EB-2015-0026

B2M Limited Partnership application for transmission revenue requirement

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COURT OF APPEAL FOR ONTARIO

CITATION: Union Gas Limited v. Ontario Energy Board, 2015 ONCA 453
DATE: 20150622
DOCKET: C58756

2015 ONCA 453 (CanLII)

Hoy A.C.J.O., and Simmons and Tulloch JJ.A.

BETWEEN

Union Gas Limited

Appellant

and

Ontario Energy Board

Respondent

Patricia D.S. Jackson, Crawford Smith and Alex Smith, for the appellant

Michael Millar, for the respondent

Heard: December 16, 2014

On appeal from the order of the Divisional Court (Justices Colin D.A. McKinnon and Susan G. Himel, Justice Herman J. Wilton-Siegel dissenting) dated December 20, 2013, with reasons reported at 2013 ONSC 7048, 316 O.A.C. 218, affirming the decision of the Ontario Energy Board, dated November 19, 2012.

Simmons J.A.:

A. INTRODUCTION

[1] Union Gas Limited appeals with leave from an order of the Divisional Court dismissing Union's appeal from a decision of the Ontario Energy Board. The

main issue on appeal is whether the Board's decision contravened the principle against retroactive ratemaking.

[2] In April 2012, Union applied to the Board for an order amending the rates it would charge to its customers for natural gas as of October 2012. A primary purpose of the application was to adjust rates as a result of allocating a portion of Union's 2011 utility earnings between Union and its ratepayers under the terms of an Earnings Sharing Mechanism ("ESM") contained in an Incentive Regulation Mechanism Settlement Agreement (the "IRM Agreement").

[3] In 2007, Union entered into the IRM Agreement with parties representing its major stakeholders and constituents (the "interveners") to provide for a five-year period of incentive regulation. By order made in January 2008, the Board approved the IRM Agreement. The IRM Agreement contained the ESM, under which Union agreed to share utility earnings greater than two per cent above its regulated rate of return with ratepayers.

[4] As part of the IRM Agreement, Union agreed to reduce its revenue requirement by $4.3 million. In exchange for this reduction, four deferral accounts previously established by the Board were eliminated.

[5] Deferral accounts allow a regulator to separately accumulate certain amounts (costs or revenues) before deciding by order, at specified intervals, to what extent, if at all, such costs or revenues will be charged to ratepayers as part

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of rates. Because it is contemplated from the outset that amounts in deferral accounts will be disposed of in a manner that affects rates, deferral accounts do not offend the principle against retroactive ratemaking.

[6] At least one of the four eliminated deferral accounts tracked upstream transportation optimization revenues. Union generated upstream transportation optimization revenues through transactions with third parties in which Union disposed of upstream transportation services.

[7] In the past, the Board had directed that Union share the upstream transportation optimization revenues in the eliminated deferral accounts with ratepayers based on a 75/25 split in favour of ratepayers.

[8] As a result of the elimination of the four deferral accounts, under the IRM Agreement, Union was able to keep net revenues that would previously have been recorded in those accounts, subject to the ESM.

[9] Union’s April 2012 application for a rate order included a request to share with ratepayers $22 million in 2011 revenues Union had earned using TransCanada Pipelines Limited’s (“TCPL”) Firm Transportation Risk Alleviation Mechanism (“FT-RAM”) program under the ESM.

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[10] Under the FT-RAM program, utilities earned credits for unused firm[1] transportation services, which the utilities could then use to purchase cheaper interruptible transportation services. Union was able to monetize the credits it earned under the FT-RAM program through various assignment and exchange transactions with third parties.

[11] Union classified its 2011 FT-RAM earnings as upstream transportation optimization revenues – that is, as utility earnings that would previously have been recorded in one of the eliminated deferral accounts. In a procedural order in Union's application, the Board directed that Union's classification of its 2011 FT-RAM revenues be dealt with as a preliminary issue in the proceeding.

[12] In its decision on the preliminary issue, the Board rejected Union's classification of its 2011 FT-RAM revenues as utility earnings and concluded instead that the disputed $22 million should be classified as "gas supply cost reductions". As such, the revenues would ordinarily be passed through to ratepayers, and Union would not be entitled to any portion of them.

[13] The Board found that Union had used the FT-RAM program to generate profits on its upstream transportation portfolio on a planned basis – whereas Union's past upstream transportation optimization activities had occurred on an unplanned basis. Because upstream transportation costs are passed through

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[1] Firm transportation refers to the quality of upstream transportation. Firm transportation cannot be interrupted by the transportation supplier, whereas interruptible transportation can be interrupted.

entirely to ratepayers, the Board found that Union's planned profit-making on its upstream transportation portfolio was inconsistent with the IRM Agreement and the regulatory principle imbedded in it that a utility "cannot profit from the procurement of gas supply for its customers."

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[14] The Board concluded that it was entitled to reclassify the FT-RAM revenues because it was part of its mandate to ensure that revenues were being properly characterized under the IRM Agreement and in a manner that resulted in just and reasonable rates.

[15] While acknowledging that gas supply costs (and gas supply cost reductions) are ordinarily passed through entirely to ratepayers, the Board directed that 90 per cent of the $22 million should be credited to ratepayers and that 10 per cent should be credited to Union as an incentive for generating the revenues. In a subsequent rate order, the Board directed that the funds should be recorded in a newly created deferral account.

[16] Union appealed the Board's decision on the preliminary issue to the Divisional Court.

[17] Before the Divisional Court, Union argued that the Board had already approved the gas supply cost reductions to be credited to ratepayers for 2011 through final rate orders made in Quarterly Rate Adjustment Mechanism ("QRAM") proceedings, which disposed of deferral accounts relating to upstream

gas and transportation costs. Accordingly, Union maintained that by reclassifying Union's 2011 FT-RAM revenues as gas supply cost reductions, the Board engaged in impermissible retroactive ratemaking.

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[18] In a split decision, the Divisional Court found that the Board's reclassification of the 2011 FT-RAM revenues did not amount to impermissible retroactive ratemaking. The majority concluded that the revenues at issue were not dealt with in the 2011 QRAM proceedings. Moreover, because the revenues were brought forward as part of the ESM proceeding, they were effectively "encumbered", and therefore subject to further disposition by the Board. The majority held that the Board's statutory rate-making authority is broad and "[does not] in any manner constrain the Board from making orders respecting matters which arose in a previous year but had not been specifically dealt with as a discrete item in the rate-setting process."

[19] Union now appeals to this court with leave and argues that the Board acted unreasonably in reclassifying Union's 2011 FT-RAM revenues as gas supply cost reductions for two reasons.

[20] First, it says the reclassification was an unauthorized departure from the terms of the IRM Agreement, which the Board had approved as the mechanism for setting rates during the IRM period. Second, it says the reclassification amounted to impermissible retroactive ratemaking. This is because gas supply

cost deferral accounts had already been disposed of through final orders in the 2011 QRAM proceedings and because there was no separate deferral account for FT-RAM revenues in relation to which the Board could make a further disposition. According to Union, the Board's decision is thus a classic impermissible attempt to remedy past rates the Board later concluded were excessive.

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[21] For the reasons that follow, I would dismiss Union's appeal.

B. BACKGROUND

(1) Union

[22] Union is an Ontario corporation that sells, distributes, transmits and stores natural gas. It does not produce natural gas. From its head office in Chatham, Union services approximately 1.4 million residential, commercial and industrial customers across northern, southwestern and eastern Ontario.

(2) The Board and its Authority

[23] The Board is a statutory tribunal governed by the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B. Among other powers, the Board has authority to set rates for the sale, transmission, distribution and storage of gas in the natural gas sector: s. 36(1).[2] The Board carries out its rate-setting function by

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[2] The text of relevant provisions under the Act is included in Appendix "A".

issuing orders: s. 19(2). In making orders, the Board is not bound by the terms of any contract: s. 36(1).

[24] Under s. 36(2) of the Act, the Board may "make orders approving or fixing *just and reasonable rates* for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas" (emphasis added).

[25] Just and reasonable rates permit a utility to recover its prudently incurred costs and earn a fair return on invested capital: see, for example, *Power Workers' Union, Canadian Union of Public Employees, Local 1000 v. Ontario (Energy Board)*, 2013 ONCA 359, 116 O.R. (3d) 793, at paras. 13, 30-32, leave to appeal to S.C.C. granted, [2013] S.C.C.A. No. 339, appeal heard and reserved December 3, 2014; *Northwestern Utilities Ltd. v. Edmonton (City)*, [1929] S.C.R. 186, pp. 192-3.

[26] Under s. 36(3) of the Act, "[i]n approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate."

[27] Deferral accounts are not defined in the Act. However, under ss. 36(4.1) and (4.2), the Board must dispose of the balances in deferral accounts at specified intervals. Deferral accounts relating to the commodity of natural gas are to be reflected in rates within a maximum of three months, and deferral accounts

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relating to other items, including transportation costs, are to be reflected in rates within a maximum of 12 months.

(3) The Board's Practice in Setting Union's Rates

[28] Historically, the Board set Union's natural gas rates following an annual cost of service hearing at which the Board established Union's revenue requirement, consisting of a forecast of Union's costs, including a return on equity, over a future year or test period. As part of the rate-setting process, typically the Board established various deferral accounts to allow it to defer consideration of revenues and expenses that could not be forecast with certainty.

[29] Between 2008 and 2012, Union's natural gas rates were set through a Board-approved Incentive Regulation Mechanism – the IRM Agreement.

[30] During incentive regulation, a utility's base rates are set initially through a cost of service proceeding and then adjusted annually using a pre-approved pricing mechanism intended to encourage productivity or efficiency improvements. If a utility is able to increase revenues or reduce costs during incentive regulation, it is permitted to retain its "over-earnings" in excess of its regulated return on equity – but subject to the terms of any earnings sharing mechanism under which the utility has agreed to share its earnings with its ratepayers.

[31] I will return later to the terms of the IRM Agreement.

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(4) Upstream Transportation Optimization

[32] To ensure a consistent supply of gas to its customers, Union holds a portfolio of upstream transportation contracts that provide gas transportation on a firm basis from supply basins across North America to Union's storage, transmission and distribution system in Ontario.

[33] Because it is difficult to predict with accuracy how much firm transportation capacity is required in any given year, as part of maintaining a conservative gas supply plan that will ensure a consistent supply of natural gas, a utility may, from time-to-time, have excess firm transportation capacity.

[34] Traditionally, the Board has passed through the cost of upstream transportation entirely to ratepayers through the use of deferral accounts. However, where a utility was able to generate revenue by disposing of unused transportation capacity through transactions with third parties, the Board has generally permitted the utility to retain some portion of the revenues generated from these transactions to encourage the utility to dispose of the unused capacity. The transactions themselves are generally referred to as "optimization activities" or "transactional services".

[35] Prior to the IRM Agreement, revenue earned from upstream transportation optimization activities was recorded in various deferral accounts. In the past, the Board had ordered that these accounts be cleared at least annually on the basis

that ratepayers receive 75 per cent of the revenues through a rate reduction and Union retain the remaining 25 per cent of revenues.

(5) The IRM Agreement

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[36] As indicated above, for the period 2008 to 2012, Union entered into the IRM Agreement with the interveners. In January 2008, the Board approved the IRM Agreement as an acceptable incentive regulation program.

[37] The following aspects of the IRM Agreement are significant for the purposes of this appeal:

- The IRM Agreement identified so-called "Y factors", which are costs incurred by Union that would be passed through entirely to customers during the term of the IRM Agreement. Items treated as "Y factors" in the IRM Agreement included upstream gas and transportation costs.
- The IRM Agreement eliminated four deferral accounts, which had been previously maintained. In return for closing these accounts, Union increased the optimization margin built into rates from $2.6 million to $6.9 million. Put another way, Union agreed to fund a $4.3 million annual decrease in rates and assumed the risk of earning sufficient optimization revenue to offset that decrease.

- The IRM Agreement included the ESM, which initially provided that utility earnings greater than two per cent above Union's regulated rate of return would be shared 50/50 with ratepayers.
- The IRM Agreement permitted the parties to re-open it if Union's earnings exceeded its regulated return on equity by more than three per cent.

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[38] When Union's earnings for 2008 did exceed three per cent, the parties to the IRM Agreement entered into a further Settlement Agreement amending the terms of the IRM Agreement (the "Amending Agreement"). Among other things, the Amending Agreement provided that earnings over three per cent of Union's regulated rate of return were to be shared 90/10 in favour of ratepayers. The Board approved this amendment by order.

(6) QRAM Proceedings

[39] As indicated above, depending on the type of deferral account, the Act requires that they be cleared at least quarterly or annually. Given the frequency with which deferral accounts must be cleared, the Board developed QRAM proceedings. They provide an abbreviated and mechanistic hearing process used to clear some, but not all, deferral accounts.

[40] In 2011, Union brought five deferral accounts forward for disposition every quarter through QRAM proceeding. Some of these accounts included gas

transportation related costs. Union did not bring the disputed $22 million in FT-RAM revenues forward for disposition in any of the 2011 QRAM proceedings.

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(7) Union's April 2012 Application

[41] The application giving rise to this appeal was brought in April 2012. As indicated above, Union filed an application at that time seeking an order amending or varying the rates charged to customers as of October 2012. A key purpose of the application was to dispose of 2011 utility earnings in accordance with the ESM.

[42] In its application, Union included as utility earnings total optimization revenues for 2011 of $31.7 million, $22 million of which was attributable to FT-RAM optimization.

(8) Union's 2013 Cost of Service Proceeding

[43] On November 10, 2011, Union filed an application with the Board for an order approving or fixing its rates effective January 1, 2013. The appropriate treatment of FT-RAM revenues was an issue in that proceeding. The cost of service decision is relevant because the Board incorporated the evidentiary record from the 2013 cost of service proceeding as part of the record on the preliminary issue.

C. DECISIONS BELOW

(1) The Board's decision on the Preliminary Issue

[44] Prior to dealing with Union's application, the Board determined that it would address Union's treatment of upstream transportation optimization revenues in 2011 as a preliminary issue.

[45] The Board described the preliminary issue as follows: "Has Union treated the upstream transportation optimization revenues appropriately in 2011 in the context of Union's existing IRM framework?"

[46] In its decision on the preliminary issue, the Board accepted the argument of several interveners that TCPL's FT-RAM program allowed Union to create revenue opportunities by planning to replace higher cost firm upstream transportation services paid for by ratepayers with lower cost upstream transportation arrangements:

> The Board agrees with the submissions of parties that *the utilization of TCPL's FT-RAM program by Union allows Union to manage its upstream transportation arrangements on a planned basis* by leaving pipe empty and flowing gas on a different and cheaper path. The Board finds that *the effect of this activity is that higher upstream transportation costs that are paid for by Union's customers, have been substituted with lower cost upstream transportation arrangements*. [Emphasis added.]

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[47] As noted by the Divisional Court, the Board used even stronger language in its companion decision on the related 2012 cost of service proceeding in describing Union's actions. For example, the Board said:

> The Board finds that the record in this proceeding is clear that firm assets are being made available for transactional services on a planned basis, with releases occurring prior to the commencement of the heating season and with capacity being assigned for up to a full year. …
>
> … the record in this proceeding suggests that Union's optimization activities have, in their own right, become a driver of the gas supply plan and are no longer solely a consequence of it.
>
> *The Board finds that Union's ability to "manufacture" optimization opportunities undermines the credibility of Union's gas supply planning process, the planning methodology, and the resulting gas supply plan.*
>
> As submitted by various parties to this proceeding and Board staff, *Union has had an incentive to contract excessive upstream gas transportation services to the detriment of the ratepayer. Union has not filed convincing evidence that the amount and type of upstream gas transportation contracts procured on behalf of ratepayers reflects the objective application of its gas supply planning principles.* [Emphasis added.]

[48] In the light of its finding that Union had acted on a planned basis, the Board concluded that treating FT-RAM revenues as utility earnings was "inconsistent" with the IRM Agreement – and contrary to the regulatory principle inherent in it – that the cost of upstream transportation is a pass-through item from which Union is not entitled to profit:

> The Board finds that Union has used TCPL's FT-RAM program to create a profit from the upstream transportation portfolio and has treated this profit as utility earnings, subject only to the provisions of the earnings sharing mechanism.
>
> *The Board finds that this treatment is inconsistent with the Settlement Agreement on the IRM Framework and contrary to long standing regulatory principle inherent in the IRM Framework that the cost of gas and upstream transportation are to be treated as pass-through items, and therefore that Union cannot profit from the procurement of gas supply for its customers*. [Emphasis added.]

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[49] Instead, the Board determined that the monies generated from FT-RAM activities should be treated as gas supply costs savings:

> As such, the Board finds that Union's upstream transportation FT-RAM optimization revenues are gas cost reductions, and are properly considered Y factor items in accordance with Union's IRM Framework.

[50] However, although gas supply cost reductions would normally be passed through completely to ratepayers, the Board noted that "absent an incentive, [Union] may not have undertaken these [optimization] activities."

[51] Accordingly, the Board directed that ratepayers would be entitled to 90 per cent of the $22 million net revenue amount related to Union's 2011 FT-RAM activities in the form of an offset to gas supply costs and that Union would be entitled to receive a 10 per cent incentive for having generated the net revenues.

[52] In the course of its reasons, the Board rejected Union's arguments that reclassifying the FT-RAM revenues would undo the IRM Agreement and amount to retroactive ratemaking.

[53] The Board noted that it was reclassifying revenues based on evidence filed in Union's 2013 cost of service proceeding, which the Board incorporated by reference. The Board stated that the reclassification of revenues "[was] consistent with the IRM Framework".

[54] Moreover, the Board found that it had "an ongoing responsibility to determine whether activities undertaken during the IRM term [were] being characterized in accordance with the IRM Framework and have been characterized in a manner which results in just and reasonable rates."

[55] Accordingly, "the annual disposition of deferral accounts, earnings sharing, and other accounts that are part of Union's IRM Framework is not merely a mechanical exercise." Instead, "it is a process that is informed by evidence relating to the balances in those accounts and whether those balances reflect the appropriate application of the IRM Framework and the regulatory principles inherent in it."

[56] The Board also rejected Union's arguments that its FT-RAM activities were no different than optimization activities or transactional services in which Union had engaged in the past and that treating its FT-RAM activities as gas supply

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cost reductions would be inconsistent with the descriptions and historical use of deferral accounts.

[57] The Board found that evidence in prior proceedings led to the conclusion that upstream optimization opportunities were generally only available on an *unplanned* basis. Further, Union had not pointed to any evidence filed prior to the concurrent cost of service proceeding that fully explained how the FT-RAM revenues were being generated.

[58] In this regard, the Board noted that an "information asymmetry … exists" between Union and its ratepayers and that Union had an obligation to make "a much higher level of disclosure than was produced in prior proceedings" concerning "departures or potential departures … from regulatory principle inherent in the IRM Framework".

[59] Despite its findings concerning the 2011 FT-RAM revenues, the Board rejected submissions from some of the interveners that it should address FT-RAM revenues earned prior to 2011.

[60] The Board directed Union to advise it of the gas supply related deferral account(s) in which the reduction to ratepayers would be recorded and to file a draft accounting order for the account(s).

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[61] The Board subsequently issued a decision and rate order on February 28, 2013, under which the revenues from the 2011 FT-RAM optimization activities were to be recorded in a newly created deferral account.

(2) The Divisional Court's Decision

[62] Union appealed the Board's decision on the preliminary issue to the Divisional Court. Before the Divisional Court, Union argued that all 2011 gas supply related costs had been dealt with through final orders in 2011 QRAM proceedings. Accordingly, by reclassifying the utility revenues as gas supply cost reductions to be passed through to ratepayers, the Board varied what were final rate orders and engaged in impermissible retroactive ratemaking.

[63] The majority dismissed the appeal, holding that the Board's findings were clear that the disputed $22 million had not been dealt with as part of the 2011 QRAM proceedings and that Union had not met its disclosure obligations concerning the FT-RAM revenue. Because the "true scope and nature of the FT-RAM program" was only revealed during the 2012 rate hearing, that revenue could only be properly classified following the 2012 hearing. It followed that the $22 million was "encumbered" because "Union, in accordance with the statutory framework and Board policy, was bringing forward its 2011 accounts for review and approval."

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[64] During the course of their reasons, the majority stated, "the provisions of section 36 of the Act are liberal in construction and do not in any manner constrain the Board from making orders respecting matters which arose in a previous year but had not been specifically dealt with as a discrete item in the ratesetting process".

[65] In the dissenting judge's view, the elimination of the deferral accounts when the IRM Agreement was entered into led to the conclusion "that the intended Y factor under the [IRM Agreement] was gross transportation costs".

[66] In other words, because the upstream transportation optimization deferral accounts were eliminated, the Y factor described as upstream transportation costs in the IRM Agreement referred to the costs associated with Union's firm transportation contracts "without regard for any netting or pass-through of profits or losses on the sale of any such contracts."

[67] Accordingly, under the terms of the IRM Agreement, the FT-RAM revenues were to be treated as utility revenues subject to the ESM because there was "no other account or provision that would mandate different treatment" for them.

[68] The dissenting judge also rejected the Board's conclusion that a meaningful distinction could be made under the terms of IRM Agreement between FT-RAM revenues and other transactional services revenues. In his view, the Board's conclusion that a distinction existed between planned and

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unplanned upstream transportation optimization activities was not justified. He concluded, "[T]he concept of 'transactional services revenues' does not, by itself, provide a basis for the re-classification of FT-RAM related revenues as gas supply costs."

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[69] Having concluded that the Y factor described in the IRM Agreement referred to gross transportation costs – and therefore that FT-RAM revenues were subject to the ESM – the dissenting judge turned to the question of the Board's authority to reclassify such revenues as gas supply cost reductions. He rejected the Board's submission on appeal that the amounts brought forward by Union were "encumbered" and questioned how, in the absence of an applicable deferral account, that condition could arise.

[70] The dissenting judge concluded that neither the IRM Agreement nor the Act authorized the Board to reclassify Union's FT-RAM revenues. Rather, the Board's reclassification of Union's 2011 FT-RAM related earnings for the purposes of the ESM constituted retroactive ratemaking, and was, "by definition, unreasonable".

D. ANALYSIS

(1) Standard of Review

[71] Under s. 33(2) of the Act, an appeal lies to the Divisional Court from an order of the Board "only upon a question of law or jurisdiction".

[72] The parties agree that decisions of the Board are reviewable on appeal to the Divisional Court on a standard of reasonableness. I agree. (See, for example, *Power Workers'*).

(2) Discussion

[73] Union submits that the Board's decision to reclassify the FT-RAM revenues as gas supply cost reductions is unreasonable because it is an unauthorized departure from the terms of the IRM Agreement, which the Board had approved as the mechanism for setting just and reasonable rates during the incentive regulation period, and because it constitutes impermissible retroactive ratemaking.

