniform basis. However, more recently, the issue of differential costs for smart meters by classes of customers has arisen. While the Board notes that utilities have not been specifically directed to record all costs on a class-specific basis, in some cases there may be class-specific information available.

In the Board's decision with respect to PowerStream's 2011 Smart Meter Disposition Application (EB-2011-0128), the Board approved an allocation methodology based on a class-specific revenue requirement, offset by class-specific revenues. The Board noted that this approach may not be appropriate or feasible for all distributors as the necessary data may not be readily available[11].

The Board views that, where practical and where the data is available, class-specific SMDRs should be calculated based on full cost causality. The methodology approved by the Board in EB-2011-0128 should serve as a suitable guide. A uniform SMDR would be suitable only where adequate data is not

[10] This was first highlighted in the Board's Decision, issued March 3, 2011, with respect to an application by Horizon Utilities Corporation for an increase to its SMFA for 2011, considered under Board File No. EB-2010-0292. Approval of smart meter costs was not sought in the application, but was considered in the concurrent Cost of Service application [EB-2010-0131].
[11] Decision and Order [EB-2011-0128], November 21, 2011, pp. 12-13.

11

Ontario

ONTARIO ENERGY BOARD

Distribution System Code

Last revised on April 15, 2015

(Originally Issued on July 14, 2000)

7 SERVICE QUALITY REQUIREMENTS

7.1 Definitions

In this section 7, the following words have the meanings set out below.

"accurate bill" means a bill that contains correct customer information, correct meter readings, and correct rates that result in an accurately calculated bill.

“answered” means connected to a person that is a representative of the distributor. Connection to a voice mailbox or an answering machine, or placing a person in a queue, does not constitute answering.

“customer care telephone number” means any telephone number that is dedicated exclusively to, and given to the public by the distributor for, the purpose of contacting the distributor on matters concerning customer care, including customer account enquiries and other customer service enquiries. Where a distributor does not have a telephone number dedicated exclusively to matters concerning customer care, any telephone number given to the public for the purpose of making enquiries of the distributor shall be deemed to be a “customer care telephone number”.

“emergency call” means a call where the assistance of the distributor has been requested by fire, ambulance or police services.

“qualified enquiry” means an enquiry received by a distributor from a customer or representative of a customer pertaining to the customer’s existing or prospective service in which a written response is requested by the customer or representative of the customer or determined by the distributor to be necessary. A “qualified enquiry” does not include any of the following, which shall be addressed in accordance with other applicable requirements: cable locate requests; retailer Service Transaction Requests; and enquiries of a general nature not relating specifically to service currently provided to a customer or to a new service being requested by a customer.

“qualified incoming calls” means calls that are received during the regular hours of operation of a distributor’s customer call centre and are either:

(a) telephone calls for which the customer normally reaches a customer service representative directly or has been transferred to a customer care line by a general operator; or

(b) telephone calls in which the customer has reached the distributor's Interactive Voice Response ("IVR") system and selected the option of speaking to a customer service representative.

The following are not "qualified incoming calls":

(a) telephone calls that are abandoned by the customer prior to asking for a customer service representative; and

(b) telephone calls for which the customer elects IVR self-service.

"new service" means a connection that requires an Electric Safety Authority certificate before the connection can be completed. This includes, but is not limited to, connections associated with a service upgrade and connections that involve the installation of an additional meter on the distribution system where no meter previously existed. Solely replacing an existing meter is not a new service.

"service conditions" means any condition that must be satisfied before the service will be provided and may include the payment of connection fees, the signing of an offer to connect, the completion of a distribution system expansion, the delivery of any necessary equipment and the receipt of an electrical safety inspection certificate.

7.2 Connection of New Services

7.2.1 A connection for a new service request for a low voltage (<750 volts) service must be completed within 5 business days from the day on which all applicable service conditions are satisfied, or at such later date as agreed to by the customer and distributor.

7.2.2 A connection for a new service request for a high voltage (>750 volts) service must be completed within 10 business days from the day on which all applicable

(b) enters into an arrears payment agreement with the distributor referred to in section 2.7.1A.

7.10.2 This service quality requirement must be met at least 85 percent of the time on a yearly basis.

7.11 Billing Accuracy

7.11.1 A distributor must issue an accurate bill to each of its customers.

7.11.2 This service quality requirement must be met at least 98 percent of the time on a yearly basis.

7.11.3 A distributor should not include customer accounts that are unmetered accounts (e.g. street lighting and unmetered scattered loads) or power generation accounts when calculating the percentage of accurate bills.

7.11.4 The percentage of bills accurately issued shall be calculated by subtracting the number of inaccurate bills issued for the year from the total number of bills issued for the year and dividing that number by the total number of bills issued for the year.

7.11.5 The total number of bills issued for the year includes original and reissued bills.

7.11.6 Accurate bills that need to be cancelled in order to correct another bill shall not be included in the calculation of billing accuracy measure.

7.11.7 A bill is considered inaccurate if:

(a) the bill does not meet the definition of an accurate bill set out in section 7.1;

(b) the bill has been issued to the customer and subsequently cancelled due to a billing error; or

(c) there has been a billing adjustment in a subsequent bill as a result of a previous billing error.