[74] Union points out that, under the terms of the IRM Agreement, it reduced its revenue requirement in exchange for the elimination of the upstream transportation optimization deferral accounts. Union contends that its FT-RAM optimization activities were no different than other optimization activities in which it had previously engaged and that it is undisputed that, absent the IRM Agreement, such revenues would have fallen within the one of the eliminated upstream transportation optimization deferral accounts. By reclassifying FT-RAM revenues as gas supply cost reductions, the Board effectively unwound the IRM Agreement. Moreover, the reclassification is inconsistent with the Board's past treatment of such revenues.

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[75] In any event, all permissible 2011 rate adjustments based on gas supply cost reductions had already been made through final orders in the QRAM proceedings. In the absence of a deferral account that segregated specified amounts for future disposition, reclassifying the FT-RAM revenues from utility earnings to gas supply cost reductions was nothing more than an impermissible attempt to adjust rates that had been previously set based on unanticipated circumstances – namely, the unanticipated amount of revenue Union was able to generate by using the FT-RAM program. By definition, the Board's decision constitutes impermissible retroactive ratemaking.

[76] I would not accept these submissions.

[77] As a starting point, contrary to Union's position, the Board made an explicit finding that monies generated by Union's 2011 FT-RAM activities would not have fallen into one of the deferral accounts eliminated under the IRM Agreement. In the Board's view, this was because Union was using the program to create optimization opportunities on a planned basis, whereas the deferral accounts recorded optimization activities carried out on an unplanned basis:

> The Board notes that *Union has classified the revenues generated from its upstream transportation FT-RAM optimization activities as transactional service revenues because it believes that these activities are no different than its traditional transactional service activities.* However, *the Board finds that a review of the evidence* filed by Union in previous proceedings to answer the

> question: "what are transactional services" *does not lead to this conclusion*.
>
> …
>
> The Board finds that *Union's evidence* in the RP-2003-0063 / EB-2003-0087 proceeding, when taken as whole, *does not support the conclusion that the planned optimization of gas supply related assets would be considered a transactional service. The evidence* in the above noted proceeding *explicitly speaks to the fact that with a balanced gas supply portfolio there will be few, if any, firm assets available to support transactional services on a future planned basis. In the Board's view, this statement speaks to the fact that the portion of utility gas supply assets that is available to support transactional service activities is only the portion of those assets that is temporarily surplus to the gas supply plan as a result of factors beyond Union's control. Therefore, a clear distinction can be made between Union's transactional services (including exchanges) and Union's FT-RAM related activities*. [Emphasis added.]

[78] In my view, the Board's findings that monies generated by Union's 2011 FT-RAM activities were generated on a planned basis, and were thus distinguishable from upstream transportation optimization revenues that would have fallen within the eliminated deferral accounts, are findings of fact that were not subject to review on appeal to the Divisional Court.

[79] In the result, rather than being a departure from the IRM Agreement that had the effect of unwinding the IRM Agreement, the Board's decision was nothing more than a review of the nature of the revenues brought forward for sharing under the ESM and a determination that some of such revenues did not

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qualify for that treatment. Accordingly, in my view, the Board's decision cannot be seen as unreasonable on the basis that it was a departure from the IRM Agreement. Nor was its conclusion that the FT-RAM revenues did not qualify for sharing under the ESM unreasonable.

[80] Moreover, I am not convinced that the fact that the FT-RAM revenues were not segregated in a special deferral account relating specifically to gas supply cost reductions means that the Board engaged in impermissible retroactive ratemaking by reclassifying them as gas supply cost reductions. Rather, I conclude that the FT-RAM revenues brought forward by Union for disposition as part of the ESM proceeding were effectively "encumbered" and subject to further disposition by the Board.

[81] This issue requires a discussion of the principle against retroactive ratemaking.

[82] It is well established that an economic regulatory tribunal, such as the Board, operating under a positive approval scheme of ratemaking must exercise its rate-making authority on a prospective basis. Generally speaking, absent express statutory authorization, such a regulator may not exercise its rate-making authority retroactively or retrospectively.

[83] As noted by the Divisional Court majority, the classic explanation for the general presumption against the retroactive operation of statutes is set out in *Young v. Adams*, [1898] A.C. 469, at p. 476:

> [I]t manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment.

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[84] In *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, ("*Bell Canada 1989*"), at p. 1749, Gonthier J. writing for the court, characterized retroactive ratemaking as ratemaking the purpose of which "is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive."

[85] At p. 1759 of the same case, Gonthier J. explained that "the power to review its own previous final decision on the fairness and reasonableness of rates would threaten the stability of the regulated entity's financial situation."

[86] From the ratepayers' perspective, retroactive ratemaking may create unfairness because it "redistributes the cost of utility service by asking today's customers to pay for the expenses incurred by yesterday's customers": *Atco Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2014 ABCA 28, 566 A.R. 323, at para. 51.

[87] Nonetheless, courts have recognized qualifications on the principle against retroactive ratemaking.

[88] In *Bell Canada 1989*, at pp. 1752-1761, the Supreme Court concluded that the power to make interim orders necessarily implies the power to modify, by final order, the rates created under an interim order.

[89] In *Bell Canada v. Bell Alliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764, ("*Bell Alliant*"), the Supreme Court noted, at para. 54, that deferral accounts are "accepted regulatory tools" that "'enabl[e] a regulator to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test year'".

[90] Although *Bell Alliant* involved the disposition of funds in a deferral account, at paras. 61 and 63, Abella J. also used the term "encumbered" to explain why the disposition of funds in a deferral account for one-time credits to ratepayers did not constitute impermissible retroactive ratemaking. A key feature of her reasoning was that it was known from the beginning that funds accumulated in the deferral accounts at issue were subject to further disposition by the regulator in the form of credits to ratepayers. She said:

> [61] In my view, because this case concerns encumbered revenues in deferral accounts … we are not dealing with the variation of final rates. As Sharlow J.A. pointed out, [the principle from] *Bell Canada 1989* [that retroactive or retrospective ratesetting is impermissible] is inapplicable because *it was known from the outset in the case before us that Bell Canada would be obliged to use the balance of its deferral account in accordance with the CRTC's subsequent direction*.

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…

> [63] In my view, the credits ordered out of the deferral accounts in the case before us are neither retroactive nor retrospective. They do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures, since *these credits or reductions were contemplated as a possible disposition of the deferral account balances from the beginning. These funds can properly be characterized as encumbered revenues, because the rates always remained subject to the deferral accounts mechanism established in the Price Caps Decision*. The use of deferral accounts therefore precludes a finding of retroactivity or retrospectivity. Furthermore, using deferral accounts to account for the difference between forecast and actual costs and revenues has traditionally been held not to constitute retroactive rate-setting [Citations omitted and emphasis added.]

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[91] More recently in *Atco Gas,* the Alberta Court of Appeal explained that "[s]lavish adherence to the use of interim rates and deferral accounts should not prohibit adjustments" in a proper case: at para. 62. Moreover, "[s]imply because a ratemaking decision has an impact on a past rate does not mean it is an impermissible retroactive decision": at para. 56. Rather, "[t]he critical factor for determining whether the regulator is engaging in retroactive ratemaking is the parties' knowledge [that the rates were subject to change]": at para. 56.

[92] In that case, the regulator directed Atco to remove certain surplus assets from its rate base and revenue requirement, and backdated the effective date of the removal to an earlier date. The earlier date was the day after the Alberta

Court of Appeal issued a decision indicating that Atco did not require the regulator's consent to remove the asset from its rate base. Removal of the assets from the rate base and revenue requirement caused a decrease in rates, and since the regulator backdated the effective date of the removal, rates were decreased after the fact.

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[93] On appeal to the Alberta Court of Appeal, Atco argued that the regulator could only change the rates by using an interim order or deferral account. The Alberta Court of Appeal rejected that argument. The court found, at para. 53, that "the utility must also be taken to know that the rates will be subject to change as a result of the non-inclusion of those assets in the rate base."

[94] In this case, Union does not dispute that, under the terms of the IRM Agreement, following its year-end, it was obliged to bring forward for the Board's review and approval amounts it classified as utility earnings that were subject to sharing under the ESM. Union also knew, from the outset of the IRM Agreement, that the Board's ESM determination would impact rates. The ESM determination under the IRM Agreement was thus inherently retrospective – and Union always knew that.

[95] Further, on the Board's findings, the manner in which Union generated its 2011 FT-RAM revenues and its classification of those revenues as utility earnings was inconsistent with the IRM Agreement and violated the regulatory

principle inherent in the IRM Agreement that the cost of upstream transportation is a pass-through item and that a utility "cannot profit from the procurement of gas supply for its customers."

[96] Although Union argued that its 2011 FT-RAM activities were no different than its previous upstream optimization activities, the Board made a specific finding that "a clear distinction can be made between Union's [unplanned] transactional services … and Union's [planned] FT-RAM activities."

[97] Significantly, prior to the 2012 hearings, the fact that the 2011 FT-RAM revenues were generated on a planned basis – and thus in a fashion inconsistent with regulatory principle and the IRM Agreement – was uniquely within Union's knowledge.

[98] In this regard, the Board found that Union had an obligation to "be mindful of the information asymmetry that exists between it and [its] ratepayers" and "to disclose departures or potential departures that it intends to make from regulatory principle inherent in the IRM Framework."

[99] In circumstances where Union knew that it was generating its 2011 FT-RAM revenues on a planned basis, Union must be fixed with knowledge, as of the date it generated those revenues, that the Board would be obliged to characterize them as a Y factor, or pass-through item, under the IRM Agreement.

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[100] Although the Board had permitted profit-taking on optimization activities in the past, on the Board's findings, the prior optimization activities involved disposing of unplanned surpluses of firm transportation. The 2011 FT-RAM activities were qualitatively different because they involved disposing of planned surpluses of firm transportation. Prior to the 2012 hearings, Union was the only party in a position to know that – and must also be taken to have known that – its actions were inconsistent with the regulatory principle inherent in the IRM Agreement.

[101] In these circumstances, where the ESM determination was inherently retrospective, and where Union failed to disclose in advance the true nature of its intended 2011 FT-RAM activities, it was not unreasonable for the Board to treat Union's 2011 FT-RAM revenues as encumbered and therefore subject to further disposition by the Board in the form of a credit to ratepayers.

[102] Union argues that the Board never made an express finding that Union was acquiring excess firm transportation during 2011. While the Board may not have said so expressly, on a fair reading of their decision on the preliminary issue in combination with their decision on the 2012 cost of service proceeding, in my view, that message is very clear.

[103] Having regard to all the circumstances, I am not persuaded that the majority of the Divisional Court erred in characterizing the 2011 FT-RAM

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revenues that Union brought forward in its 2012 application as encumbered or that the Board's decision to reclassify those revenues as gas supply cost reductions was unreasonable.

E. DISPOSITION

[104] Based on the foregoing reasons, the appeal is dismissed.

[105] Neither party requested costs and none are awarded.

Released:

"AH"
"JUN 22 2015"

"Janet Simmons J.A."
"I agree Alexandra Hoy A.C.J.O."
"I agree M. Tulloch J.A."

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Appendix "A"

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

19. (2) The Board shall make any determination in a proceeding by order.

33. (1) An appeal lies to the Divisional Court from,

(a) an order of the Board …

(2) An appeal may be made only upon a question of law or jurisdiction and must be commenced not later than 30 days after the making of the order or rule or the issuance of the code.

36. (1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.

…(2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.

(3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.

…

(4.1) If a gas distributor has a deferral or variance account that relates to the commodity of gas, the Board shall, at least once every three months, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates.

(4.2) If a gas distributor has a deferral or variance account that does not relate to the commodity of gas, the Board shall, at least once every 12 months, or such shorter period as is prescribed by the regulations, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates.

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Bell Canada *Appellant*

v.

Bell Aliant Regional Communications, Limited Partnership, Consumers' Association of Canada, National Anti-Poverty Organization, Public Interest Advocacy Centre, MTS Allstream Inc., Société en commandite Télébec and TELUS Communications Inc. *Respondents*

and

Canadian Radio-television and Telecommunications Commission *Intervener*

- and -

TELUS Communications Inc. *Appellant*

v.

Bell Canada, Arch Disability Law Centre, Bell Aliant Regional Communications, Limited Partnership, Canadian Radio-television and Telecommunications Commission, Consumers' Association of Canada, National Anti-Poverty Organization, Public Interest Advocacy Centre, MTS Allstream Inc., Saskatchewan Telecommunications and Société en commandite Télébec *Respondents*

- and -

Consumers' Association of Canada and National Anti-Poverty Organization *Appellants*

v.

Canadian Radio-television and Telecommunications Commission, Bell Aliant Regional Communications, Limited

Bell Canada *Appelante*

c.

Bell Aliant Communications régionales, Société en commandite, Association des consommateurs du Canada, Organisation nationale anti-pauvreté, Centre pour la défense de l'intérêt public, MTS Allstream Inc., Société en commandite Télébec et TELUS Communications Inc. *Intimés*

et

Conseil de la radiodiffusion et des télécommunications canadiennes *Intervenant*

- et -

TELUS Communications Inc. *Appelante*

c.

Bell Canada, Arch Disability Law Centre, Bell Aliant Communications régionales, Société en commandite, Conseil de la radiodiffusion et des télécommunications canadiennes, Association des consommateurs du Canada, Organisation nationale anti-pauvreté, Centre pour la défense de l'intérêt public, MTS Allstream Inc., Saskatchewan Telecommunications et Société en commandite Télébec *Intimés*

- et -

Association des consommateurs du Canada et Organisation nationale anti-pauvreté *Appelantes*

c.

Conseil de la radiodiffusion et des télécommunications canadiennes, Bell Aliant Communications régionales,

2009 SCC 40 (CanLII)

Partnership, Bell Canada, Arch Disability Law Centre, MTS Allstream Inc., TELUS Communications Inc. and TELUS Communications (Québec) Inc. *Respondents*

Indexed as: Bell Canada *v.* Bell Aliant Regional Communications

Neutral citation: 2009 SCC 40.

File Nos.: 32607, 32611.

2009: March 26; 2009: September 18.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Communications law — Telephone — Regulation of rates charged by telecommunications carriers — Canadian Radio-television and Telecommunications Commission ordering carriers to create deferral accounts — Accounts being collected from urban residential telephone service revenues to enhance competition — CRTC directing that accounts be disposed of to increase accessibility of telecommunications services for persons with disabilities and to expand broadband coverage — Remaining amounts, if any, being distributed to subscribers — Whether Telecommunications Act authorizes CRTC to direct disposition of deferral account funds as it did — Telecommunications Act, S.C. 1993, c. 38, ss. 7, 47.

Administrative law — Appeals — Standard of review — Canadian Radio-television and Telecommunications Commission — Standard of review applicable to CRTC's decision to direct disposition of deferral accounts — Telecommunications Act, S.C. 1993, c. 38, ss. 7, 47, 52(1).

In May 2002, the Canadian Radio-television and Telecommunications Commission ("CRTC"), in the exercise of its rate-setting authority, established a formula to regulate the maximum prices to be charged for certain services offered by incumbent local exchange carriers, including for residential telephone services in mainly urban non-high cost serving areas (the "Price Caps Decision"). Under the formula established by the Price Caps Decision, any increase in the price charged

Société en commandite, Bell Canada, Arch Disability Law Centre, MTS Allstream Inc., TELUS Communications Inc. et TELUS Communications (Québec) Inc. *Intimés*

Répertorié : Bell Canada *c.* Bell Aliant Communications régionales

Référence neutre : 2009 CSC 40.

Nos du greffe : 32607, 32611.

2009 : 26 mars; 2009 : 18 septembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit des communications — Téléphone — Réglementation des tarifs exigés par les entreprises de télécommunication — Ordonnance du Conseil de la radiodiffusion et des télécommunications canadiennes intimant aux fournisseurs de créer des comptes de report — Comptes créés au moyen des revenus des services téléphoniques résidentiels en milieu urbain en vue d'encourager la concurrence — Ordonnance du CRTC intimant d'utiliser les comptes pour faciliter l'accès des personnes handicapées aux services de télécommunication et pour étendre le service à large bande — Distribution aux abonnés des éventuelles sommes restantes — La Loi sur les télécommunications autorise-t-elle le CRTC à ordonner comme il l'a fait l'utilisation des fonds se trouvant dans les comptes de report? — Loi sur les télécommunications, L.C. 1993, ch. 38, art. 7, 47.

Droit administratif — Appels — Norme de contrôle — Conseil de la radiodiffusion et des télécommunications canadiennes — Norme de contrôle applicable à la décision du CRTC prescrivant l'utilisation des comptes de report — Loi sur les télécommunications, L.C. 1993, ch. 38, art. 7, 47, 52(1).

En mai 2002, dans l'exercice de son pouvoir de tarification, le Conseil de la radiodiffusion et des télécommunications canadiennes (« CRTC ») a élaboré une formule pour réglementer les prix maximums exigés pour certains services offerts par des entreprises de services locaux titulaires, y compris pour les services téléphoniques résidentiels dans les zones de desserte — principalement urbaines — autres que celles à coût élevé (la « Décision sur le plafonnement des prix »). Selon la

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for these services in a given year was limited to an inflationary cap, less a productivity offset to reflect the low degree of competition in that particular market. The CRTC ordered the carriers to establish deferral accounts as separate accounting entries in their ledgers to record funds representing the difference between the rates actually charged and those as otherwise determined by the formula. At the time, the CRTC did not direct how the deferral account funds were to be used.

In December 2003, Bell Canada sought approval from the CRTC to use the balance in its deferral account to expand high-speed broadband internet services in remote and rural communities. The CRTC invited submissions and conducted a public process to determine the appropriate disposition of the deferral accounts. In February 2006, it decided that each deferral account should be used to improve accessibility for individuals with disabilities and for broadband expansion. Any unexpended funds were to be distributed to certain current residential subscribers through a one-time credit or via prospective rate reductions. This was known as the "Deferral Accounts Decision".

Bell Canada appealed the order of one-time credits, while the Consumers' Association of Canada and the National Anti-Poverty Organization appealed the direction that the funds be used for broadband expansion. The Federal Court of Appeal dismissed the appeals, finding that the Price Caps Decision regime always contemplated that the disposition of the deferral accounts would be subject to the CRTC's directions and that the CRTC was at all times acting within its mandate. TELUS Communications Inc. joined Bell Canada as an appellant in this Court.

Held: The appeals should be dismissed.

The CRTC's creation and use of the deferral accounts for broadband expansion and consumer credits was authorized by the provisions of the *Telecommunications Act* which lays out the basic legislative framework of the Canadian telecommunications industry. In particular, s. 7 of the Act sets out certain broad telecommunications policy objectives and s. 47(*a*) directs the CRTC to implement them when exercising its statutory authority, balancing the interests of consumers, carriers and competitors. A central responsibility of the CRTC is to determine and approve just and reasonable rates to be charged for telecommunications services. Pursuing

formule établie par la Décision sur le plafonnement des prix, toute hausse de prix de ces services pour une année donnée était limitée à un plafond lié à l'inflation, moins une compensation de la productivité visant à refléter le faible degré de concurrence dans ce marché particulier. Le CRTC a ordonné aux entreprises de créer dans leurs grands livres des comptes de report dont les fonds correspondent à la différence entre les tarifs réellement exigés et ceux autrement calculés selon la formule. À l'époque, il n'a pas précisé de quelle façon les fonds des comptes de report devraient être utilisés.

En décembre 2003, Bell Canada a demandé au CRTC la permission d'utiliser le solde de son compte de report pour étendre à des collectivités rurales et éloignées le service Internet haute vitesse à large bande. Le CRTC a sollicité, dans le cadre d'une instance publique, des propositions relatives à l'utilisation des comptes de report. En février 2006, le CRTC a décidé que les comptes de report devaient être utilisés pour améliorer l'accès des personnes handicapées aux services et pour étendre le service à large bande. Toute somme non dépensée devait être distribuée à certains abonnés actuels au moyen d'un crédit unique ou de réductions tarifaires futures. Cette décision est appelée la « Décision sur les comptes de report ».

Bell Canada a interjeté appel de l'ordonnance intimant le versement d'un crédit unique, alors que l'Association des consommateurs du Canada et l'Organisation nationale anti-pauvreté ont fait appel de la décision prescrivant l'utilisation des fonds aux fins d'expansion du service à large bande. La Cour d'appel fédérale a rejeté les appels. Elle a conclu, d'une part, que le régime institué par la Décision sur le plafonnement des prix a toujours envisagé que les fonds accumulés dans les comptes de report seraient utilisés de la manière que prescrirait le CRTC, et, d'autre part, que ce dernier avait à tout moment agi dans les limites de son mandat. TELUS Communications Inc. s'est jointe à Bell Canada, en tant qu'appelante, devant la Cour.

Arrêt : Les pourvois sont rejetés.

La création et l'utilisation des comptes de report aux fins d'expansion du service à large bande et de versement de crédits aux consommateurs étaient autorisées par les dispositions de la *Loi sur les télécommunications*, laquelle pose le cadre législatif de base de l'industrie des télécommunications au Canada. En particulier, l'art. 7 de la Loi énonce certains grands objectifs de la politique canadienne de télécommunication et l'al. 47*a*) de cette même loi enjoint au CRTC de veiller à leur réalisation lorsqu'il exerce les pouvoirs qui lui sont conférés et concilie les intérêts des consommateurs, des entreprises et de leurs concurrents. Une responsabilité centrale

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policy objectives through the exercise of its rate-setting power is precisely what s. 47 requires the CRTC to do in setting just and reasonable rates. [1] [28] [36]

du CRTC consiste à déterminer et à approuver les tarifs justes et raisonnables des services de télécommunication. La poursuite par le CRTC des objectifs de la politique, au moyen de l'exercice de son pouvoir de tarification, constitue précisément ce que l'art. 47 lui demande de faire lorsqu'il fixe des tarifs justes et raisonnables. [1] [28] [36]

The issues raised in these appeals go to the very heart of the CRTC's specialized expertise. The core of the quarrel in effect is with the methodology for setting rates and the allocation of certain proceeds derived from those rates, a polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake. The standard of review is therefore reasonableness. [38]

Les questions soulevées dans les présents pourvois ressortissent à l'essence même de l'expertise spécialisée du CRTC. Le nœud du litige concerne en fait la méthode d'établissement des tarifs et l'affectation de certains fonds provenant de ces tarifs, un exercice polycentrique que le législateur a confié au CRTC et pour lequel ce dernier possède une compétence particulière. La norme de contrôle est donc celle de la décision raisonnable. [38]

In ordering subscriber credits and approving the use of funds for broadband expansion, the CRTC acted reasonably and in accordance with the policy objectives of the *Telecommunications Act*. In the Price Caps Decision, the CRTC indicated that the amounts in the deferral accounts would help achieve the CRTC's objectives. When the CRTC approved the rates derived from the Price Caps Decision, the portion of the revenues that went into the deferral accounts remained subject to the CRTC's further directions. The deferral accounts, and the fact that they were encumbered by the possibility of the CRTC's future directions, were therefore an integral part of the rate-setting exercise. The allocation of deferral account funds to consumers was neither a variation of a final rate nor, strictly speaking, a rebate. From the Price Caps Decision onwards, it was understood that the disposition of the deferral account funds might include an eventual credit to subscribers once the CRTC determined the appropriate allocation. [64-65] [77]

Lorsqu'il a ordonné l'attribution de crédits aux abonnés et lorsqu'il a approuvé l'utilisation des fonds pour l'expansion du service à large bande, le CRTC a agi de manière raisonnable et en conformité avec les objectifs de la politique de la *Loi sur les télécommunications*. Dans la Décision sur le plafonnement des prix, le CRTC a indiqué que les fonds des comptes de report contribueraient à la réalisation de ses objectifs. Lorsque le CRTC a approuvé les tarifs découlant de la Décision sur le plafonnement des prix, la partie des revenus qui avait été versée dans les comptes de report est demeurée assujettie aux prescriptions que pourraient formuler ultérieurement le CRTC. Les comptes de report, ainsi que la possibilité qu'ils fassent par la suite l'objet de prescriptions de la part du CRTC, faisaient donc partie intégrante de l'opération de fixation de tarifs. L'attribution de fonds des comptes de report aux consommateurs ne constituait ni une modification d'une ordonnance tarifaire définitive ni à proprement parler un rabais. Dès la Décision sur le plafonnement des prix, il était entendu que les fonds des comptes de report pourraient notamment être utilisés pour le versement d'un éventuel crédit aux abonnés une fois que le CRTC aurait déterminé l'affectation souhaitable. [64-65] [77]

There was no inappropriate cross-subsidization between residential telephone services and broadband expansion. The *Telecommunications Act* contemplates a comprehensive national telecommunications framework. The policy objectives that the CRTC is always obliged to consider demonstrate that it need not limit itself to considering solely the service at issue in determining whether rates are just and reasonable. It properly treated the statutory objectives as guiding principles in the exercise of its rate-setting authority, and came to a reasonable conclusion. [73] [75] [77]

Il n'y a pas eu interfinancement inapproprié entre les services téléphoniques résidentiels et l'expansion du service à large bande. La *Loi sur les télécommunications* envisage un cadre national global en matière de télécommunications. Les objectifs de la politique de télécommunication — dont le CRTC doit toujours tenir compte — montrent qu'il n'a pas à prendre en considération uniquement le service en cause pour déterminer si les tarifs sont justes et raisonnables. Il a à juste titre considéré les objectifs inscrits dans la loi comme des principes directeurs régissant l'exercice de son pouvoir de tarification et il est arrivé à une conclusion raisonnable. [73] [75] [77]

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Cases Cited

Referred to: Telecom Decision CRTC 2002-34, May 30, 2002; Telecom Decision CRTC 2005-69, December 16, 2005; Telecom Decision CRTC 2003-15, March 18, 2003; Telecom Decision CRTC 2003-18, March 18, 2003; Telecom Decision CRTC 2006-9, February 16, 2006; Telecom Decision CRTC 2008-1, January 17, 2008; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12; *Canadian National Railways Co. v. Bell Telephone Co. of Canada*, [1939] 1 S.C.R. 308; Telecom Decision CRTC 97-9, May 1, 1997; Telecom Decision CRTC 94-19, September 16, 1994; *Edmonton (City) v. 360Networks Canada Ltd.*, 2007 FCA 106, [2007] 4 F.C.R. 747, leave to appeal refused, [2007] 3 S.C.R. vii; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476; Telecom Decision CRTC 93-9, July 23, 1993; *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *EPCOR Generation Inc. v. Energy and Utilities Board*, 2003 ABCA 374, 346 A.R. 281; *Reference Re Section 101 of the Public Utilities Act* (1998), 164 Nfld. & P.E.I.R. 60.

Statutes and Regulations Cited

Railway Act, R.S.C. 1985, c. R-3, s. 340(1).
Telecommunications Act, S.C. 1993, c. 38, ss. 7, 24, 25(1), 27, 32(*g*), 35(1), 37(1), 42(1), 46.5(1), 47, 52(1).

Authors Cited

Ryan, Michael H. *Canadian Telecommunications Law and Regulation*. Scarborough: Carswell, 1993 (loose-leaf updated 2008, release 2).

APPEALS from a judgment of the Federal Court of Appeal (Richard C.J. and Noël and Sharlow JJ.A.), 2008 FCA 91, 375 N.R. 124, 80 Admin. L.R. (4th) 159, [2008] F.C.J. No. 397 (QL), 2008 CarswellNat 544, affirming a decision of the Canadian Radio-television and Telecommunications Commission, 2006 LNCRTCE 9 (QL), 2006 CarswellNat 6317. Appeals dismissed.

Jurisprudence

Arrêts mentionnés : Décision de télécom CRTC 2002-34, 30 mai 2002; Décision de télécom CRTC 2005-69, 16 décembre 2005; Décision de télécom CRTC 2003-15, 18 mars 2003; Décision de télécom CRTC 2003-18, 18 mars 2003; Décision de télécom CRTC 2006-9, 16 février 2006; Décision de télécom CRTC 2008-1, 17 janvier 2008; *Conseil des Canadiens avec déficiences c. VIA Rail Canada Inc.*, 2007 CSC 15, [2007] 1 R.C.S. 650; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339; *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186; *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140; *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12; *Canadian National Railways Co. c. Bell Telephone Co. of Canada*, [1939] 1 R.C.S. 308; Décision de télécom CRTC 97-9, 1er mai 1997; Décision de télécom CRTC 94-19, 16 septembre 1994; *Edmonton (Ville) c. 360Networks Canada Ltd.*, 2007 CAF 106, [2007] 4 R.C.F. 747, autorisation de pourvoi refusée, [2007] 3 R.C.S. vii; *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, 2003 CSC 28, [2003] 1 R.C.S. 476; Décision de télécom CRTC 93-9, 23 juillet 1993; *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722; *EPCOR Generation Inc. c. Energy and Utilities Board*, 2003 ABCA 374, 346 A.R. 281; *Reference Re Section 101 of the Public Utilities Act* (1998), 164 Nfld. & P.E.I.R. 60.

Lois et règlements cités

Loi sur les chemins de fer, L.R.C. 1985, ch. R-3, art. 340(1).
Loi sur les télécommunications, L.C. 1993, ch. 38, art. 7, 24, 25(1), 27, 32*g*), 35(1), 37(1), 42(1), 46.5(1), 47, 52(1).

Doctrine citée

Ryan, Michael H. *Canadian Telecommunications Law and Regulation*. Scarborough : Carswell, 1993 (loose-leaf updated 2008, release 2).

POURVOIS contre un arrêt de la Cour d'appel fédérale (le juge en chef Richard et les juges Noël et Sharlow), 2008 CAF 91, 375 N.R. 124, 80 Admin. L.R. (4th) 159, [2008] A.C.F. no 397 (QL), 2008 CarswellNat 2390, qui a confirmé une décision du Conseil de la radiodiffusion et des télécommunications canadiennes, 2006 LNCRTCE 9 (QL), 2006 CarswellNat 6318. Pourvois rejetés.

2009 SCC 40 (CanLII)

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Michael H. Ryan, *John E. Lowe*, *Stephen R. Schmidt* and *Sonya A. Morgan*, for the appellant/respondent TELUS Communications Inc. and the respondent TELUS Communications (Québec) Inc.

Richard P. Stephenson, *Danny Kastner* and *Michael Janigan*, for the appellants/respondents the Consumers' Association of Canada and the National Anti-Poverty Organization and the respondent the Public Interest Advocacy Centre.

Michael Koch and *Dina F. Graser*, for the respondent MTS Allstream Inc.

John B. Laskin and *Afshan Ali*, for the respondent/intervener the Canadian Radio-television and Telecommunications Commission.

No one appeared for the respondents Société en commandite Télébec, Arch Disability Law Centre, Bell Aliant Regional Communications, Limited Partnership, and Saskatchewan Telecommunications.

The judgment of the Court was delivered by

[1] ABELLA J. — The *Telecommunications Act*, S.C. 1993, c. 38, sets out certain broad telecommunications policy objectives. It directs the Canadian Radio-television and Telecommunications Commission ("CRTC") to implement them in the exercise of its statutory authority, balancing the interests of consumers, carriers and competitors in the context of the Canadian telecommunications industry. The issue in these appeals is whether this authority was properly exercised.

[2] While distinct questions arise in each of the appeals before us, the common problem is whether the CRTC, in the exercise of its rate-setting

Neil Finkelstein, *Catherine Beagan Flood* et *Rahat Godil*, pour l'appelante/intimée Bell Canada.

Michael H. Ryan, *John E. Lowe*, *Stephen R. Schmidt* et *Sonya A. Morgan*, pour l'appelante/intimée TELUS Communications Inc. et l'intimée TELUS Communications (Québec) Inc.

Richard P. Stephenson, *Danny Kastner* et *Michael Janigan*, pour les appelantes/intimées l'Association des consommateurs du Canada et l'Organisation nationale anti-pauvreté et l'intimé le Centre pour la défense de l'intérêt public.

Michael Koch et *Dina F. Graser*, pour l'intimée MTS Allstream Inc.

John B. Laskin et *Afshan Ali*, pour l'intimé/intervenant le Conseil de la radiodiffusion et des télécommunications canadiennes.

Personne n'a comparu pour les intimés la Société en commandite Télébec, Arch Disability Law Centre, Bell Aliant Communications régionales, Société en commandite, et Saskatchewan Telecommunications.

Version française du jugement de la Cour rendu par

[1] LA JUGE ABELLA — La *Loi sur les télécommunications*, L.C. 1993, ch. 38, énonce certains grands objectifs de la politique canadienne de télécommunication. Elle enjoint au Conseil de la radiodiffusion et des télécommunications canadiennes (« CRTC ») de veiller à leur réalisation dans l'exercice des pouvoirs qui lui sont conférés par la loi, en conciliant les intérêts des consommateurs, des entreprises et de leurs concurrents dans le contexte de l'industrie canadienne des télécommunications. Les présents pourvois soulèvent la question de savoir si l'organisme a exercé ces pouvoirs d'une manière appropriée.

[2] Bien que chacun des pourvois dont nous sommes saisis soulève des questions distinctes, le problème commun est de savoir si le CRTC, dans

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authority, appropriately directed the allocation of funds to various purposes. In the Bell Canada and TELUS Communications Inc. appeal, the challenged purpose is the distribution of funds to customers, while in the Consumers' Association of Canada and National Anti-Poverty Organization appeal, the impugned allocation was directed at the expansion of broadband infrastructure. For the reasons that follow, in my view the CRTC's allocations were reasonable based on the Canadian telecommunications policy objectives that it is obliged to consider in the exercise of all of its powers, including its authority to approve just and reasonable rates.

l'exercice de son pouvoir de tarification, a ordonné d'une manière appropriée l'affectation de fonds à diverses fins. Dans le pourvoi de Bell Canada et de TELUS Communications Inc., c'est la distribution de fonds aux clients qui est contestée, alors que, dans celui de l'Association des consommateurs du Canada et de l'Organisation nationale anti-pauvreté, c'est l'affectation de fonds à l'expansion du service à large bande. Pour les motifs qui suivent, je suis d'avis que les affectations décidées par le CRTC étaient raisonnables au regard des objectifs de la politique canadienne de télécommunication que le CRTC doit prendre en considération dans l'exercice de tous ses pouvoirs, y compris l'approbation de tarifs justes et raisonnables.

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Background

[3] The CRTC issued its landmark "Price Caps Decision"[1] in May 2002. Exercising its rate-setting authority, the CRTC established a formula to regulate the maximum prices charged for certain services offered by incumbent local exchange carriers ("ILECs"), who are primarily well-established telecommunications carriers.

[4] As part of its decision, the CRTC ordered the affected carriers to create separate accounting entries in their ledgers. These were called "deferral accounts". The funds contained in these deferral accounts were derived from residential telephone service revenues in non-high cost serving areas ("non-HCSAs"), which are mainly urban. Under the formula established by the Price Caps Decision, any increase in the price charged for these services in a given year was limited to an inflationary cap, less a productivity offset to reflect the low degree of competition in that particular market.

[5] More specifically, the effect of the inflationary cap was to bar carriers from increasing their prices at a rate greater than inflation. The productivity

[1] Telecom Decision CRTC 2002-34, May 30, 2002 (online: www.crtc.gc.ca/eng/archive/2002/dt2002-34.htm).

Contexte

[3] Le CRTC a rendu sa décision-clé sur le plafonnement des prix[1] en mai 2002 (« Décision sur le plafonnement des prix »). Dans l'exercice de son pouvoir de tarification, le CRTC a élaboré une formule pour réglementer les prix maximums exigés pour certains services offerts par des entreprises de services locaux titulaires (« ESLT »), lesquelles sont principalement des entreprises de télécommunication bien établies.

[4] Dans le cadre de sa décision, le CRTC a ordonné aux entreprises visées de créer dans leurs grands livres des comptes distincts, appelés « comptes de report ». Les fonds de ces comptes de report provenaient des revenus tirés des services téléphoniques résidentiels dans les zones de desserte autres que celles à coût élevé (« les zones autres que les ZDCE »), qui sont principalement urbaines. Selon la formule établie par la Décision sur le plafonnement des prix, toute hausse de prix de ces services pour une année donnée était limitée à un plafond lié à l'inflation, moins une compensation de la productivité visant à refléter le faible degré de concurrence dans ce marché particulier.

[5] Plus précisément, le plafond lié à l'inflation avait pour effet d'empêcher les entreprises d'augmenter leurs prix selon un taux supérieur à l'inflation.

[1] Décision de télécom CRTC 2002-34, 30 mai 2002 (en ligne : www.crtc.gc.ca/fra/archive/2002/dt2002-34.htm).

offset, on the other hand, put downward pressure on the rates to be charged. While market forces would normally serve to encourage carriers to reduce both their costs and their prices, the low level of competition in the non-HCSA market led the CRTC to conclude that an offsetting factor was necessary as a proxy for the effect of competition.

La compensation de la productivité, quant à elle, créait une pression à la baisse sur les tarifs exigés. Les forces du marché inciteraient normalement les entreprises à réduire à la fois leurs coûts et leurs prix, mais le faible degré de concurrence dans le marché des zones autres que les ZDCE a amené le CRTC à conclure qu'il était nécessaire d'utiliser un facteur de compensation en remplacement de l'effet de la concurrence.

[6] Given the countervailing factors at work in the Price Caps Decision formula, there was the potential for a decrease in the price of residential services in these areas if inflation fell below a certain level. Rather than mandating such a decrease, however, the CRTC concluded that lower prices, and therefore the prospect of lower revenues, would constitute a barrier to the entry of new carriers into this particular telecommunications market. It therefore ordered that amounts representing the difference between the rates *actually* charged, not including the decrease mandated by the Price Caps Decision formula, and the rates as *otherwise determined* through the formula, were to be collected from subscribers and recorded in deferral accounts held by each carrier. These accounts were to be reviewed annually by the CRTC. The intent of the Price Caps Decision was, therefore, that prices for these services would remain at a level sufficient to encourage market entry, while at the same time maintaining the pressure on the incumbent carriers to reduce their costs.

[6] Étant donné les facteurs compensateurs utilisés dans la formule imposée par la Décision sur le plafonnement des prix, il y avait une possibilité de voir baisser les tarifs des services résidentiels dans ces zones si l'inflation tombait en dessous d'un certain niveau. Le CRTC n'a cependant pas ordonné une telle baisse, estimant que des tarifs plus bas, et donc la perspective de revenus inférieurs, constitueraient un obstacle à l'entrée de nouveaux concurrents sur ce marché des télécommunications en particulier. Par conséquent, il a ordonné que les sommes correspondant à la différence entre les tarifs *réellement* exigés, sans la baisse imposée par la formule établie dans la Décision sur le plafonnement des prix, et ceux *autrement calculés* selon la formule, soient perçues auprès des abonnés et comptabilisées dans des comptes de report établis par chaque entreprise. Ces comptes devaient faire l'objet d'un examen annuel par le CRTC. L'intention du CRTC, dans sa Décision sur le plafonnement des prix, était donc que les prix de ces services demeurent à un niveau suffisant pour favoriser l'entrée sur le marché tout en maintenant la pression sur les entreprises titulaires pour qu'elles réduisent leurs coûts.

[7] The principal objectives the CRTC intended the Price Caps Decision to achieve were the following:

a) to render reliable and affordable services of high quality, accessible to both urban and rural area customers;

b) to balance the interests of the three main stakeholders in telecommunications markets, i.e., customers, competitors and incumbent telephone companies;

c) to foster facilities-based competition in Canadian telecommunications markets;

[7] Voici les principaux objectifs poursuivis par le CRTC lorsqu'il a rendu la Décision sur le plafonnement des prix :

a) rendre des services fiables et abordables, de qualité et accessibles aux clients des zones urbaines et rurales;

b) concilier les intérêts des trois principaux intervenants dans les marchés des télécommunications, c.-à-d., les clients, les concurrents et les compagnies de téléphone titulaires;

c) encourager la concurrence fondée sur les installations dans les marchés canadiens des télécommunications;

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d) to provide incumbents with incentives to increase efficiencies and to be more innovative; and

e) to adopt regulatory approaches that impose the minimum regulatory burden compatible with the achievement of the previous four objectives. [para. 99]

[8] The CRTC discussed the future use of the deferral account funds as follows:

> The Commission anticipates that an adjustment to the deferral account would be made whenever the Commission approves rate reductions for residential local services that are proposed by the ILECs as a result of competitive pressures. The Commission also anticipates that the deferral account would be drawn down to mitigate rate increases for residential service that could result from the approval of exogenous factors or when inflation exceeds productivity. <u>Other draw downs could occur, for example, through subscriber rebates or the funding of initiatives that would benefit residential customers in other ways.</u> [Emphasis added; para. 412.]

At the time, it did not specifically direct how the deferral account funds were to be used, leaving the issue subject to further submissions. While some participants objected to the creation of the deferral accounts, no one appealed the Price Caps Decision (*Bell Canada v. Canadian Radio-television and Telecommunications Commission*, 2008 FCA 91, 80 Admin. L.R. (4th) 159, at para. 14).

[9] The Price Caps Decision was to apply to services offered by Bell Canada, TELUS, and other affected carriers for the four-year period from June 1, 2002 to May 31, 2006. In a decision in 2005, the CRTC extended this price regulation regime for another year to May 31, 2007.[2] The CRTC allowed some draw-downs of the deferral accounts following the Price Caps Decision that are not at issue in these appeals.

[2] Telecom Decision CRTC 2005-69, December 16, 2005 (online: www.crtc.gc.ca/eng/archive/2005/dt2005-69.htm).

d) inciter les titulaires à accroître les efficiences et à être plus innovatrices;

e) adopter des approches réglementaires qui imposent le fardeau réglementaire minimum compatible avec l'atteinte des quatre objectifs précédents. [par. 99]

[8] Le CRTC a fait les observations suivantes au sujet de l'utilisation future des fonds du compte de report :

> Le Conseil prévoit qu'un rajustement du compte de report serait fait chaque fois qu'il approuverait des réductions tarifaires pour les services locaux de résidence qui sont proposées par les ESLT en raison de pressions concurrentielles. Le Conseil prévoit également que le compte de report serait utilisé pour atténuer les augmentations de tarifs des services de résidence qui pourraient faire suite à l'approbation de facteurs exogènes ou lorsque l'inflation excède la productivité. <u>Cela pourrait aussi se faire par exemple au moyen de rabais aux abonnés ou par le financement d'initiatives à l'avantage des abonnés du service résidentiel d'autres façons.</u> [Je souligne; par. 412.]

À l'époque, il n'a pas précisé de quelle façon les fonds des comptes de report devraient être utilisés, laissant la question en suspens. Certains participants s'opposaient à la création des comptes de report, mais aucun n'a interjeté appel de la Décision sur le plafonnement des prix (*Bell Canada c. Conseil de la radiodiffusion et des télécommunications canadiennes*, 2008 CAF 91, 80 Admin. L.R. (4th) 159 (p. 179), par. 14).

[9] La Décision sur le plafonnement des prix devait s'appliquer aux services offerts par Bell Canada, TELUS et d'autres entreprises pour la période de quatre ans allant du 1er juin 2002 au 31 mai 2006. Dans une décision rendue en 2005, le CRTC a prolongé d'un an l'application de ce régime de réglementation des prix, soit jusqu'au 31 mai 2007[2]. Le CRTC a autorisé quelques réductions des comptes de report après la Décision sur le plafonnement des prix, mais ces réductions ne sont pas en litige dans les présents pourvois.

[2] Décision de télécom CRTC 2005-69, 16 décembre 2005 (en ligne : www.crtc.gc.ca/fra/archive/2005/dt2005-69.htm).

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[10] In March 2003, in two separate decisions, the CRTC approved the rates for Bell Canada and TELUS.[3] In the Bell Canada decision, the CRTC appeared to contemplate the continued operation of the deferral accounts established in the Price Caps Decision. It ordered, for example, that certain tax savings be allocated to the deferral accounts:

The Commission, in Decision 2002-34, established a deferral account in conjunction with the application of a basket constraint equal to the rate of inflation less a productivity offset to all revenues from residential services in non-HCSAs. The Commission considers that AT&T Canada's proposal to allocate the Ontario GRT and the Quebec TGE tax savings associated with all capped services to the price cap deferral account is inconsistent with that determination. The Commission finds that Bell Canada's proposal to include the Ontario GRT and Quebec TGE tax savings associated with the residential local services in non-HCSAs basket in the price cap deferral account is consistent with that determination. [Emphasis added; para. 32.]

[11] On December 2, 2003, Bell Canada sought the approval of the CRTC to use the balance in its deferral account to expand high-speed broadband internet service to remote and rural communities. In response, on March 24, 2004, the CRTC issued a public notice requesting submissions on the appropriate disposition of the deferral accounts.[4] Pursuant to this notice, the CRTC conducted a public process whereby proposals were invited for the disposition of the affected carriers' deferral accounts. The review was extensive and proposals were received from numerous parties.

[10] En mars 2003, dans deux décisions distinctes, le CRTC a approuvé les tarifs de Bell Canada et de TELUS[3]. Dans la décision portant sur Bell Canada, le CRTC a semblé envisager le maintien des comptes de report établis dans la Décision sur le plafonnement des prix. Il a ordonné, par exemple, que certaines économies de taxe soient attribuées aux comptes de report :

Dans la décision 2002-34, le Conseil a établi un compte de report en même temps qu'il a appliqué à tous les revenus des services de résidence dans les zones autres que les ZDCE une restriction au niveau de l'ensemble égale au taux d'inflation moins une compensation de la productivité. Le Conseil estime que la proposition d'AT&T Canada visant à attribuer au compte de report des prix plafonds les économies provenant de la TRB de l'Ontario et de la taxe TGE du Québec associées à tous les services plafonnés n'est pas conforme à cette conclusion. Le Conseil conclut que la proposition de Bell Canada qui veut inclure dans le compte de report des prix plafonds les économies provenant de la TRB de l'Ontario et de la taxe TGE du Québec associées aux services locaux de résidence dans les zones autres que ZDCE est conforme à cette conclusion. [Je souligne; par. 32.]

[11] Le 2 décembre 2003, Bell Canada a demandé au CRTC la permission d'utiliser le solde de son compte de report pour étendre à des collectivités rurales et éloignées le service Internet haute vitesse à large bande. Le CRTC a répondu le 24 mars 2004 en sollicitant dans un avis public des propositions relatives à l'utilisation des comptes de report[4]. Conformément à cet avis, le CRTC a tenu une instance publique dans le cadre de laquelle il a sollicité des propositions relatives à l'utilisation des comptes de report des entreprises concernées. La question a fait l'objet d'un examen approfondi et des propositions ont été reçues de nombreuses parties.

[3] Telecom Decision CRTC 2003-15, March 18, 2003 (online: www.crtc.gc.ca/eng/archive/2003/dt2003-15.htm) and Telecom Decision CRTC 2003-18, March 18, 2003 (online: www.crtc.gc.ca/eng/archive/2003/dt2003-18.htm).

[4] Telecom Public Notice CRTC 2004-1.

[3] Décision de télécom CRTC 2003-15, 18 mars 2003 (en ligne : www.crtc.gc.ca/fra/archive/2003/dt2003-15.htm) et Décision de télécom CRTC 2003-18, 18 mars 2003 (en ligne : www.crtc.gc.ca/fra/archive/2003/dt2003-18.htm).

[4] Avis public de télécom CRTC 2004-1.

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[12] This led to the release of the "Deferral Accounts Decision" on February 16, 2006.[5] In this decision, the CRTC directed how the funds in the deferral accounts were to be used. These directions form the foundation of these appeals.

[12] Cela a mené à la publication de la « Décision sur les comptes de report » le 16 février 2006[5]. Dans cette décision, le CRTC a formulé des directives quant à l'utilisation des fonds des comptes de report. Ces directives constituent le fondement des présents pourvois.

[13] After considering the various policy objectives outlined in the applicable statute, the *Telecommunications Act*, and the purposes set out in the Price Caps Decision, the CRTC concluded that all funds in the deferral accounts should be targeted for disposal by a designated date in 2006:

The attachment to this Decision provides preliminary estimates of the deferral account balances as of the end of the fourth year of the current price cap period in 2006. The Commission notes that the deferral account balances are expected to be very large for some ILECs. It also notes the concern that allowing funds to continue to accumulate in the accounts would create inefficiencies and uncertainties.

. . .

Accordingly, the Commission considers it appropriate not only to provide directions on the disposition of all the funds that will have accumulated in the ILECs' deferral accounts by the end of the fourth year of the price cap period in 2006, but also to provide directions to address amounts recurring beyond this period in order to prevent further accumulation of funds in the deferral accounts. The Commission will provide directions and guidelines for disposing of these amounts later in this Decision. [Emphasis added; paras. 58 and 60.]

[13] Après avoir examiné les divers objectifs inscrits dans la loi applicable, la *Loi sur les télécommunications*, ainsi que les objectifs énoncés dans la décision sur le plafonnement des prix, le CRTC a conclu qu'il fallait viser l'utilisation de la totalité des fonds des comptes de report au plus tard à une date déterminée en 2006 :

L'annexe de la présente décision fournit des estimations préliminaires des soldes des comptes de report à la fin de la quatrième année de l'actuelle période de plafonnement des prix, en 2006. Le Conseil fait remarquer que les soldes sont censés être très élevés pour certaines ESLT. Il souligne également la crainte que des pratiques non efficientes et des incertitudes ne soient créées s'il permet aux ESLT de continuer à cumuler des fonds dans ces comptes.

. . .

Le Conseil estime donc qu'il est non seulement indiqué qu'il formule des directives quant à l'utilisation de tous les fonds cumulés dans les comptes de report des ESLT d'ici la fin de la quatrième année de la période de plafonnement des prix, soit en 2006, mais qu'il en fournisse aussi concernant l'utilisation des montants récurrents au-delà de cette période afin d'éviter que d'autres fonds ne s'accumulent dans les comptes de report. Plus loin dans la présente décision, le Conseil énoncera les directives et les lignes directrices concernant l'utilisation de ces montants. [Je souligne; par. 58 et 60.]

[14] The CRTC further decided that the deferral accounts should be disbursed primarily for two purposes. As a priority, at least 5 percent of the accounts was to be used for improving accessibility to telecommunications services for individuals with disabilities. The other 95 percent was to be used for broadband expansion in rural and remote communities. Proposals were invited on how the deferral account funds should be applied. If the

[14] Le CRTC a également décidé que les fonds des comptes de report devaient être utilisés principalement à deux fins. En priorité, au moins 5 pour 100 du solde des comptes devaient servir à faciliter l'accès des personnes handicapées aux services de télécommunication. Les 95 pour 100 restants devaient être utilisés pour étendre le service à large bande aux collectivités rurales et éloignées. Les entreprises ont été invitées à présenter des propositions

[5] Telecom Decision CRTC 2006-9 (online: www.crtc.gc.ca/eng/archive/2006/dt2006-9.htm).

[5] Décision de télécom CRTC 2006-9 (en ligne : www.crtc.gc.ca/fra/archive/2006/dt2006-9.htm).

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proposal as approved was for less than the balance of its deferral account, an affected carrier was to distribute the remaining amount to consumers.

relatives à l'utilisation des fonds des comptes de report pour l'expansion du service à large bande. Si le coût de la proposition approuvée était inférieur au solde de son compte de report, l'entreprise visée devait remettre la somme excédentaire aux consommateurs.

[15] In summary, therefore, the CRTC decided that the affected carriers should focus on broadband expansion and accessibility improvement. It also decided that if these two objectives could be fulfilled for an amount less than the full deferral account balances, credits to subscribers would be ordered out of the remainder. It should be noted that customers were not to be compensated in proportion to what they had paid through these credits because of the potential administrative complexity of identifying these individuals and quantifying their respective shares. Instead, the credits were to be provided to certain current subscribers. Prospective rate reductions could also be used to eliminate recurring amounts in the accounts.

[15] En résumé, le CRTC a donc décidé que les entreprises visées devaient concentrer leurs efforts sur l'extension du service à large bande et l'amélioration de l'accessibilité. Il a en outre décidé que, dans le cas où elles pourraient atteindre ces objectifs sans utiliser la totalité du solde du compte de report, les fonds restants serviraient au versement de crédits aux abonnés. Il convient de souligner que les clients ne devaient pas recevoir un crédit proportionnel à la somme qu'ils avaient payée, étant donné qu'il se serait sans doute avéré trop complexe sur le plan administratif de repérer ces clients et d'établir leurs quotes-parts respectives. Les crédits devaient plutôt être versés à certains abonnés actuels. Des réductions tarifaires futures pouvaient aussi servir à éliminer les montants récurrents dans les comptes.

[16] At the time, the balance in the deferral accounts established under the Price Caps Decision was considerable. Bell Canada's account was estimated to contain approximately $480.5 million, while the TELUS account was estimated at about $170 million.

[16] À l'époque, le solde des comptes de report établis conformément à la Décision sur le plafonnement des prix était considérable. Le compte de Bell Canada s'élevait, selon les estimations, à environ 480,5 millions de dollars, alors que celui de TELUS atteignait environ 170 millions de dollars.

[17] It is helpful to set out how the CRTC explained its decision on the allocation of the deferral account funds. Referencing the importance of telecommunications in connecting Canada's "vast geography and relatively dispersed population", it stressed that Canada had fallen behind in the adoption of broadband services (paras. 73-74). It contrasted the wide availability of broadband service in urban areas with the less developed network in rural and remote communities. Further, it noted that the objectives outlined in the Price Caps Decision and in the *Telecommunications Act* at s. 7(*b*) provided for improving the quality of telecommunications services in those communities, and that their social and economic development would be favoured by an expansion of the national broadband network. In

[17] Il est utile d'indiquer de quelle façon le CRTC a expliqué sa décision sur l'affectation des fonds des comptes de report. Évoquant le caractère essentiel des télécommunications au Canada, pays au « vaste territoire » et à la « population relativement dispersée », le CRTC a insisté sur le retard pris par le Canada dans l'adoption des services à large bande (par. 73-74). Il a souligné le contraste entre la grande disponibilité de ces services dans les zones urbaines et le réseau moins étendu dans les collectivités rurales et éloignées. Il a ajouté que les objectifs énoncés dans la Décision sur le plafonnement des prix et à l'al. 7*b*) de la *Loi sur les télécommunications* comprenaient l'amélioration de la qualité des services de télécommunication dans ces collectivités et que l'expansion du réseau

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its view, this initiative would also provide a helpful complement to the efforts of both levels of government to expand broadband coverage. It therefore concluded that broadband expansion was an appropriate use of a part of the deferral account funds (paras. 73-80).

national à large bande favoriserait leur développement social et économique. À son avis, cette initiative apporterait en outre un complément utile aux efforts déployés par les deux paliers de gouvernement en vue d'étendre la couverture des services à large bande. Il a par conséquent conclu que l'expansion de ces services constituait une utilisation appropriée d'une partie des fonds des comptes de report (par. 73-80).

[18] The CRTC also explained that while customer credits would be consistent with the objectives set out in s. 7 of the *Telecommunications Act* and with the Price Caps Decision, these disbursements should not be given priority because broadband expansion and accessibility services provided greater long-term benefits. Nevertheless, credits effectively balanced the interests of the "three main stakeholders in the telecommunications markets" (para. 115), namely customers, competitors and carriers. It concluded that credits did not contradict the purpose of the deferral accounts, and contrasted one-time credits with a reduction of rates. In its view, credits, unlike rate reductions, did not have a sustained negative impact on competition in these markets, which was the concern the deferral accounts were set up to address (paras. 112-16).

[18] Le CRTC a aussi expliqué que, si l'attribution de crédits aux clients était compatible avec les objectifs énoncés à l'art. 7 de la *Loi sur les télécommunications* et avec la Décision sur le plafonnement des prix, il ne fallait pas pour autant donner la priorité à ces déboursements, étant donné que l'expansion des services à large bande et les services favorisant l'accessibilité seraient plus profitables à long terme. Néanmoins, les crédits permettaient effectivement de concilier les intérêts des « trois principaux intervenants dans les marchés des télécommunications » (par. 115), à savoir les clients, les concurrents et les entreprises titulaires. Le CRTC a conclu que les crédits n'allaient pas à l'encontre de l'objectif des comptes de report et il a souligné la différence entre les crédits uniques et les réductions tarifaires. À son avis, les crédits, contrairement aux réductions tarifaires, n'avaient pas d'incidence négative continue sur la concurrence au sein de ces marchés, crainte à l'origine de la création des comptes de report (par. 112-116).

[19] A dissenting Commissioner expressed concerns over the disposition of the deferral account funds. In her view, the CRTC had no mandate to direct the expansion of broadband networks across the country. The CRTC's policy had generally been to ensure the provision of a basic level of service, not services like broadband, and she therefore considered the CRTC's reliance on the objectives of the *Telecommunications Act* to be inappropriate.

[19] Une conseillère dissidente a exprimé son désaccord au sujet de l'utilisation des fonds du compte de report. À son avis, le CRTC n'avait pas le mandat d'ordonner l'expansion des réseaux à large bande dans l'ensemble du pays. D'une manière générale, le CRTC avait eu pour politique de garantir la prestation d'un service de base, et non celle de services comme les services à large bande. La conseillère estimait par conséquent inapproprié pour le CRTC de se fonder sur les objectifs de la *Loi sur les télécommunications*.

[20] On January 17, 2008, the CRTC issued another decision dealing with the carriers' proposals to use their deferral account balances for the purposes set

[20] Le 17 janvier 2008, le CRTC a rendu une autre décision portant sur les propositions des entreprises titulaires quant à l'utilisation du solde de leur

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out in the Deferral Accounts Decision.[6] Some carriers' plans were approved in part, with the result that only a portion of their deferral account balances was allocated to those projects. Consequently, the CRTC required them to submit, by March 25, 2008, a plan for crediting the balance in their deferral accounts to residential subscribers in non-HCSAs.

compte de report pour les fins mentionnées dans la Décision sur les comptes de report[6]. Certains plans ont été approuvés en partie seulement, si bien que seule une partie du solde du compte de report des entreprises en cause se trouvait affectée à ces projets. Le CRTC a donc ordonné à ces entreprises de lui présenter, au plus tard le 25 mars 2008, un plan de distribution du solde sous forme de crédits aux abonnés résidentiels des zones autres que les ZDCE.

[21] Bell Canada, as well as the Consumers' Association of Canada and the National Anti-Poverty Organization, appealed the CRTC's Deferral Accounts Decision to the Federal Court of Appeal. The Deferral Accounts Decision was stayed by Richard C.J. in the Federal Court of Appeal on January 25, 2008. The decision requiring further submissions on plans to distribute the deferral account balances was also stayed by Sharlow J.A. pending the filing of an application for leave to appeal to this Court on April 23, 2008. Both stay orders were extended by this Court on September 25, 2008. The stay orders do not apply to the funds allocated for the improvement of accessibility for individuals with disabilities.

[21] Bell Canada, de même que l'Association des consommateurs du Canada et l'Organisation nationale anti-pauvreté, ont interjeté appel devant la Cour d'appel fédérale de la Décision sur les comptes de report rendue par le CRTC. Le 25 janvier 2008, le juge en chef Richard de la Cour d'appel fédérale a sursis à l'exécution de cette décision. Un sursis d'exécution a également été ordonné par la juge Sharlow de cette même cour, le 23 avril 2008, à l'égard de la décision exigeant la présentation d'observations complémentaires sur les plans de distribution du solde du compte de report, jusqu'au dépôt d'une demande d'autorisation d'appel devant notre Cour. Le 25 septembre 2008, la Cour a prorogé ces deux ordonnances de sursis, qui ne visent pas les fonds affectés à l'amélioration de l'accès des personnes handicapées aux services de télécommunication.

[22] In a careful judgment by Sharlow J.A., the court unanimously dismissed the appeals (2008 FCA 91, 80 Admin. L.R. (4th) 159), concluding that the Price Caps Decision regime always contemplated the future disposition of the deferral account funds as the CRTC would direct, and that the CRTC acted within its broad mandate to pursue its regulatory objectives. For the reasons that follow, I agree with the conclusions reached by Sharlow J.A.

[22] Dans un jugement soigné rédigé par la juge Sharlow, la Cour d'appel fédérale a unanimement rejeté les appels : 2008 CAF 91, 80 Admin. L.R. (4th) 159 (p. 179). Elle a conclu que le régime institué par la Décision sur le plafonnement des prix a toujours envisagé l'utilisation future des fonds accumulés dans les comptes de report de la manière que prescrirait le CRTC, et que ce dernier a agi dans le cadre du mandat étendu dont il dispose pour la poursuite de ses objectifs de réglementation. Pour les motifs qui suivent, je suis d'accord avec les conclusions de la juge Sharlow.

Analysis

[23] The parties have staked out diametrically opposite positions on how the balance of the deferral account funds should be allocated.

Analyse

[23] Les parties ont exposé des points de vue diamétralement opposés sur l'affectation du solde des comptes de report.

[6] Telecom Decision CRTC 2008-1 (online: www.crtc.gc.ca/eng/archive/2008/dt2008-1.htm).

[6] Décision de télécom CRTC 2008-1 (en ligne : www.crtc.gc.ca/fra/archive/2008/dt2008-1.htm).

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[24] Bell Canada argued that the CRTC had no statutory authority to order what it claimed amounted to retrospective "rebates" to consumers. In its view, the distributions ordered by the CRTC were in substance a variation of rates that had been declared final. TELUS joined Bell Canada in this Court, and argued that the CRTC's order for "rebates" constituted an unjust confiscation of property.

[24] Pour Bell Canada, le CRTC n'était pas habilité par la loi à ordonner ce qui constituait selon elle des « rabais » rétroactifs aux consommateurs. À son avis, la distribution de fonds ordonnée par le CRTC était essentiellement une modification de tarifs qui avaient été déclarés définitifs. Devant notre Cour, TELUS a plaidé, à l'instar de Bell Canada, que l'ordonnance de « rabais » du CRTC constituait une confiscation injustifiée de biens.

[25] In response, the CRTC contended that its broad mandate to set rates under the *Telecommunications Act* includes establishing and ordering the disposal of funds from deferral accounts. Because the deferral account funds had always been subject to the possibility of disbursement to customers, there was therefore no variation of a final rate or any impermissible confiscation.

[25] En réponse, le CRTC a fait valoir que le vaste mandat dont il dispose pour la fixation des tarifs en vertu de la *Loi sur les télécommunications* lui permet d'établir et d'ordonner de quelle façon seront utilisés les fonds des comptes de report. Comme les fonds de ces comptes ont toujours été susceptibles d'être remis aux clients, il n'y avait donc aucune modification d'un tarif définitif ni aucune confiscation illégitime.

[26] The Consumers' Association of Canada was the only party to oppose the allocation of 5 percent of the deferral account balances to improving accessibility, but abandoned this argument during the hearing before the Federal Court of Appeal. Together with the National Anti-Poverty Organization, it argued before this Court that the rest of the deferral account balances should be distributed to customers in full, and that the CRTC had no authority to allow the use of the funds for broadband expansion.

[26] L'Association des consommateurs du Canada était la seule partie à contester l'affectation de 5 pour 100 du solde des comptes de report à l'amélioration de l'accessibilité, mais elle a abandonné cet argument pendant l'audience devant la Cour d'appel fédérale. Avec l'Organisation nationale anti-pauvreté, elle a soutenu devant notre Cour que le reste du solde des comptes devait être entièrement distribué aux clients et que le CRTC n'avait pas le pouvoir d'autoriser l'utilisation des fonds pour l'expansion du service à large bande.

[27] These arguments bring us directly to the statutory scheme at issue.

[27] Ces arguments nous amènent directement au régime législatif en cause.

[28] The *Telecommunications Act* lays out the basic legislative framework of the Canadian telecommunications industry. In addition to setting out numerous specific powers, the statute's guiding objectives are set out in s. 7. Pursuant to s. 47(*a*), the CRTC must consider these objectives in the exercise of *all* of its powers. These provisions state:

[28] La *Loi sur les télécommunications* pose le cadre législatif de base de l'industrie des télécommunications au Canada. En plus d'établir plusieurs pouvoirs spécifiques, la loi énonce à l'art. 7 quels sont les grands objectifs visés. Suivant l'al. 47*a*), le CRTC doit tenir compte de ces objectifs dans l'exercice de *tous* ses pouvoirs. Ces dispositions sont ainsi libellées :

7. It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives

7. La présente loi affirme le caractère essentiel des télécommunications pour l'identité et la souveraineté canadiennes; la politique canadienne de télécommunication vise à :

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(*a*) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;

(*b*) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;

(*c*) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

(*d*) to promote the ownership and control of Canadian carriers by Canadians;

(*e*) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;

(*f*) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;

(*g*) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;

(*h*) to respond to the economic and social requirements of users of telecommunications services; and

(*i*) to contribute to the protection of the privacy of persons.

. . .

47. The Commission shall exercise its powers and perform its duties under this Act and any special Act

(*a*) with a view to implementing the Canadian telecommunications policy objectives and ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with section 27;

The CRTC relied on these two provisions in arguing that it was required to take into account a broad spectrum of considerations in the exercise of its rate-setting powers, and that the Deferral Accounts Decision was simply an extension of this approach.

a) favoriser le développement ordonné des télécommunications partout au Canada en un système qui contribue à sauvegarder, enrichir et renforcer la structure sociale et économique du Canada et de ses régions;

b) permettre l'accès aux Canadiens dans toutes les régions — rurales ou urbaines — du Canada à des services de télécommunication sûrs, abordables et de qualité;

c) accroître l'efficacité et la compétitivité, sur les plans national et international, des télécommunications canadiennes;

d) promouvoir l'accession à la propriété des entreprises canadiennes, et à leur contrôle, par des Canadiens;

e) promouvoir l'utilisation d'installations de transmission canadiennes pour les télécommunications à l'intérieur du Canada et à destination ou en provenance de l'étranger;

f) favoriser le libre jeu du marché en ce qui concerne la fourniture de services de télécommunication et assurer l'efficacité de la réglementation, dans le cas où celle-ci est nécessaire;

g) stimuler la recherche et le développement au Canada dans le domaine des télécommunications ainsi que l'innovation en ce qui touche la fourniture de services dans ce domaine;

h) satisfaire les exigences économiques et sociales des usagers des services de télécommunication;

i) contribuer à la protection de la vie privée des personnes.

. . .

47. Le Conseil doit [. . .] exercer les pouvoirs et fonctions que lui confèrent la présente loi et toute loi spéciale de manière à réaliser les objectifs de la politique canadienne de télécommunication et à assurer la conformité des services et tarifs des entreprises canadiennes avec les dispositions de l'article 27.

Le CRTC s'est fondé sur ces deux dispositions pour faire valoir qu'il devait tenir compte de toute une gamme de considérations dans l'exercice de ses pouvoirs de tarification et que la Décision sur les comptes de report n'était qu'un prolongement de cette approche.

[29] The *Telecommunications Act* grants the CRTC the general power to set and regulate rates for telecommunications services in Canada. All tariffs imposed by carriers, including rates for services, must be submitted to it for approval, and it may decide any matter with respect to rates in the telecommunications services industry, as the following provisions show:

24. The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.

25. (1) No Canadian carrier shall provide a telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.

. . .

32. The Commission may, for the purposes of this Part,

. . .

(*g*) in the absence of any applicable provision in this Part, determine any matter and make any order relating to the rates, tariffs or telecommunications services of Canadian carriers.

[30] The guiding rule of rate-setting under the *Telecommunications Act* is that the rates be "just and reasonable", a longstanding regulatory principle. To determine whether rates meet this standard, the CRTC has a wide discretion which is protected by a privative clause:

27. (1) Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.

. . .

(3) The Commission may determine in any case, as a question of fact, whether a Canadian carrier has

[29] La *Loi sur les télécommunications* confère au CRTC le pouvoir de fixer et de réglementer, d'une manière générale, les tarifs des services de télécommunication au Canada. Tous les tarifs imposés par les entreprises, y compris les tarifs des services, doivent être soumis pour approbation au CRTC, qui peut statuer sur toute question concernant les tarifs dans l'industrie des services de télécommunication, comme le montrent les dispositions suivantes :

24. L'offre et la fourniture des services de télécommunication par l'entreprise canadienne sont assujetties aux conditions fixées par le Conseil ou contenues dans une tarification approuvée par celui-ci.

25. (1) L'entreprise canadienne doit fournir les services de télécommunication en conformité avec la tarification déposée auprès du Conseil et approuvée par celui-ci fixant — notamment sous forme de maximum, de minimum ou des deux — les tarifs à imposer ou à percevoir.

. . .

32. Le Conseil peut, pour l'application de la présente partie :

. . .

g) en l'absence de disposition applicable dans la présente partie, trancher toute question touchant les tarifs et tarifications des entreprises canadiennes ou les services de télécommunication qu'elles fournissent.

[30] Le principe directeur aux fins d'établissement des tarifs en vertu de la *Loi sur les télécommunications* est que ceux-ci doivent être « justes et raisonnables ». Il s'agit d'un principe établi depuis longtemps en matière de réglementation. Pour déterminer si les tarifs satisfont à cette norme, le CRTC jouit d'un large pouvoir discrétionnaire, protégé par une clause privative :

27. (1) Tous les tarifs doivent être justes et raisonnables.

. . .

(3) Le Conseil peut déterminer, comme question de fait, si l'entreprise canadienne s'est ou non conformée

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complied with section 25, this section or section 29, or with any decision made under section 24, 25, 29, 34 or 40.

. . .

(5) In determining whether a rate is just and reasonable, the Commission may adopt any method or technique that it considers appropriate, whether based on a carrier's return on its rate base or otherwise.

. . .

52. (1) The Commission may, in exercising its powers and performing its duties under this Act or any special Act, determine any question of law or of fact, and its determination on a question of fact is binding and conclusive.

[31] In addition to the power under s. 27(5) to adopt "any method or technique that it considers appropriate" for determining whether a rate is just and reasonable, the CRTC also has the authority under s. 37(1) to order a carrier to adopt "any accounting method or system of accounts" in view of the proper administration of the *Telecommunications Act*. Section 37(1) states:

37. (1) The Commission may require a Canadian carrier

(*a*) to adopt any method of identifying the costs of providing telecommunications services and to adopt any accounting method or system of accounts for the purposes of the administration of this Act;

[32] The CRTC has other broad powers which, while not at issue in this case, nevertheless further demonstrate the comprehensive regulatory powers Parliament intended to grant. These include the ability to order a Canadian carrier to provide any service in certain circumstances (s. 35(1)); to require communications facilities to be provided or constructed (s. 42(1)); and to establish any sort of fund for the purpose of supporting access to basic telecommunications services (s. 46.5(1)).

[33] This statutory overview assists in dealing with the preliminary issue of the applicable standard of review. Although the Federal Court of Appeal

aux dispositions du présent article ou des articles 25 ou 29 ou à toute décision prise au titre des articles 24, 25, 29, 34 ou 40.

. . .

(5) Pour déterminer si les tarifs de l'entreprise canadienne sont justes et raisonnables, le Conseil peut utiliser la méthode ou la technique qu'il estime appropriée, qu'elle soit ou non fondée sur le taux de rendement par rapport à la base tarifaire de l'entreprise.

. . .

52. (1) Le Conseil connaît, dans l'exercice des pouvoirs et fonctions qui lui sont conférés au titre de la présente loi ou d'une loi spéciale, aussi bien des questions de droit que des questions de fait; ses décisions sur ces dernières sont obligatoires et définitives.

[31] Outre le pouvoir qui lui est conféré par le par. 27(5) d'utiliser « la méthode ou la technique qu'il estime appropriée » pour déterminer si un tarif est juste et raisonnable, le CRTC peut, en vertu du par. 37(1), imposer à une entreprise l'adoption de « méthodes ou systèmes comptables » en vue de la bonne application de la *Loi sur les télécommunications*. Cette disposition dit ce qui suit :

37. (1) Le Conseil peut [. . .] imposer à l'entreprise canadienne l'adoption d'un mode de calcul des coûts liés à ses services de télécommunication et de méthodes ou systèmes comptables relativement à l'application de la présente loi . . .

[32] Le CRTC possède d'autres pouvoirs étendus qui, s'ils ne sont pas en cause en l'espèce, confirment néanmoins l'ampleur des pouvoirs réglementaires que le législateur a voulu lui conférer. Il peut ainsi ordonner à une entreprise canadienne de fournir des services dans certaines circonstances (par. 35(1)); ordonner la fourniture ou la construction d'installations de télécommunication (par. 42(1)); établir un fonds pour soutenir l'accès à des services de télécommunication de base (par. 46.5(1)).

[33] Ce survol de la loi nous aide à trancher la question préliminaire de la norme de contrôle applicable. Bien que la Cour d'appel fédérale ait accepté

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accepted the parties' position that the applicable standard of review was correctness, Sharlow J.A. acknowledged that the standard of review could be more deferential in light of this Court's decision in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at paras. 98-100. This was an invitation, it seems to me, to clarify what the appropriate standard is.

la position des parties selon laquelle la norme de contrôle applicable était celle de la décision correcte, la juge Sharlow a reconnu que la norme de contrôle pourrait faire davantage appel à la déférence à la lumière de la décision rendue par notre Cour dans *Conseil des Canadiens avec déficiences c. VIA Rail Canada Inc.*, 2007 CSC 15, [2007] 1 R.C.S. 650, par. 98-100. Il s'agissait, me semble-t-il, d'une invitation à clarifier la question de la norme applicable.

[34] Bell Canada and TELUS concede that the CRTC had the authority to approve disbursements from the deferral accounts for initiatives to improve broadband expansion and accessibility to telecommunications services for persons with disabilities, and that they actually sought such approval. In their view, however, this authority did not extend to what they characterized as retrospective "rebates". Similarly, in the Consumers' appeal the crux of the complaint is with whether the CRTC could direct that the funds be disbursed in certain ways, not with whether it had the authority to direct how the funds ought to be spent generally.

[34] Bell Canada et TELUS admettent que le CRTC avait le pouvoir d'approuver l'utilisation des fonds des comptes de report pour des initiatives visant l'expansion du service à large bande et l'amélioration de l'accès des personnes handicapées aux services de télécommunication, et qu'elles ont effectivement demandé une telle approbation. Mais selon elles, ce pouvoir ne s'étendait pas à la mesure qu'elles ont qualifiée de « rabais » rétroactifs. De même, dans le pourvoi formé par l'Association des consommateurs du Canada, le cœur de la plainte concerne la question de savoir si le CRTC pouvait ordonner que les fonds soient utilisés de certaines façons, et non sur celle de savoir s'il avait le pouvoir d'ordonner de quelle manière générale les fonds devaient être employés.

[35] This means that for the Bell Canada and TELUS appeal, the dispute is over the CRTC's authority and discretion under the *Telecommunications Act* in connection with ordering credits to customers from the deferral accounts. In the Consumers' appeal, it is over its authority and discretion in ordering that funds from the deferral accounts be used for the expansion of broadband services.

[35] Cela signifie que, dans le pourvoi de Bell Canada et de TELUS, le litige porte sur la question de savoir si les pouvoirs discrétionnaires conférés au CRTC par la *Loi sur les télécommunications* lui permettaient d'ordonner l'attribution de crédits aux consommateurs au moyen des comptes de report. Dans le pourvoi formé par l'Association des consommateurs du Canada, il porte sur son pouvoir discrétionnaire d'ordonner que les fonds des comptes de report soient utilisés pour l'expansion des services à large bande.

[36] A central responsibility of the CRTC is to determine and approve just and reasonable rates to be charged for telecommunications services. Together with its rate-setting power, the CRTC has the ability to impose *any* condition on the provision of a service, adopt *any* method to determine whether a rate is just and reasonable and require a carrier to adopt *any* accounting method. It is

[36] Une responsabilité centrale du CRTC consiste à déterminer et à approuver les tarifs justes et raisonnables des services de télécommunication. En plus de son pouvoir de tarification, le CRTC peut assujettir la fourniture d'un service à *toutes* conditions, adopter *toute* méthode qu'il estime appropriée pour déterminer si un tarif est juste et raisonnable et imposer *toute* méthode comptable de son choix à

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obliged to exercise all of its powers and duties with a view to implementing the Canadian telecommunications policy objectives set out in s. 7.

une entreprise. Il doit exercer tous ses pouvoirs et fonctions de manière à réaliser les objectifs de la politique canadienne de télécommunication énoncés à l'art. 7.

[37] The CRTC's authority to establish the deferral accounts is found through a combined reading of ss. 27 and 37(1). The authority to establish these accounts necessarily includes the disposition of the funds they contain, a disposition which represents the final step in a process set in motion by the Price Caps Decision. It is self-evident that the CRTC has considerable expertise with respect to this type of question. This observation is reflected in its extensive statutory powers in this regard and in the strong privative clause in s. 52(1) protecting its determinations on questions of fact from appeal, including whether a carrier has adopted a just and reasonable rate.

[37] La lecture conjuguée de l'art. 27 et du par. 37(1) permet de conclure à l'existence du pouvoir du CRTC d'établir les comptes de report. Ce pouvoir s'étend nécessairement à l'utilisation des fonds de ces comptes, utilisation qui constitue la dernière étape du processus mis en branle par la Décision sur le plafonnement des prix. Le CRTC possède de toute évidence une expertise considérable sur ce type de question. En témoignent les pouvoirs étendus qui lui sont conférés à cet égard par le législateur ainsi que la solide clause privative du par. 52(1), selon laquelle ses décisions sur des questions de fait — dont celle de savoir si une entreprise a adopté un tarif juste et raisonnable — ne peuvent faire l'objet d'un appel.

[38] In my view, therefore, the issues raised in these appeals go to the very heart of the CRTC's specialized expertise. In the appeals before us, the core of the quarrel in effect is with the methodology for setting rates and the allocation of certain proceeds derived from those rates, a polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake. This argues for a more deferential standard of review, which leads us to consider whether the CRTC was reasonable in directing how the funds from the deferral accounts were to be used. (See *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 25; and *VIA Rail Canada*, at paras. 88-100.)

[38] À mon avis, les questions soulevées dans les présents pourvois ressortissent donc à l'essence même de l'expertise spécialisée du CRTC. Le fond du différend concerne en fait la méthode d'établissement des tarifs et l'affectation de certains fonds provenant de ces tarifs, un exercice polycentrique que le législateur a confié au CRTC et pour lequel ce dernier possède une compétence particulière. Ces constatations militent en faveur de l'application d'une norme de contrôle faisant davantage appel à la déférence. La question à laquelle il nous faut répondre est alors celle de savoir si le CRTC a agi raisonnablement lorsqu'il a indiqué de quelle façon devaient être utilisés les fonds des comptes de report. (Voir *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 54; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, par. 25; et *VIA Rail Canada*, par. 88-100.)

[39] This brings us to the nature of the CRTC's rate-setting power in the context of this case. The predecessor statute for telecommunications rate-setting, the *Railway Act*, R.S.C. 1985, c. R-3, also stipulated that rates be "just and reasonable" (s. 340(1)). Traditionally, those rates were based on a balancing between a fair rate for the consumer and

[39] Cela nous amène à la nature du pouvoir de tarification du CRTC dans le contexte de la présente affaire. Le texte qui régissait auparavant la tarification des télécommunications, soit la *Loi sur les chemins de fer*, L.R.C. 1985, ch. R-3, précisait lui aussi que les tarifs devaient être « justes et raisonnables » (par. 340(1)). Auparavant, ces tarifs étaient

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a fair return on the carrier's investment. (See, e.g., *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186, at pp. 192-93, and *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 65.)

établis de façon à assurer un tarif équitable pour le consommateur et un rendement équitable sur l'investissement de l'entreprise. (Voir, par exemple, *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186, p. 192-193, et *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 65.)

[40] Even before the expansive language now found in the *Telecommunications Act*, regulatory agencies had enjoyed considerable discretion in determining the factors to be considered and the methodology that could be adopted for assessing whether rates were just and reasonable. For instance, in dismissing a leave application in *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12 (S.C.C.), Taschereau J. wrote:

> [I]f the Board is bound to grant a relief which is just to the public and secures to the railways a fair return, it is not bound to accept for the determination of the rates to be charged, the sole method proposed by the applicant. The obligation to act is a question of law, but the choice of the method to be adopted is a question of discretion with which, under the statute, no Court of law may interfere. [Emphasis added; p. 13.]

In making this determination, he relied on Duff C.J.'s judgment in *Canadian National Railways Co. v. Bell Telephone Co. of Canada*, [1939] S.C.R. 308, for the following proposition in the particular statutory context of that case:

> The law dictates neither the order to be made in a given case nor the considerations by which the Board is to be guided in arriving at the conclusion that an order, or what order, is necessary or proper in a given case. True, it is the duty of all public bodies and others invested with statutory powers to act reasonably in the execution of them, but the policy of the statue [*sic*] is that, subject to the appeal to the Governor in Council under section 52, in exercising an administrative discretion entrusted to it, the Board itself is to be the final arbiter as to the order to be made. [p. 315]

[40] Même avant les formulations larges figurant maintenant dans la *Loi sur les télécommunications*, les organismes de réglementation disposaient d'un vaste pouvoir discrétionnaire pour déterminer les facteurs à prendre en compte et la méthode qu'ils pouvaient adopter pour décider si les tarifs étaient justes et raisonnables. Par exemple, en rejetant une demande d'autorisation dans *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12 (C.S.C.), le juge Taschereau a écrit ce qui suit :

> [TRADUCTION] [S]i la Commission est tenue d'accorder une demande qui est juste pour le public et qui assure aux chemins de fer un rendement équitable, elle n'est pas tenue d'accepter, pour la détermination des tarifs qui seront exigés, la seule méthode proposée par la demanderesse. L'obligation d'agir est une question de droit, mais le choix de la méthode est une question relevant de l'exercice du pouvoir discrétionnaire et à l'égard de laquelle, selon le texte de loi, aucun tribunal judiciaire ne peut intervenir. [Je souligne; p. 13.]

Pour arriver à cette conclusion, il s'est appuyé sur le jugement rendu par le juge en chef Duff dans *Canadian National Railways Co. c. Bell Telephone Co. of Canada*, [1939] R.C.S. 308, et sur la proposition suivante faite dans le contexte législatif particulier de cette affaire :

> [TRADUCTION] La loi ne prescrit ni l'ordonnance qui doit être rendue dans une affaire donnée ni les considérations sur lesquelles doit se guider la Commission pour arriver à la conclusion qu'une ordonnance, ou que telle ordonnance particulière, est nécessairement indiquée dans une affaire donnée. Certes, il incombe à tous les organismes publics et autres organismes investis de pouvoirs conférés par la loi d'agir raisonnablement dans l'exercice de ces pouvoirs; mais selon le texte législatif, la Commission est, dans l'exercice d'un pouvoir discrétionnaire administratif qui lui est conféré, l'arbitre ultime quant à l'ordonnance qui doit être rendue, sous réserve de l'appel devant le gouverneur en conseil prévu par l'art. 52. [p. 315]

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(See also Michael H. Ryan, *Canadian Telecommunications Law and Regulation* (loose-leaf), at §612.)

[41] The CRTC's already broad discretion in determining whether rates are just and reasonable has been further enhanced by the inclusion of s. 27(5) in the *Telecommunications Act* permitting the CRTC to adopt "any method", language which was absent from the *Railway Act*.

[42] Even more significantly, the *Railway Act* contained nothing analogous to the statutory direction under s. 47 that the CRTC must exercise its rate-setting powers with a view to implementing the Canadian telecommunications objectives set out in s. 7. These statutory additions are significant. Coupled with its rate-setting power, and its ability to use any method for arriving at a just and reasonable rate, these provisions contradict the restrictive interpretation of the CRTC's authority proposed by various parties in these appeals.

[43] This was highlighted by Sharlow J.A. when she stated:

Because of the combined operation of section 47 and section 7 of the *Telecommunications Act* . . ., the CRTC's rating jurisdiction is not limited to considerations that have traditionally been considered relevant to ensuring a fair price for consumers and a fair rate of return to the provider of telecommunication services. Section 47 of the *Telecommunications Act* expressly requires the CRTC to consider, as well, the policy objectives listed in section 7 of the *Telecommunications Act*. What that means, in my view, is that in rating decisions under the *Telecommunications Act*, the CRTC is entitled to consider any or all of the policy objectives listed in section 7. [para. 35]

[44] It is true that the CRTC had previously used a "rate base rate of return" method, based on a combination of a rate of return for investors in telecommunications carriers and a rate base calculated using the carriers' assets. This resulted in

(Voir aussi Michael H. Ryan, *Canadian Telecommunications Law and Regulation* (feuilles mobiles), §612.)

[41] Le large pouvoir discrétionnaire dont le CRTC disposait déjà pour déterminer si les tarifs sont justes et raisonnables a été encore élargi par l'insertion du par. 27(5) dans la *Loi sur les télécommunications*, lequel lui permet d'utiliser « la méthode ou la technique qu'il estime appropriée », une formulation absente de la *Loi sur les chemins de fer*.

[42] Plus significatif encore, la *Loi sur les chemins de fer* ne contenait aucune disposition analogue à celle de l'art. 47, qui enjoint au CRTC d'exercer son pouvoir de tarification de manière à réaliser les objectifs de la politique canadienne de télécommunication énoncés à l'art. 7. Ces ajouts législatifs sont importants. Conjuguées au pouvoir de tarification du CRTC et à sa faculté d'utiliser la méthode de son choix pour arriver à un tarif juste et raisonnable, les dispositions en question contredisent l'interprétation restrictive des pouvoirs de l'organisme proposée par diverses parties dans les présents pourvois.

[43] La juge d'appel Sharlow a mis en relief cet argument dans le passage suivant de ses motifs :

Étant donné l'application conjointe des articles 47 et 7 de la *Loi sur les télécommunications* [. . .], la compétence de tarification du CRTC ne se limite pas à la prise en compte des facteurs traditionnellement considérés comme pertinents pour assurer un prix équitable aux consommateurs et un rendement équitable aux fournisseurs de services de télécommunication. L'article 47 de la *Loi sur les télécommunications* prescrit expressément au CRTC de prendre en considération, entre autres, les objectifs de la politique canadienne de télécommunication énumérés à l'article 7 de la même loi. Il s'ensuit à mon avis que le CRTC a le droit, aux fins des décisions de tarification qu'il rend sous le régime de la *Loi sur les télécommunications*, de prendre en considération tous les objectifs de ladite politique énoncés à l'article 7. [par. 35]

[44] Il est vrai que le CRTC avait précédemment utilisé une méthode « base tarifaire/taux de rendement », fondée à la fois sur un taux de rendement pour les investisseurs dans les entreprises de télécommunication et une base tarifaire calculée en

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rates charged for the carrier's services that would, on the one hand, provide a fair return for the capital invested in the carrier, and, on the other, be fair to the customers of the carrier.

[45] However, these expansive provisions mean that the rate base rate of return approach is not necessarily the only basis for setting a just and reasonable rate. Furthermore, based on ss. 7, 27(5) and 47, the CRTC is not required to confine itself to balancing only the interests of subscribers and carriers with respect to a particular service. In the Price Caps Decision, for example, the CRTC chose to focus on maximum prices for services, rather than on the rate base rate of return approach. It did so, in part, to foster competition in certain markets, a goal untethered to the direct relationship between the carrier and subscriber in the traditional rate base rate of return approach. A similar pricing approach was adopted by the CRTC in a decision preceding the Price Caps Decision.[7]

[46] The CRTC has interpreted these provisions broadly and identified them as responsive to the evolved industry context in which it operates. In its "Review of Regulatory Framework" decision,[8] it wrote:

> The Act . . . provides the tools necessary to allow the Commission to alter the traditional manner in which it regulates (i.e., to depart from rate base rate of return regulation).
>
> . . .
>
> In brief, telecommunications today transcends traditional boundaries and simple definition. It is an industry, a market and a means of doing business that

[7] Telecom Decision CRTC 97-9, May 1, 1997 (online: www.crtc.gc.ca/eng/archive/1997/DT97-9.htm).

[8] Telecom Decision CRTC 94-19, September 16, 1994 (online: www.crtc.gc.ca/eng/archive/1994/DT94-19.htm).

fonction des actifs des entreprises. Par conséquent, les tarifs exigés pour les services des entreprises, procuraient un rendement équitable sur le capital investi d'une part, et ils étaient justes pour les consommateurs d'autre part.

[45] Toutefois, ces dispositions de portée plus large signifient que l'approche base tarifaire/taux de rendement n'est pas nécessairement la seule façon de fixer un tarif juste et raisonnable. De plus, il ressort des art. 7 et 47 et du par. 27(5) que le CRTC n'est pas tenu de se limiter à la conciliation des intérêts des abonnés et des entreprises à l'égard d'un service donné. Dans la Décision sur le plafonnement des prix, par exemple, le CRTC a choisi de mettre l'accent sur le prix maximum des services plutôt que sur l'approche base tarifaire/taux de rendement. Il l'a fait, en partie, pour favoriser la concurrence au sein de certains marchés, un objectif sans aucun rapport avec la relation entre l'entreprise et l'abonné dans l'approche traditionnelle base tarifaire/taux de rendement. Le CRTC a emprunté une approche similaire fondée sur l'établissement de prix plafonds dans une décision antérieure à la Décision sur le plafonnement des prix[7].

[46] Le CRTC a interprété ces dispositions de manière libérale, considérant qu'elles répondaient au contexte d'une industrie évoluée, dans lequel il s'acquitte de sa mission. Dans sa décision intitulée « Examen du cadre de réglementation »[8], il a écrit ce qui suit :

> La Loi prévoit . . . les moyens par lesquels le Conseil peut modifier la méthode de réglementation traditionnelle (c.-à-d. mettre fin à la réglementation base tarifaire/taux de rendement).
>
> . . .
>
> Bref, les télécommunications d'aujourd'hui transcendent les frontières traditionnelles et les définitions simples. Elles forment une industrie, un marché et un moyen

[7] Décision de télécom CRTC 97-9, 1er mai 1997 (en ligne : www.crtc.gc.ca/fra/archive/1997/dt97-9.htm).

[8] Décision de télécom CRTC 94-19, 16 septembre 1994 (en ligne : www.crtc.gc.ca/fra/archive/1994/DT94-19.htm).

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encompasses a constantly evolving range of voice, data and video products and services. . . .

In this context, the Commission notes that the Act contemplates the evolution of basic service by setting out as an objective the provision of reliable and affordable telecommunications, rather than merely affordable telephone service. [Emphasis added; pp. 6 and 10.]

[47] In *Edmonton (City) v. 360Networks Canada Ltd.*, 2007 FCA 106, [2007] 4 F.C.R. 747, leave to appeal refused, [2007] 3 S.C.R. vii, the Federal Court of Appeal drew similar conclusions, observing that the *Telecommunications Act* should be interpreted by reference to the policy objectives, and that s. 7 justified in part the view that the "Act should be interpreted as creating a comprehensive regulatory scheme" (para. 46). A duty to take a more comprehensive approach was also noted by Ryan, who observed:

> Because of the importance of the telecommunications industry to the country as a whole, rate-making issues may sometimes assume a dimension that gives them a significance that extends beyond the immediate interests of the carrier, its shareholders and its customers, and engages the interests of the public at large. It is also part of the duty of the regulator to take these more far-reaching interests into account. [§604]

[48] This leads inevitably, it seems to me, to the conclusion that the CRTC may set rates that are just and reasonable for the purposes of the *Telecommunications Act* through a diverse range of methods, taking into account a variety of different constituencies and interests referred to in s. 7, not simply those it had previously considered when it was operating under the more restrictive provisions of the *Railway Act*. This observation will also be apposite later in these reasons when the question of "final rates" is discussed in connection with the Bell Canada appeal.

[49] I see nothing in this conclusion which contradicts the ratio in *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476. In that case, the issue was

de faire des affaires qui englobent une gamme toujours grandissante de services et de produits vocaux, données et vidéo. . .

Dans ce contexte, le Conseil fait observer que la Loi prévoit l'évolution du service de base en établissant, à titre d'objectif, la fourniture de services de télécommunications fiables et abordables, et non pas simplement un service téléphonique abordable. [Je souligne; p. 7 et 11.]

[47] Dans *Edmonton (Ville) c. 360Networks Canada Ltd.*, 2007 CAF 106, [2007] 4 R.C.F. 747, autorisation de pourvoi refusée, [2007] 3 R.C.S. vii, la Cour d'appel fédérale a tiré des conclusions semblables, faisant observer que la *Loi sur les télécommunications* devait être interprétée en fonction des objectifs de la politique et que l'art. 7 justifiait en partie le point de vue selon lequel « il convient d'interpréter la Loi comme établissant un cadre réglementaire complet » (par. 46). L'auteur Michael H. Ryan a lui aussi conclu à l'obligation d'adopter une approche plus globale :

> [TRADUCTION] Vu l'importance de l'industrie des télécommunications pour l'ensemble du pays, les questions de tarification peuvent parfois prendre une dimension qui leur donne une importance débordant les intérêts immédiats de l'entreprise, de ses actionnaires et de ses clients, et où entrent en jeu les intérêts du public en général. L'organisme de réglementation a aussi l'obligation de prendre en considération ces intérêts de caractère plus général. [§604]

[48] Cela conduit inévitablement, me semble-t-il, à la conclusion que le CRTC peut fixer des tarifs justes et raisonnables pour l'application de la *Loi sur les télécommunications* au moyen de toute une gamme de méthodes, en prenant en considération la diversité des parties prenantes et intérêts mentionnés à l'art. 7, et non seulement ceux qu'il prenait en considération quand il s'acquittait de sa mission en vertu des dispositions plus restrictives de la *Loi sur les chemins de fer*. Cette observation sera également pertinente plus loin dans les présents motifs, lorsque la question des « tarifs définitifs » sera examinée dans le cadre du pourvoi de Bell Canada.

[49] Je ne vois rien dans cette conclusion qui contredise le raisonnement sur lequel repose *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, 2003 CSC 28, [2003] 1 R.C.S. 476. Dans

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whether the CRTC could make an order granting cable companies access to certain utilities' power poles. In that decision, the CRTC had relied on the Canadian telecommunications policy objectives to inform its interpretation of the relevant provisions. In deciding that the language of the *Telecommunications Act* did not give the CRTC the power to grant access to the power poles, Gonthier J. for the majority concluded that the CRTC had inappropriately interpreted the Canadian telecommunications policy objectives in s. 7 as power-conferring (para. 42).

cet arrêt, la question était de savoir si le CRTC pouvait rendre une ordonnance pour donner à des câblodistributeurs l'accès aux poteaux électriques de certaines entreprises d'électricité. Dans cette décision, le CRTC s'était fondé sur les objectifs de la politique canadienne de télécommunication pour interpréter les dispositions pertinentes. En décidant que les dispositions de la *Loi sur les télécommunications* ne conféraient pas au CRTC le pouvoir de donner l'accès aux poteaux électriques, le juge Gonthier, qui s'exprimait pour la majorité, a conclu que le CRTC avait mal interprété les objectifs de la politique canadienne de télécommunication énoncés à l'art. 7 en concluant qu'ils conféraient des pouvoirs (par. 42).

[50] The circumstances of *Barrie Public Utilities* are entirely distinct from those at issue before us. Here, we are dealing with the CRTC setting rates that were required to be just and reasonable, an authority fully supported by unambiguous statutory language. In so doing, the CRTC was exercising a broad authority, which, according to s. 47, it was required to do "with a view to implementing the Canadian telecommunications policy objectives". The policy considerations in s. 7 were factors that the CRTC was required to, and did, take into account.

[50] Les circonstances de *Barrie Public Utilities* sont complètement différentes de celles dont nous sommes saisis. Ce qui est en cause, en l'espèce, c'est l'établissement par le CRTC de tarifs qui devaient être justes et raisonnables, dans l'exercice d'un pouvoir qui s'appuie incontestablement sur des dispositions législatives non équivoques. Le CRTC se trouvait ainsi à exercer un large pouvoir, pouvoir qu'il devait exercer, selon l'art. 47, « de manière à réaliser les objectifs de la politique canadienne de télécommunication ». Les considérations de politique générale énoncées à l'art. 7 étaient des facteurs dont le CRTC était obligé de tenir compte — ce qu'il a fait.

[51] Nor does this Court's decision in *ATCO* preclude the pursuit of public interest objectives through rate-setting. In that case, Bastarache J. for the majority, took a strict approach to the Alberta Energy and Utilities Board's powers under the applicable statute. The issue was whether the Board had the authority to order the distribution of proceeds by a regulated company to its subscribers from an asset sale it had approved. It was argued that because the Board had the authority to make "further orders" and impose conditions "in the public interest" on any order, it therefore had the ability to order the disposition of the sale proceeds.

[51] L'arrêt *ATCO* de notre Cour n'empêche pas non plus la réalisation, par la fixation de tarifs, d'objectifs relevant de l'intérêt public. Dans cet arrêt, le juge Bastarache, se prononçant pour la majorité, a considéré de façon restrictive les pouvoirs conférés à l'Alberta Energy and Utilities Board par la loi applicable. Il fallait décider si l'organisme avait le pouvoir d'attribuer aux abonnés le produit de la vente des biens d'une entreprise réglementée qu'il avait approuvée. On avait soutenu que, comme l'organisme possédait le pouvoir de rendre « toute autre ordonnance » et d'assortir une ordonnance de conditions nécessaires « dans l'intérêt public », il était par conséquent habilité à ordonner l'attribution du produit de la vente.

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[52] In holding that the Board had no such authority, Bastarache J. relied in part on the conclusion that the Board's statutory power to make orders or impose conditions in the public interest was insufficiently precise to grant the ability to distribute sale proceeds to ratepayers (para. 46). The ability of the Board to approve an asset sale, and its authority to make any order it wished in the public interest, were necessarily limited by the context of the relevant provisions (paras. 46-48 and 50). It was obliged too to adopt a rate base rate of return method to determine rates, pursuant to its governing statute (paras. 65-66).

[52] Pour conclure que l'organisme n'avait pas ce pouvoir, le juge Bastarache s'est fondé en partie sur la conclusion suivant laquelle le pouvoir de l'organisme de rendre des ordonnances ou d'imposer des conditions nécessaires dans l'intérêt public n'était pas suffisamment précis pour lui conférer le pouvoir d'attribuer le produit de la vente aux clients (par. 46). Le pouvoir de l'organisme d'approuver une vente de biens ainsi que son pouvoir de rendre les ordonnances jugées nécessaires dans l'intérêt public étaient nécessairement restreints par le contexte des dispositions pertinentes (par. 46-48 et 50). L'organisme était également tenu, selon sa loi habilitante, d'adopter une méthode base tarifaire/taux de rendement pour fixer les tarifs (par. 65-66).

[53] Unlike *ATCO*, in the case before us, the CRTC's rate-setting authority and its ability to establish deferral accounts for this purpose are at the very core of its competence. The CRTC is statutorily authorized to adopt *any* method of determining just and reasonable rates. Furthermore, it is required to consider the statutory objectives in the exercise of its authority, in contrast to the permissive, free-floating direction to consider the public interest that existed in *ATCO*. The *Telecommunications Act* displaces many of the traditional restrictions on rate-setting described in *ATCO*, thereby granting the CRTC the ability to balance the interests of carriers, consumers and competitors in the broader context of the Canadian telecommunications industry (Review of Regulatory Framework decision, at pp. 6 and 10).

[53] Dans l'affaire dont nous sommes saisis, contrairement à la situation dans *ATCO*, le pouvoir de tarification du CRTC et son pouvoir d'établir des comptes de report à cette fin sont au cœur même de sa compétence. Le CRTC est légalement habilité à utiliser *toute* méthode qui lui semble appropriée pour fixer des tarifs justes et raisonnables. De plus, il est obligé de tenir compte des objectifs énoncés dans la loi dans l'exercice de ses pouvoirs, alors que dans *ATCO* l'instruction de tenir compte de l'intérêt public revêtait un caractère facultatif et vague. La *Loi sur les télécommunications* écarte plusieurs des restrictions traditionnelles en matière de tarification décrites dans *ATCO*, conférant ainsi au CRTC la capacité de concilier les intérêts des entreprises, des consommateurs et des concurrents dans le contexte plus large de l'industrie canadienne des télécommunications (décision relative à l'examen du cadre de réglementation, p. 7 et 11).

[54] The fact that deferral accounts are at issue does nothing to change this framework. No party objected to the CRTC's authority to establish the deferral accounts themselves. These accounts are accepted regulatory tools, available as a part of the Commission's rate-setting powers. As the CRTC has noted, deferral accounts "enabl[e] a regulator to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test

[54] Le fait que le litige porte sur des comptes de report ne change rien à cette analyse. Aucune partie n'a contesté le pouvoir du CRTC d'ordonner l'établissement des comptes de report eux-mêmes. Ces comptes sont des outils réglementaires dont on reconnaît que le Conseil peut se servir dans l'exercice de son pouvoir de tarification. Comme l'a souligné le CRTC, les comptes de report permettent à « un organisme de réglementation [de] reporter l'examen d'un article de frais ou de revenu particulier

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year".[9] They have traditionally protected against future eventualities, particularly the difference between forecasted and actual costs and revenues, allowing a regulator to shift costs and expenses from one regulatory period to another. While the CRTC's creation and use of the deferral accounts for broadband expansion and consumer credits may have been innovative, it was fully supported by the provisions of the *Telecommunications Act*.

qu'on ne peut estimer avec certitude pour l'année-témoin »[9]. Ils ont traditionnellement permis de parer à certaines éventualités, notamment les écarts entre les coûts et revenus prévus et réels, l'organisme de réglementation pouvant déplacer les coûts et dépenses d'une période réglementaire à l'autre. Bien que le CRTC ait peut-être fait preuve d'innovation avec la création et l'utilisation des comptes de report pour l'expansion du service à large bande et le versement de crédits aux consommateurs, ces mesures étaient parfaitement compatibles avec les dispositions de la *Loi sur les télécommunications*.

[55] In my view, it follows from the CRTC's broad discretion to determine just and reasonable rates under s. 27, its power to order a carrier to adopt any accounting method under s. 37, and its statutory mandate under s. 47 to implement the wide-ranging Canadian telecommunications policy objectives set out in s. 7, that the *Telecommunications Act* provides the CRTC with considerable scope in establishing and approving the use to be made of deferral accounts. They were created in accordance both with the CRTC's rate-setting authority and with the goal that all rates charged by carriers were and would remain just and reasonable.

[55] À mon avis, le vaste pouvoir discrétionnaire conféré au CRTC pour la détermination des tarifs justes et raisonnables exigés par l'art. 27, son pouvoir d'imposer à une entreprise, en vertu de l'art. 37, l'adoption de toute méthode comptable qu'il estime appropriée et l'obligation qui lui est faite par l'art. 47 de veiller à la réalisation des grands objectifs de la politique canadienne de télécommunication énoncés à l'art. 7 indiquent que la *Loi sur les télécommunications* lui donne une latitude considérable pour établir les comptes de report et approuver l'utilisation qui en sera faite. Ces comptes ont été créés conformément au pouvoir de tarification du CRTC et à l'objectif selon lequel tous les tarifs exigés par les entreprises doivent être justes et raisonnables et le demeurer.

[56] A deferral account would not serve its purpose if the CRTC did not also have the power to order the disposition of the funds contained in it. In my view, the CRTC had the authority to order the disposition of the accounts in the exercise of its rate-setting power, provided that this exercise was reasonable.

[56] Les comptes de report ne rempliraient pas leur fonction si le CRTC n'avait pas aussi le pouvoir de prescrire la manière dont les fonds de ces comptes doivent être employés. Je suis d'avis que le CRTC pouvait, dans l'exercice de son pouvoir de tarification, ordonner l'utilisation de ces comptes, dans la mesure où il exerçait ce pouvoir de manière raisonnable.

[57] I therefore agree with the following observation by Sharlow J.A.:

[57] Par conséquent, je souscris aux observations suivantes de la juge d'appel Sharlow :

> The Price Caps Decision required Bell Canada to credit a portion of its final rates to a deferral account, which the CRTC had clearly indicated would be disposed of in due course as the CRTC would direct. There

> La décision sur le plafonnement des prix prescrivait à Bell Canada de porter une fraction de ses tarifs définitifs au crédit d'un compte de report, lequel — le CRTC l'a clairement indiqué — serait utilisé en temps voulu de

[9] Telecom Decision CRTC 93-9, July 23, 1993 (online: www.crtc.gc.ca/eng/archive/1993/DT93-9.htm).

[9] Décision de télécom CRTC 93-9, 23 juillet 1993 (en ligne : www.crtc.gc.ca/fra/archive/1993/dt93-9.htm).

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is no dispute that the CRTC is entitled to use the device of a mandatory deferral account to impose a contingent obligation on a telecommunication service provider to make expenditures that the CRTC may direct in the future. It necessarily follows that the CRTC is entitled to make an order crystallizing that obligation and directing a particular expenditure, provided the expenditure can reasonably be justified by one or more of the policy objectives listed in section 7 of the *Telecommunications Act.* [Emphasis added; para. 52.]

[58] This general analytical framework brings us to the more specific questions in these appeals. In the first appeal, Bell Canada relied on Gonthier J.'s decision *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 ("*Bell Canada (1989)*"), to argue that "final" rates cannot be changed and that the funds in the deferral accounts could not, therefore, be distributed as "rebates" to customers.

[59] In *Bell Canada (1989)*, the CRTC approved a series of interim rates. It subsequently reviewed them in light of Bell Canada's changed financial situation, and ordered the carrier to credit what it considered to be excess revenues to its current subscribers. Arguing against the CRTC's authority to do so, Bell Canada contended that the CRTC could not order a one-time credit with respect to revenues earned from rates approved by the CRTC, whether the rate order was an interim one or not. Gonthier J. observed that while the *Railway Act* contemplated a positive approval scheme that only allowed for prospective, not retroactive or retrospective rate-setting, the one-time credit at issue was nevertheless permissible because the original rates were interim and therefore inherently subject to change.

[60] In the current case, Bell Canada argued that the rates had been made final, and that the disposition of the deferral accounts for one-time credits was therefore impermissible. More specifically, it argued that the CRTC's order of one-time credits

la manière qu'il prescrirait. Il n'est pas contesté que le CRTC ait le droit d'imposer à un fournisseur de services de télécommunication, en lui prescrivant l'ouverture d'un compte de report, l'obligation éventuelle d'effectuer des dépenses qu'il se réserve de lui ordonner ultérieurement. Il s'ensuit par voie de conséquence nécessaire que le CRTC a le droit de rendre une ordonnance actualisant cette obligation et prescrivant des dépenses déterminées, à condition que l'on puisse plausiblement justifier celles-ci par un ou plusieurs des objectifs de la politique de télécommunication énumérés à l'article 7 de la *Loi sur les télécommunications.* [Je souligne; par. 52.]

[58] Ce cadre d'analyse général nous amène aux questions plus précises soulevées dans les présents pourvois. Dans le premier pourvoi, se fondant sur la décision du juge Gonthier dans l'arrêt *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722 (« *Bell Canada (1989)* »), Bell Canada a plaidé que des tarifs « définitifs » ne peuvent pas être modifiés et que les fonds des comptes de report ne pouvaient donc pas être versés à titre de « rabais » aux clients.

[59] Dans *Bell Canada (1989)*, le CRTC avait approuvé une série de tarifs provisoires. Il les avait ensuite réexaminés à la lumière de la nouvelle situation financière de Bell Canada et avait ordonné à l'entreprise de porter au crédit du compte des abonnés actuels ce qu'il considérait comme des revenus excédentaires. Contestant le pouvoir du CRTC de rendre une telle ordonnance, Bell Canada faisait valoir que l'organisme ne pouvait ordonner l'attribution d'un crédit forfaitaire à l'égard de revenus obtenus à partir de tarifs approuvés par le CRTC, que ces tarifs soient fixés dans une ordonnance provisoire ou définitive. Le juge Gonthier a estimé que, si la *Loi sur les chemins de fer* instituait un système positif d'approbation permettant seulement la tarification prospective, et non rétroactive ou rétrospective, le crédit forfaitaire en question était néanmoins permis puisque les tarifs initiaux étaient provisoires et, partant, susceptibles d'être modifiés.

[60] En l'espèce, Bell Canada a soutenu que les tarifs avaient été rendus définitifs et que l'utilisation des comptes de report pour l'attribution d'un crédit unique était donc impossible. Elle a fait valoir, plus précisément, que l'ordonnance du CRTC concernant

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from the deferral accounts amounted to retrospective rate-setting as the term was used in *Bell Canada (1989)*, at p. 1749, namely, that their "purpose is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive".

l'attribution d'un crédit unique, au moyen des comptes de report, équivalait à une tarification rétroactive, au sens dans lequel cette expression est utilisée dans *Bell Canada (1989)* à la p. 1749, c'est-à-dire qu'elle « vis[ait] à remédier à l'imposition des taux approuvés antérieurement qui ont été jugés excessifs en dernier ressort ».

[61] In my view, because this case concerns encumbered revenues in deferral accounts (referred to by Sharlow J.A. as contingent obligations or liabilities), we are not dealing with the variation of final rates. As Sharlow J.A. pointed out, *Bell Canada (1989)* is inapplicable because it was known from the outset in the case before us that Bell Canada would be obliged to use the balance of its deferral account in accordance with the CRTC's subsequent direction (para. 53).

[61] Comme la présente affaire porte sur des revenus mis en réserve dans des comptes de report (ce que la juge d'appel Sharlow a appelé des obligations ou dettes éventuelles), il n'y est selon moi pas question de modification de tarifs définitifs. Comme l'a souligné la juge Sharlow, *Bell Canada (1989)* ne s'applique pas, car on savait dès le départ en l'espèce que Bell Canada serait tenue d'utiliser le solde de son compte de report selon les prescriptions ultérieures du CRTC (par. 53).

[62] It would, with respect, be an oversimplification to consider that *Bell Canada (1989)* applies to bar the provision of credits to consumers in this case. *Bell Canada (1989)* was decided under the *Railway Act*, a statutory scheme that, significantly, did not include any of the considerations or mandates set out in ss. 7, 27(5) and 47 of the *Telecommunications Act*. Nor did it involve the disposition of funds contained in deferral accounts.

[62] Ce serait à mon avis simplifier à outrance que de conclure que *Bell Canada (1989)* s'applique et a pour effet d'empêcher en l'espèce le versement de crédits aux consommateurs. L'arrêt *Bell Canada (1989)* a été rendu sous le régime de la *Loi sur les chemins de fer*, un régime législatif qui, il importe de le rappeler, ne comportait aucune des considérations et prescriptions énoncées aux art. 7 et 47 et au par. 27(5) de la *Loi sur les télécommunications*. Il n'y était pas non plus question de l'utilisation des fonds de comptes de report.

[63] In my view, the credits ordered out of the deferral accounts in the case before us are neither retroactive nor retrospective. They do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures, since these credits or reductions were contemplated as a possible disposition of the deferral account balances from the beginning. These funds can properly be characterized as encumbered revenues, because the rates *always* remained subject to the deferral accounts mechanism established in the Price Caps Decision. The use of deferral accounts therefore precludes a finding of retroactivity or retrospectivity. Furthermore, using deferral accounts to account for the difference between forecast and actual costs and revenues has traditionally

[63] Selon moi, les crédits dont le versement a été ordonné en l'espèce sur les comptes de report ne sont de nature ni rétroactive ni rétrospective. Ils ne modifient pas le tarif initial approuvé, qui comprenait les comptes de report, et ne visent pas non plus à corriger un défaut de l'ordonnance tarifaire définitive au moyen de mesures ultérieures, puisque ces crédits ou réductions avaient été envisagés dès le départ comme utilisation possible du solde des comptes de report. Ces fonds peuvent à juste titre être qualifiés de « revenus mis en réserve », parce que les tarifs définitifs sont *toujours* restés assujettis au mécanisme des comptes de report établi dans la Décision sur le plafonnement des prix. Le recours à des comptes de report empêche donc de conclure qu'il y a eu rétroactivité ou rétrospectivité. De plus, l'utilisation de comptes de report pour tenir compte

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been held not to constitute retroactive rate-setting (*EPCOR Generation Inc. v. Energy and Utilities Board*, 2003 ABCA 374, 346 A.R. 281, at para. 12, and *Reference Re Section 101 of the Public Utilities Act* (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. C.A.), at paras. 97-98 and 175).

de la différence entre les coûts et revenus prévus et réels n'est habituellement pas considérée comme une tarification rétroactive (*EPCOR Generation Inc. c. Energy and Utilities Board*, 2003 ABCA 374, 346 A.R. 281, par. 12, et *Reference Re Section 101 of the Public Utilities Act* (1998), 164 Nfld. & P.E.I.R. 60 (C.A.T.-N.), par. 97-98 et 175).

[64] The Deferral Accounts Decision was the culmination of a process undertaken in the Price Caps Decision. In the Price Caps Decision, the CRTC indicated that the amounts in the deferral accounts were to be used in a manner contributing to achieving the CRTC's objectives (paras. 409 and 412). In the Deferral Accounts Decision, the CRTC summarized its earlier findings that draw-downs could occur for various purposes, including through subscriber credits (para. 6). When the CRTC approved the rates derived from the Price Caps Decision, the portion of the revenues that went into the deferral accounts remained encumbered. The deferral accounts, and the encumbrance to which the funds recorded in them were subject, were therefore an integral part of the rate-setting exercise ensuring that the rates approved were just and reasonable. It follows that nothing in the Deferral Accounts Decision changed either the Price Caps Decision or any other prior CRTC decision on this point. The CRTC's later allocation of deferral account balances for various purposes, therefore, including customer credits, was not a variation of a final rate order.

[64] La Décision sur les comptes de report marquait le point culminant d'un processus amorcé avec la Décision sur le plafonnement des prix. Dans cette dernière, le CRTC avait indiqué que les fonds des comptes de report devaient être utilisés de manière à contribuer à la réalisation des objectifs de l'organisme (par. 409 et 412). Dans la Décision sur les comptes de report, le CRTC a résumé ses conclusions antérieures selon lesquelles les fonds des comptes de report pourraient être utilisés à diverses fins, notamment pour accorder des crédits aux abonnés (par. 6). Lorsque le CRTC a approuvé les tarifs découlant de la Décision sur le plafonnement des prix, la partie des revenus qui avait été versée dans les comptes de report est demeurée en réserve. Les comptes de report, et la réserve à laquelle étaient assujettis les fonds inscrits à ces comptes, étaient donc une partie intégrante de l'opération de tarification et garantissaient que les tarifs approuvés étaient justes et raisonnables. Rien dans la Décision sur les comptes de report n'est par conséquent venu modifier la Décision sur le plafonnement des prix ou quelque décision antérieure du CRTC sur cette question. L'affectation ultérieure par le CRTC du solde des comptes de report à diverses fins, dont l'attribution d'un crédit aux clients, ne constituait donc pas une modification d'une ordonnance tarifaire définitive.

[65] The allocation of deferral account funds to consumers was not, strictly speaking, a "rebate" in any event. Instead, as in *Bell Canada (1989)*, these allocations were one-time disbursements or rate reductions the carriers were required to make out of the deferral accounts to their *current* subscribers. The possibility of one-time credits was present from the inception of the rate-setting exercise. From the Price Caps Decision onwards, it was understood that the disposition of the deferral account funds might include an eventual credit to

[65] De toute façon, l'attribution de fonds des comptes de report aux consommateurs ne constituait pas à proprement parler un « rabais ». Comme dans *Bell Canada (1989)*, ces affectations étaient plutôt des versements ou des réductions tarifaires uniques dont les entreprises devaient faire bénéficier leurs abonnés *actuels* en puisant dans les comptes de report. La possibilité d'un crédit unique était présente dès le début de l'opération de tarification. Dès la décision sur le plafonnement des prix, il était entendu que les fonds des comptes de report

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subscribers once the CRTC determined the appropriate allocation. It was precisely because the rate-setting mechanism approved by the CRTC included accumulation in and disposition from the deferral accounts pursuant to further CRTC orders, that the rates were and continued to be just and reasonable.

pourraient notamment être utilisés pour le versement d'un éventuel crédit aux abonnés une fois que le CRTC aurait déterminé l'affectation souhaitable. C'est précisément parce que le mécanisme de tarification approuvé par le CRTC comprenait l'accumulation de fonds dans les comptes de report et l'affectation de ces fonds conformément à des ordonnances ultérieures du CRTC que les tarifs étaient et sont demeurés justes et raisonnables.

[66] Therefore, rather than viewing *Bell Canada (1989)* as setting a strict rule that subscriber credits can never be ordered out of revenues derived from final rates, it is important to remember Gonthier J.'s concern that the financial stability of regulated utilities could be undermined if rates were open to indiscriminate variation (p. 1760). Nothing in the Deferral Accounts Decision undermined the financial stability of the affected carriers. The amounts at issue were always treated differently for accounting purposes, and the regulated carriers were aware of the fact that the portion of their revenues going into the deferral accounts remained encumbered. In fact, the Price Caps Decision formula would have allowed for *lower* rates than the ones ultimately set, were it not for the creation of the deferral accounts. Those lower rates could conceivably have been considered sufficient to maintain the financial stability of the carriers and were increased only in an effort to encourage market entry by new competitors.

[66] Par conséquent, au lieu de voir dans *Bell Canada (1989)* l'établissement d'une règle stricte selon laquelle il ne serait en aucun cas possible d'ordonner le versement de crédits sur des revenus tirés de tarifs définitifs, il importe de rappeler que le juge Gonthier craignait de voir la stabilité financière des services publics réglementés être minée si les tarifs pouvaient connaître des variations arbitraires (p. 1760). Or, rien dans la Décision sur les comptes de report ne compromettait la stabilité financière des entreprises visées. Les sommes en cause ont toujours fait l'objet d'un traitement comptable différent et les entreprises réglementées savaient que la partie des revenus versée aux comptes de report demeurait en réserve. En fait, la formule établie dans la Décision sur le plafonnement des prix aurait accordé des tarifs *inférieurs* à ceux finalement fixés, n'eût été la création des comptes de report. Ces tarifs inférieurs auraient sans doute pu être jugés suffisants pour maintenir la stabilité financière des entreprises. S'ils ont été augmentés, c'est uniquement pour encourager l'entrée de nouveaux concurrents sur le marché.

[67] TELUS argued additionally that the Deferral Accounts Decision constituted a confiscation of its property. This is an argument I have difficulty accepting. The funds in the accounts never belonged unequivocally to the carriers, and always consisted of encumbered revenues. Had the CRTC intended that these revenues be used for any purposes the affected carriers wanted, it could simply have approved the rates as just and reasonable and ordered the balance of the deferral accounts turned over to them. It chose not to do so.

[67] TELUS a plaidé en outre que la Décision sur les comptes de report constituait une confiscation de ses biens. Voilà un argument que j'ai de la difficulté à accepter. Les fonds des comptes de report n'ont jamais appartenu sans équivoque aux entreprises et ont toujours consisté dans des revenus mis en réserve. Si le CRTC avait voulu que ces revenus soient utilisés au gré des entreprises visées, il aurait pu simplement approuver les tarifs en les considérant comme justes et raisonnables et ordonner que le solde des comptes de report soit remis aux entreprises en question. Il a choisi de ne pas le faire.

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[68] It is also worth noting that in approving Bell Canada's rates, the CRTC ordered it to allocate certain tax savings to the deferral accounts.[10] Neither the CRTC, nor Bell Canada, could possibly have expected that the company would be able to keep that portion of its rate revenue representing a past liability for taxes that it was in fact not currently liable to pay or defer.

[68] Il convient également de souligner que, en approuvant les tarifs de Bell Canada, le CRTC a ordonné à l'entreprise d'affecter aux comptes de report une partie des économies provenant de certaines taxes[10]. Ni le CRTC ni Bell Canada ne pouvaient s'attendre à ce que l'entreprise soit en mesure de conserver cette partie de ses revenus tirés des tarifs, qui correspondait à une obligation fiscale antérieure qu'elle n'était en réalité pas tenue d'acquitter ni de reporter.

[69] For the above reasons, I would dismiss the Bell Canada and TELUS appeal.

[69] Pour les motifs qui précèdent, je suis d'avis de rejeter le pourvoi de Bell Canada et de TELUS.

[70] The premise underlying the Consumers' Association of Canada appeal is that the disposition of some deferral account funds for broadband expansion highlighted the fact that the rates charged by carriers were, in a certain sense, not just and reasonable. Consumers can only succeed if it can demonstrate that the CRTC's decision was unreasonable.

[70] La prémisse du pourvoi de l'Association des consommateurs du Canada est que l'utilisation d'une partie des fonds des comptes de report pour l'expansion du service à large bande a fait ressortir le fait que les tarifs exigés par les entreprises n'étaient pas, en un certain sens, justes et raisonnables. L'Association peut avoir gain de cause uniquement si elle démontre que la décision du CRTC était déraisonnable.

[71] At its core, Consumers' primary argument was that the Deferral Accounts Decision effectively forced users of a certain service (residential subscribers in certain areas) to subsidize users of another service (the future users of broadband services) once the expansion of broadband infrastructure was completed. In its view, this was an indication that the rates charged to residential users were not in fact just and reasonable, and that therefore the balance in the deferral accounts, excluding the disbursements for accessibility services, should be distributed to customers.

[71] L'Association des consommateurs du Canada fait valoir essentiellement que la Décision sur les comptes de report a dans les faits obligé les utilisateurs d'un certain service (les abonnés résidentiels de certaines zones) à subventionner les utilisateurs d'un autre service (les futurs utilisateurs de services à large bande) une fois achevée l'expansion de l'infrastructure à large bande. À son avis, cela indiquait que les tarifs exigés des utilisateurs résidentiels n'étaient pas en fait justes et raisonnables et que, par conséquent, le solde des comptes de report — abstraction faite des sommes déboursées pour améliorer l'accessibilité des services — devait être distribué aux clients.

[72] As previously noted, the deferral accounts were created and disbursed pursuant to the CRTC's power to approve just and reasonable rates, and were an integral part of such rates. Far from rendering these rates inappropriate, the deferral accounts *ensured* that the rates were just and reasonable. And the policy objectives in s. 7, which the CRTC is always obliged to consider, demonstrate

[72] Comme je l'ai déjà signalé, les comptes de report ont été créés et utilisés conformément au pouvoir du CRTC d'approuver des tarifs justes et raisonnables, et ils faisaient partie intégrante de ces tarifs. Loin de rendre ces tarifs inappropriés, les comptes de report *garantissaient* que les tarifs étaient justes et raisonnables. En outre, les objectifs de la politique de télécommunication énoncés

[10] Telecom Decision CRTC 2003-15, at para. 32.

[10] Décision de télécom CRTC 2003-15, par. 32.

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that the CRTC need not limit itself to considering solely the service at issue in determining whether rates are just and reasonable. The statute contemplates a comprehensive national telecommunications framework. It does not require the CRTC to atomize individual services. It is for the CRTC to determine a tolerable level of cross-subsidization.

à l'art. 7, dont le CRTC doit toujours tenir compte, montrent qu'il n'a pas à prendre en considération uniquement le service en cause pour déterminer si les tarifs sont justes et raisonnables. La loi envisage un cadre national global en matière de télécommunications. Elle n'oblige pas le CRTC à atomiser les différents services. Il appartient au CRTC de déterminer le niveau tolérable d'interfinancement.

[73] Nor does the traditional approach to telecommunications regulation support Consumers' argument. Long-distance telephone users have long subsidized local telephone users (Price Caps Decision, at para. 2). Therefore, while rates for individual services covered by the *Telecommunications Act* may be evaluated on a just and reasonable basis, rates are not necessarily rendered unreasonable or unjust simply because there is some cross-subsidization between services. (See Ryan, at §604, for the proposition that the CRTC can determine the appropriate extent of cross-subsidization for a given telecommunications carrier.)

[73] L'approche traditionnelle en matière de télécommunications ne peut pas non plus être invoquée à l'appui de l'argument de l'Association des consommateurs du Canada. Les usagers du service d'interurbain financent depuis longtemps la téléphonie locale (Décision sur le plafonnement des prix, par. 2). Par conséquent, même si les tarifs des différents services couverts par la *Loi sur les télécommunications* peuvent être évalués selon le critère des tarifs justes et raisonnables, ils ne sont pas nécessairement rendus déraisonnables ou injustes par la seule existence d'un certain interfinancement entre les services. (Voir Ryan, §604, relativement à la proposition suivant laquelle le CRTC peut déterminer le niveau approprié d'interfinancement pour une entreprise de télécommunication donnée.)

[74] In my view, the CRTC properly considered the objectives set out in s. 7 when it ordered expenditures for the expansion of broadband infrastructure and consumer credits. In doing so, it treated the statutory objectives as guiding principles in the exercise of its rate-setting authority. Pursuing policy objectives through the exercise of its rate-setting power is precisely what s. 47 requires the CRTC to do in setting just and reasonable rates.

[74] J'estime que le CRTC a correctement tenu compte des objectifs énoncés à l'art. 7 quand il a ordonné l'affectation de certaines sommes à l'expansion du service à large bande et au versement de crédits aux consommateurs. Ce faisant, il a considéré les objectifs inscrits dans la loi comme des principes directeurs régissant l'exercice de son pouvoir de tarification. Le fait pour le CRTC de poursuivre les objectifs de la politique dans l'exercice de son pouvoir de tarification constitue précisément ce que l'art. 47 lui demande de faire lorsqu'il fixe des tarifs justes et raisonnables.

[75] In deciding to allocate the deferral account funds to improving accessibility services and broadband expansion in rural and remote areas, the CRTC had in mind its statutorily mandated objectives of facilitating "the orderly development throughout Canada of a telecommunications system that serves to . . . strengthen the social and economic fabric of Canada" under s. 7(*a*); rendering "reliable and affordable telecommunications

[75] En décidant d'utiliser les fonds des comptes de report pour améliorer les services d'accessibilité et pour étendre aux collectivités rurales et éloignées les services à large bande, le CRTC avait à l'esprit les objectifs qui lui sont fixés par le législateur : « favoriser le développement ordonné des télécommunications partout au Canada en un système qui contribue à [. . .] renforcer la structure sociale et économique du Canada » (al. 7*a*)); « permettre l'accès

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services . . . to Canadians in both urban and rural areas" under s. 7(*b*); and responding "to the economic and social requirements of users of telecommunications services" pursuant to s. 7(*h*).

[76] The CRTC heard from several parties, considered its statutorily mandated objectives in exercising its powers, and decided on an appropriate course of action. Under the circumstances, I have no hesitation in holding that the CRTC made a reasonable decision in ordering broadband expansion.

[77] I would therefore conclude that the CRTC did exactly what it was mandated to do under the *Telecommunications Act*. It had the statutory authority to set just and reasonable rates, to establish the deferral accounts, and to direct the disposition of the funds in those accounts. It was obliged to do so in accordance with the telecommunications policy objectives set out in the legislation and, as a result, to balance and consider a wide variety of objectives and interests. It did so in these appeals in a reasonable way, both in ordering subscriber credits and in approving the use of the funds for broadband expansion.

[78] I would dismiss the appeals. At the request of all parties, there will be no order for costs.

Appeals dismissed.

Solicitors for the appellant/respondent Bell Canada: Blake, Cassels & Graydon, Toronto.

Solicitors for the appellant/respondent TELUS Communications Inc. and the respondent TELUS Communications (Québec) Inc.: Burnet, Duckworth & Palmer, Calgary.

Solicitors for the appellants/respondents the Consumers' Association of Canada and the National Anti-Poverty Organization and the respondent the Public Interest Advocacy Centre: Paliare, Roland, Rosenberg, Rothstein, Toronto.

aux Canadiens dans toutes les régions — rurales ou urbaines — du Canada à des services de télécommunication sûrs [et] abordables » (al. 7*b*)); « satisfaire les exigences économiques et sociales des usagers des services de télécommunication » (al. 7*h*)).

[76] Le CRTC a entendu plusieurs parties, il a exercé ses pouvoirs en prenant en considération les objectifs que le législateur lui a imposés et il a décidé les mesures appropriées. Dans les circonstances, je n'hésite pas à conclure que le CRTC a pris une décision raisonnable lorsqu'il a ordonné l'expansion du service à large bande.

[77] Je conclurais donc que le CRTC a fait exactement ce que la *Loi sur les télécommunications* lui demandait de faire. Il avait, en vertu de la loi, le pouvoir de fixer des tarifs justes et raisonnables, d'établir des comptes de report et de prescrire de quelle manière devaient être utilisés les fonds de ces comptes. Il était tenu d'exercer ces pouvoirs en conformité avec les objectifs de la politique de télécommunication énoncés dans la loi et, par conséquent, de soupeser et d'examiner toute une gamme d'objectifs et d'intérêts. Il l'a fait d'une manière raisonnable, à la fois lorsqu'il a ordonné l'attribution de crédits aux abonnés et lorsqu'il a approuvé l'utilisation des fonds pour l'expansion du service à large bande.

[78] Je suis d'avis de rejeter les pourvois. À la demande de toutes les parties, aucune ordonnance ne sera rendue quant au dépens.

Pourvois rejetés.

Procureurs de l'appelante/intimée Bell Canada : Blake, Cassels & Graydon, Toronto.

Procureurs de l'appelante/intimée TELUS Communications Inc. et l'intimée TELUS Communications (Québec) Inc. : Burnet, Duckworth & Palmer, Calgary.

Procureurs des appelantes/intimées l'Association des consommateurs du Canada et l'Organisation nationale anti-pauvreté et l'intimé le Centre pour la défense de l'intérêt public : Paliare, Roland, Rosenberg, Rothstein, Toronto.

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Solicitors for the respondent MTS Allstream Inc.: Goodmans, Toronto.

Solicitors for the respondent/intervener the Canadian Radio-television and Telecommunications Commission: Torys, Toronto.

Procureurs de l'intimée MTS Allstream Inc. : Goodmans, Toronto.

Procureurs de l'intimé/intervenant le Conseil de la radiodiffusion et des télécommunications canadiennes : Torys, Toronto.

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In the Court of Appeal of Alberta

Citation: Calgary (City) v. Alberta (Energy and Utilities Board), 2010 ABCA 132

Date: 20100423
Docket: 0801-0030-AC
Registry: Calgary

2010 ABCA 132 (CanLII)

Between:

City of Calgary

Appellant
(Applicant)

- and -

Alberta Energy and Utilities Board

Respondent
(Respondent)

- and -

ATCO Gas and Pipelines Ltd.

Respondent
(Respondent)

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Constance Hunt
The Honourable Madam Justice Marina Paperny

Reasons for Judgment Reserved of The Honourable Madam Justice Hunt
Concurred in by The Honourable Madam Justice Paperny

Reasons for Judgment Reserved of The Honourable Mr. Justice Côté
Concurring in Part

Appeal from the Alberta Energy and Utilities Board
Decision 2008-001 dated January 8, 2008 and
Decision 2005-036 dated April 28, 2005

Reasons for Judgment Reserved of
The Honourable Madam Justice Hunt

2010 ABCA 132 (CanLII)

[1] I agree with Côté J.A. that the orders under appeal should be vacated, but reach that conclusion for different reasons. I would allow the appeal and return the matter to the Alberta Utilities Commission ("Board[1]") for reconsideration in accordance with this judgment.

Facts

History of Deferred Gas Accounts (DGA)

[2] The modern origin of deferred gas accounts (formerly deferred gas accounting) ("DGA") is a 1988 decision which arose out of a utility's general rate application: *Re Northwestern Utilities Limited*, In the matter of an application to determine rate base and fix a fair return thereon for the test years 1987 and 1988, Decision E88018, (Public Utilities Board). The use of a DGA was proposed to deal with seasonal price differences in gas costs. It required segregating the sales rate into two components, gas and non-gas. The latter would be determined in a general rate application while the former, the Gas Cost Recovery Rate ("GCRR"), would be determined twice a year using a formal filing process, subject to Board monitoring or review by way of a hearing. Adjustments to actual and estimated costs of gas would be held in the DGA then reconciled for refund to or recovery from consumers.

[3] In approving these procedures, the Board emphasized that the outcome would be "customers pay for no more or less than the price of gas actually incurred ... the shareholders would not gain or be penalized as a result of price variations ...": p. 325. The use of a DGA would be beneficial to customers: p. 326. The Board described the GCRR's gas cost component as "interim": p. 327. This early decision demonstrates that the Board intended to scrutinize the use of the DGA on an ongoing basis.

[4] The principles from this decision were applied the same year to Canadian Western Natural Gas Company Limited, the respondent ATCO's predecessor: *Re Canadian Western Natural Gas Company Limited*, In the matter of an Application by Canadian Western Natural Gas Company Limited for approval of Deferred Gas Accounting and Reconciliation procedures respecting its gas supply costs, Order E88019, (Public Utilities Board, 1988). The DGAs at issue here were then created.

[5] In 2001 ATCO and the appellant City of Calgary (Calgary) were both parties to a hearing that considered, *inter alia*, the methodology for determining the GCRR: Methodology for Managing

[1] "Board" means the regulator of Alberta's gas industry which has, over time, been the Public Utilities Board, the Energy and Utilities Board and the Alberta Utilities Commission.

Gas Supply Portfolios and Determining Gas Cost Recovery Rates (Methodology) Proceeding and Gas Rate Unbundling (Unbundling) Proceeding, Part A: GCRR Methodology and Gas Rate Unbundling. Decision 2001-75 (Alberta Energy and Utilities Board, 2001). Its context was the transition to competitive retail gas service. The Board noted its general supervisory power over utilities and its power to fix just and reasonable rates as the basis of its authority to deal with the issues in the hearing: p. 10.

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[6] The Board described "GCRR/DGA Programs" as follows at p. 56:

> The effect of a Gas Cost Recovery Rate/Deferred Gas Account (GCRR/DGA) mechanism is to spread the cost of gas acquisition and management over a forecast period, keeping consumer gas prices stable during that period. The use of a DGA to keep track of differences between actual and forecast gas costs ensures that customers pay no more and no less than actual costs incurred on their behalf. However, the reconciliation between forecast and actual costs occurs over one or more seasons. [footnote omitted] During periods of rapid gas price increase, as experienced in the winter of 2000/2001, the accumulated balances in the DGA can become large. The current system of GCRRs/DGAs has defined tolerance limits on the size of the DGAs, requiring the utilities to file for gas rate adjustments when the variance between forecast and actual costs becomes too large. [emphasis added]

[7] The Board determined that utilities no longer needed to "file formal GCRR applications with the Board, but would instead file ... on a monthly basis", and monthly adjustments would be made to the GCRR: p. 64. Interested parties would have an opportunity to raise concerns about the monthly GCRRs filed by the utilities. Reconciliation of DGA balances would be done on a three-month rolling basis. The Board set a date for the commencement of this system, "in conjunction with the revised interim rates noted elsewhere in this Decision": p. 64.

[8] Since then, the use of DGAs has evolved. For example, in ATCO Gas South Jumping Pound Meter Station – Gas Measurement Adjustment Application No. 1314487, Decision 2004-013, the Board approved adjustments to an ATCO DGA balance to reflect measurement errors caused by equipment malfunction. Part of the Board's rationale was that the adjustment was made in accordance with approved DGA procedures. A related adjustment to the DGA (timing costs) was rejected by the Board because it was not a previously approved DGA adjustment.

[9] In other DGA decisions, the Board considered factors such as the amount of the adjustment, the timeliness of the application, whether the utility had acted responsibly, the foreseeability of the problem, and whether consumers who received the service were bearing the cost of the adjustment, see e.g., Northwestern Utilities Limited, 1996/1997 Winter Period Gas Cost Recovery Rate, Decision U97053 97053; IN THE MATTER of a Gas Cost Recovery Rate Refund for the 2001 Summer Period for AltaGas Utilities Inc. Order U2001-316.

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Origin of this Dispute

[10] In May 2004, ATCO sought Board approval to correct balances in the DGAs for each of its south and north gas distribution service territories. The proposed adjustment to the DGA for northern Alberta was largely attributable to *overstated* gas costs from January 1998 to February 2004, whereas in southern Alberta the actual gas costs ATCO incurred from January 1999 to February 2004 were *understated*. ATCO proposed that its present southern Alberta consumers would pay the shortfalls and that it would refund excesses to its present northern Alberta consumers. Since this appeal concerns only the adjustment proposed to the southern DGA, I make no further reference to the northern DGA.

[11] The adjustments were sought because there had been inaccurate reporting of gas being transported for other entities through ATCO's pipeline network ("transportation imbalances"). It appears the errors began when the administration of ATCO's gas transportation system was moved to a new system, the transportation information system ("System").

[12] ATCO had included the transportation imbalances as prior period adjustments in the DGA as part of its December 2003 GCRR filings. While producing supplementary information requested by the Board, ATCO detected additional transportation imbalances. It then refiled its December 2003 GCRR *excluding* the transportation imbalance adjustments. ATCO engaged chartered accountants to review its re-calculation of the imbalances. The Board's treatment of ATCO's subsequent application to record the revised transportation imbalances in the DGA is at the root of this appeal.

Board Decisions

[13] Three Board decisions are relevant. Each is described in more detail beginning at para. 16.

[14] The first decision partly allowed ATCO's application to use the DGA/GCRR reconciliation process to record the transportation imbalances: ATCO Gas, A Division of ATCO Gas and Pipelines Ltd. Imbalance and Production Adjustments – Deferred Gas Account Application No. 1347852, Decision 2005-036, ("DGA Decision"). In the second, the Board established a general rule that the DGA/GCRR reconciliation process has a two-year limitation period: ATCO Gas, A Division of ATCO Gas and Pipelines Ltd., Deferred Gas Account Limitation Period, Decision 2006-042 ("Limitations Decision"). The third focused on the Board's jurisdiction to make the DGA and the Limitations Decisions: ATCO Gas, A Division of ATCO Gas and Pipelines Ltd. Reconsideration of Decision 2005-036 Deferred Gas Account, Imbalance and Production Adjustments, Application No. 1524763 Proceeding ID. 5, Decision 2008-001 ("DGA Reconsideration Decision).

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[15] As to the DGA and DGA Reconsideration Decisions, Calgary obtained leave to appeal on the following question: "Whether the Board erred in law or in jurisdiction by allowing for the recovery, in 2005, of costs or expenses that were incurred between 199[9][2] and 2004.": *Calgary (City) v. Alberta (Energy and Utilities Board*), 2009 ABCA 150 at para. 9, [2009] A.J. No. 408. ATCO has discontinued its application for leave to appeal the Limitations Decision.

DGA Decision (Decision 2005-036)

[16] The Board defined the central issue as "whether or not it is appropriate for the DGA to be a vehicle of all and any updates and corrections other than for price and actual gas sales (or deliveries)": p. 10.

[17] In reviewing the history of the DGA/GCRR process, the Board noted that the DGA/GCRR process was originally approved to provide a method for adjusting for gas price volatility and that, by April 2002, the process was refined so that monthly (not seasonal) reconciliations were made: p. 10. Over time, DGAs were used without complaint to adjust gas rates for reasons unrelated to price volatility, including measurement corrections. While it had become a "relatively common occurrence" for DGAs to be used for making prior period adjustments, most were made "within a reasonable time period": *Id*.

[18] The Board was troubled by the evolution of DGAs into a 'catch all' method for fixing all possible gas cost errors and by the timing of the adjustments. It criticized ATCO for the design errors in the System report and its delay in detecting them, reinforcing its expectation that ATCO's internal controls should detect material errors in a timely way.

[19] Notwithstanding these misgivings, the Board permitted ATCO to recover eighty-five percent of the amounts it sought through adjustments to its DGA.

Limitations Decision (Decision 2006-042)

[20] The Board's concerns about ATCO's delay in applying for the imbalance adjustments led to a hearing to examine whether it ought to impose a general policy limiting the extent to which adjustments are made to DGAs.

[21] In the resulting Limitations Decision, the Board considered its jurisdiction to establish limitation periods for the DGA/GCRR process in the context of its statutory mandate to set just and

[2] Calgary did not challenge the adjustments the Board approved to ATCO's northern territory DGA arising from transportation imbalances for the 1998 - 2004 period (Board factum at para. 14). Accordingly, 1999 (not 1998, as was stated in the leave decision) is the appropriate starting point.

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reasonable rates and court decisions approving their use. It concluded that setting the GCRR requires the use of DGAs. Moreover:

> the deferral nature of the DGAs is specifically contemplated and acknowledged when the rates are set. Deferral accounts, by their nature, anticipate adjustments such as the ones at issue in this matter and, as such, cannot be said to constitute retroactive rate-making. The Supreme Court of Canada has approved the use of deferral accounts for gas and has further noted that such a mechanism is a purely administrative matter [citation omitted]. In *EPCOR Generation Inc. v. AEUB*, 2003 ABCA 374, the Alberta Court of Appeal adopted the same approach and stated that as the deferral account in issue in that decision was not closed, it was not a final order, and was not retroactive rate making or procedurally unfair.
>
> Consequently, the Board considers that a DGA has not been subject to any limitation regarding jurisdiction either by way of legislation, past Board decision or court ruling which would have prevented the Board from considering prior period adjustments to a DGA. In fact the Board has dealt with prior period adjustments to DGAs since their inception in 1987, with the prior periods being of varying lengths.

p. 4 (emphasis added).

[22] The Board adopted a general limitation period of two years prior to the effective date of the proposed GCRR for refunds to and recoveries from consumers. It permitted applications for

> approval of an adjustment to the DGA, where the cause of the adjustment originates outside the two-year limitation period, provided the following conditions are met:
>
> > (a) the adjustment sought exceeds the threshold value by being greater than 5% of the average monthly DGA gas commodity costs of the previous 12 months; and
> >
> > (b) the adjustment arose from special circumstances that were not within the utility's control.

p. 17

[23] As regards possible 'inter-generational equity' issues (a concept discussed more fully at para. 48 that means utility consumers should pay the costs associated with *their* consumption of the service, and future consumers should not benefit from or be burdened by the cost of services consumed by past consumers), the Board said at p. 12:

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> While intergenerational equity questions ... arise ... particularly in relation to deferral accounts, the Board believes in this case that the imposition of a limitation period for DGAs assists in addressing the intergenerational issue raised ... because it limits the adjustments in the ordinary course. [ATCO] is correct in pointing out that deferred accounts have an inherent intergenerational aspect; however, the Board considers that it is important to not allow too long a period before dealing with adjustments. [emphasis added]

DGA Reconsideration Decision (Decision 2008-001)

[24] Calgary was granted leave to appeal the DGA Decision on the question of whether the Board was authorized under its governing legislation to approve any of the adjustments to the Deferred Gas Account applied for by ATCO Gas. Following a hearing, this Court concluded that since the issue of the Board's jurisdiction to grant ATCO's May 2004 application had not been raised before the Board, the evidentiary record necessary for an appeal was lacking: *Calgary (City of) v. ATCO Gas and Pipelines Ltd.*, 2007 ABCA 133, 404 A.R. 317. The Court returned the matter to the Board, which then considered whether it was "authorized under its governing legislation to approve adjustments to the ATCO Gas DGA in 2005 for costs and expenses incurred between 199[9] and 2004": p. 2.

[25] Calgary argued that the Board's jurisdiction was limited by section 40 of the *Gas Utilities Act* (see para. 27) such that "the Board's jurisdiction to consider prior period financial activity of a utility is limited to a 12-month period, even when the financial activity occurs in a deferral account approved by the Board": p. 7. The Board disagreed, partly because of its interpretation of its broad statutory mandate to fix just and reasonable rates. The Board reasoned that DGAs would serve no purpose under Calgary's interpretation because section 40 specifically authorizes the Board to take into account excess revenues or losses in "the whole of the fiscal year" of the rate application (ss. 40(a)(i)) and in any consecutive two-year period thereto (ss. 40(a)(iii)).

[26] The Board reiterated its Limitations Decision's conclusion on jurisdiction, found above at para. 21.

Legislation

[27] When ATCO applied for this DGA adjustment in 2004, the relevant legislation provided (with emphasis):

***Alberta Energy and Utilities Board Act,* R.S.A. 2000. c. A-17**

Powers of the Board

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15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ... PUB that are granted or provided for by any enactment or by law.

[...]

(3) Without restricting subsection (1), the Board may do all or any of the following:

(a) make any order that the ... PUB may make under any enactment;
[...]
(d) with respect to an order made by the Board ... in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;
(e) make an order granting the whole or part only of the relief applied for;

[...]

26(1) Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.

***Gas Utilities Act*, R.S.A. 2000, c. G-5**

The word "Board" is defined as the Public Utilities Board in section 1(b).

Powers of Board

36 The Board ... may ...

(a) fix just and reasonable ... rates, ...
[...]
(e) require an owner of a gas utility to supply and deliver gas to the persons, for the purposes, at the rates, prices and charges and on the terms and conditions that the Board directs....

Rate base

37(1) In fixing just and reasonable rates ... the Board shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base. ...

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Schedule of rates

38(1) For the purpose of fixing the just and reasonable rates that may be charged to consumers of gas by an owner of a gas utility who purchases gas pursuant to a contract under which provision is made

> (a) for the progressive increase in the price of gas to the owner of the gas utility,
> (b) for an increase in the price of gas to the owner of the gas utility by reason of changes in any prices received by the owner on resale of the gas,
> (c) for an increase in the price of gas to the owner of the gas utility by reason of the payment of higher prices by any purchaser of gas in any gas producing area, or
> (d) for the redetermination of the price of gas to the owner of the gas utility either by agreement of the parties or pursuant to arbitration,

the Board ... may receive for filing a new schedule of rates that are alleged by the owner to be occasioned by the rise in the price required to be paid by the owner for purchased gas.

(2) The new schedule may be put into effect by the owner of the gas utility on receiving the approval of the Board to it ....

[...]

Excess revenues or losses

40 In fixing just and reasonable rates, tolls or charges ...,

> (a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of
>
> > (i) the whole of the fiscal year of the owner in which a proceeding is initiated ...,
> > (ii) a subsequent fiscal year of the owner, or
> > (iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,
>
> and need not consider the allocation of those revenues and costs to any part of that period,

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> [...]
>
> (c) the Board may give effect to that part of ... any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates ... that the Board determines has been due to undue delay in the hearing and determining of the matter, and
>
> (d) the Board shall by order approve
>
> (i) the method by which, and
> (ii) the period, including any subsequent fiscal period, during which,
>
> any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.

***Public Utilities Board Act,* R.S.A. 2000, c. P-45**

> **Jurisdiction and powers**
>
> 36(1) The Board has all the necessary jurisdiction and power
>
> (a) to deal with public utilities and the owners of them as provided in this Act; ....
>
> (2) In addition to the jurisdiction and powers mentioned in subsection (1), the Board has all necessary jurisdiction and powers to perform any duties that are assigned to it by statute ....
>
> [...]
>
> **Fixing of rates**
>
> 89 The Board ... may ...
>
> (a) <u>fix just and reasonable</u> ... <u>rates</u> ...

<u>Chronology of Legislation</u>

[28] Some of the following discussion refers to judicial interpretations of predecessor legislation. An understanding of those decisions requires an appreciation of the interaction between the earlier and current legislation.

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[29] Subsection 67(a) of the *Public Utilities* Act, R.S.A. 1955, c. 267 provided:

> 67. The Board ... may ...,
>
> > (a) fix just and reasonable individual rates ....

[30] Section 67 of the *Public Utilities Act* was amended in April 1959 by S.A. 1959, c. 73, s. 9 as follows:

> (a) by renumbering the present section as subsection (1), ... [in other words, s. 67(a) became s. 67(1)]
>
> (d) by adding immediately after the renumbered subsection (1) the following subsections: ...
>
> > (2) In fixing just and reasonable rates, ... the Board shall determine a rate base for the property of the proprietor ... and fix a fair return thereon.
> >
> > [...]
> >
> > (8) ... in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by a proprietor after an application has been made to the Board for the fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of the application.

[31] In 1960, the *Gas Utilities Act*, S.A. 1960, c. 37 was enacted and provided:

> **Powers of the Board**
>
> 27. The Board ... may ...
>
> > (a) fix just and reasonable individual rates ...
>
> **Rate base**
>
> 28.(1) In fixing just and reasonable rates ... the Board shall determine a rate base for the property of the owner that is used or required to be used in his services to the public within Alberta and fix a fair return thereon.
>
> **Excess revenue or losses**

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

[32] To summarize, the predecessor of present section 36 of the *Gas Utilities Act* (the power to set just and reasonable rates) is section 27 of the S.A. 1960 version of the *Gas Utilities Act*. The latter's predecessor is subsection 67(a) of the *Public Utilities Act* (later subsection 67(1)). The present section 37 of the *Gas Utilities Act* (fixing just and reasonable rates by determining rate base and fixing a fair return thereon) was section 28 in the S.A. 1960 version and it, in turn, was based on section 67(2) of the 1959 amendments to the *Public Utilities Act*. The predecessor to the present section 40 of the *Gas Utilities Act* is section 31 of S.A. 1960, which took its wording from ss. 67(8) of the 1959 amendments to the *Public Utilities Act*.

Discussion

[33] Calgary sees the central issue as the extent to which the Board can engage in retroactive ratemaking. ATCO says the appeal concerns an exercise of discretion by the Board. In my view, the appeal raises the following issues:

> (1) What is the source of the Board's jurisdiction over DGAs?
> (2) Did the Board retroactively change rates or did its decision have a prohibited effect?
> (3) What standard applies to this Court's review of the Board's decisions?
> (4) Against that standard, do the Board's decisions to allow ATCO to use the DGA to record transportation imbalances for 1999 to February 2004 warrant this Court's intervention?

The first two are threshold issues; if the decision under appeal falls because of the answer to either of them, the subsequent issues do not arise.

Issue 1. What is the source of the Board's jurisdiction over DGAs?

[34] Calgary acknowledges "the Board has jurisdiction to set up a DGA or what classes of costs or recoveries are to be included or how they are to be allocated.": Factum at para. 43. This Court implicitly approved the use of deferral accounts in regulated utility rate setting: *ATCO Electric Limited v. Alberta (Energy and Utilities Board)*, 2004 ABCA 215 at para. 26, 361 A.R. 1 ("*ATCO Electric*").

[35] That said, it is critical to identify the source of the Board's jurisdiction over deferral accounts. If it is section 40 of the *Gas Utilities Act*, time limits apply. If, as ATCO argues, it is sections 36 and 37, that legal impediment disappears.

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<u>A. Nature and Function of Deferral Accounts in Utility Regulation</u>

[36] A consideration of the nature and function of deferral accounts provides context:

> Deferral accounts allow a utility to accumulate variances between a utility's approved rate based on forecasted costs and the utility's actual costs for a given period. Typically, at the end of the period, a utility will then collect from customers through a rate rider any balances in the deferral accounts owing by them and refund any balances owing to them.
>
> *ATCO Electric* at para. 26.

> In Alberta, utilities are usually regulated using a future test year regulatory framework in which the Board approves a forecast of a utility's revenue requirements that equates to a forecast of its future costs. However, if the Board is unable to determine a just and reasonable forecast, deferral accounts may be established to deal with uncertain items. In this case, due to the inability to accurately forecast pool prices, deferral accounts were created for 1999 and 2000 ...
>
> *Epcor Generation Inc. v. Alberta (Energy and Utilities Board)*, 2003 ABCA 374 at para. 2, 346 A.R. 281 ("*Epcor*").

> [D]eferral accounts ... are accepted regulatory tools, available as a part of ... rate-setting powers ... [they] ...'enabl[e] a regulator to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test year' [citation omitted]. They have traditionally protected against future eventualities, particularly the difference between forecasted and actual costs and revenues, allowing a regulator to shift costs and expenses from one regulatory period to another.
>
> *Bell Canada v. Bell Aliant Regional Communications,* 2009 SCC 40, [2009] 2 S.C.R. 764 at para. 54 ("*Bell Aliant*").

[37] To summarize to this point, descriptions of the general purpose of deferral accounts and the history of this DGA shows that DGAs in gas utility regulation exist to ensure that consumers pay the cost of the gas they consume, with no resulting profit or loss to the utility's shareholders. This general objective has been fully supported by the courts: *ATCO Electric, Epcor, Bell Aliant*, *City of Edmonton, infra.*

<u>B. Source of the Board's Authority</u>

[38] What, then, is the source of the Board's jurisdiction to permit the use of DGAs as a regulatory tool? As outlined above at para. 3, the DGA at issue was approved in 1988. Nevertheless,

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before 1988 the Board employed tools with a similar function to regulate gas utilities. Judicial views about the source of the Board's authority to use those tools are instructive.

[39] In the late 1950s the Board proposed a "purchased gas adjustment clause". It would permit the utility to recoup from consumers in the future amounts the utility had to pay for gas that proved more expensive than the utility's estimates, and to refund amounts to consumers if the estimates proved to be greater than the actual cost: *City of Edmonton et al. v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392 at 396-397, 28 D.L.R. (2d) 125 ("*City of Edmonton*"). The Board's jurisdiction to approve such a device was upheld by the Supreme Court, which said that its purpose was to:

> ensure that the utility should from year to year be enabled to realize, as nearly as may be, the fair return mentioned in [s. 67(2)] and to comply with the Board's duty ... to permit this to be done. How this should be accomplished...was an administrative matter for the Board to determine ... under the powers ... to fix just and reasonable rates which would yield the fair return mentioned in s. 67(2).

Id at 406-407 with emphasis added.

The counterparts to the section referred to in this passage are the present sections 36(a) and 37 of the *Gas Utilities Act*.

[40] In *Bell Aliant*, the telecommunication regulator, the Canadian Radio Television and Telecommunications Commission's ("CRTC") source of authority to establish deferral accounts was held to be the combined effect of sections 27 and 37(1) of the *Telecommunications Act*, S.C. 1993, c. 38: para. 37. Section 27(1) concerns setting just and reasonable rates, while section 37(1) permits the CRTC to require carriers to adopt any method of identifying the costs of providing services and to adopt any accounting method. The Court added that the "guiding rule of rate-setting under the *Telecommunications Act* is that the rates be 'just and reasonable', a longstanding regulatory principle.": para. 30. The authority to establish the accounts "necessarily includes the disposition of the funds they contain.": *Ibid*.

[41] These cases suggest that the Board's authority over DGAs flows from its power to set just and reasonable rates and a fair rate of return on rate base found in sections 36 and 37 of the *Gas Utilities Act*. Underlying that mandate is the "regulatory compact":

> 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.

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140 ("*Stores Block*") at para. 63.

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[42] I agree with ATCO that the Board's authority over DGAs does not come from section 40. Although that provision uses broad language, its function is limited. It permits, among other things, consideration of utility's revenues and costs for the whole fiscal year in which an application for rates is made. It also authorizes adjustments for regulatory lag, that is, the difference between rates the utility seeks when its general rate application is made, and those appropriate when the rates are approved. But it does not limit the Board's general authority to employ other tools (such as the gas purchase adjustment clause and DGAs) that assist in the discharge of its obligation to set just and reasonable rates.

[43] It is worth repeating that this principle flows from *City of Edmonton*, where the Supreme Court considered the newly enacted section 67(8) of the *Public Utilities Act* (section 40's predecessor) in conjunction with the recovery of 1959 transitional losses which arose as a result of the 15-month delay between the utility's rate application (June 1958) and the rate approval (September 1959). As to the second issue before the Court, the Board's jurisdiction to permit the establishment of the gas purchase adjustment clause (the DGA's predecessor), the Court referred to "s. 67(2) of the 1959 amendment" (which the Court of Appeal found did not grant the Board the necessary jurisdiction to permit the gas purchase adjustment clause) and held at 407 (emphasis added):

> With great respect, however, the proposed order [establishing the gas purchase adjustment clause] would be made in an attempt to ensure that the utility should from year to year be enabled to realize, as nearly as may be, the fair return mentioned in that subsection and to comply with the Board's duty to permit this to be done. How this should be accomplished, when the prospective outlay for gas purchases was impossible to determine in advance with reasonable certainty, was an administrative matter for the Board to determine, in my opinion. This, it would appear, it proposed to do in a practical manner which would, in its judgment, be fair alike to the utility and the consumer.
>
> ... the Board ... propose[s] to make the order under the powers given to it and the duty imposed upon it by the sections to which I have referred to fix just and reasonable rates which would yield the fair return mentioned in s. 67(2).

[44] Calgary argues against reliance on sections 36 and 37 as the source of the Board's authority because of the Supreme Court's admonition against employing general statutory authority to ground the exercise of overly-broad Board powers, see e.g., *Stores Block* at para. 50. Elsewhere in the same decision, however, the Court emphasized the need to determine whether the exercise of the proposed power is a "practical necessity for the regulatory body to accomplish the object prescribed by

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legislation": para. 77. According to the majority, such necessity was lacking in *Stores Block*. Here, for reasons outlined above at paras. 36-37, the use of DGAs is required if the Board is to regulate utilities effectively. Moreover, in *Bell Aliant*, Abella J. explained at paras. 51 - 53 that *Stores Block* did not "preclude the pursuit of public interest objectives through rate-setting". She contrasted *Stores Block* by pointing out that in *Bell Aliant*, the CRTC's rate-setting authority and its ability to establish deferral accounts for that purpose were at the very core of its competence. The same holds true in this case.

Issue 2. Did the Board retroactively change rates or did its decision have a prohibited effect?

[45] Calgary argues that by permitting ATCO to use the DGA to make adjustments going back several years the Board engaged in prohibited ratemaking because, in the result, ATCO's present consumers must make up for a past shortfall. I do not agree. I have already explained why I think its power to set just and reasonable rates allowed it to authorize the use of DGAs. It follows that its further orders about *how* to use a DGA did not constitute prohibited ratemaking. As discussed at paras. 69-71, however, this does not mean that the effect of its decision on future ratepayers is irrelevant in determining whether the Board reasonably exercised its powers over the DGA.

[46] 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*").

[47] 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.

[48] 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). "[T]oday's customers ought not to be held responsible for expenses associated with services provided to yesterday's customers": Yvonne Penning, *"The 1986 Bell Rate Case: Can Economic Policy and Legal Formalism be Reconciled*" (1989), 47(2) U.T. Fac. L. Rev. 607 at 610. This is sometimes referred to as the problem of inter-generational equity (which the Board discusses at p. 12 of the Limitations Decision reproduced at para. 23).

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[49] 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: *City of Edmonton* at 402.

[50] In this case, the proposed accounting adjustments had retrospective effect: past costs would be borne by ATCO's present southern Alberta consumers, not the 1999 - 2004 consumers who received gas utility services when ATCO's gas costs were incurred.

[51] In summary, whether termed retrospective or retroactive ratemaking, imposing gas cost shortfalls or surpluses incurred by past consumers on future consumers is generally prohibited. Although this prohibition against retroactive and retrospective ratemaking is relatively clear, how to apply it in practice is less so. A review of key cases illustrates the complexity.

[52] A one-time credit order for consumers was upheld despite the fact that it was "retrospective in the sense that its purpose is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive": *Bell Canada 1989* at 1749. Although the Board's review was retrospective in manner, the credit order was approved through an adjustment to interim rates. The Supreme Court stressed that the regulator had consistently stated its intention to review the interim rates: at 1755. Gonthier J. stated at 1752:

> ... one of the differences between interim and final orders must be that interim decisions may be reviewed and modified in a retrospective manner by a final decision. It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order... the words "further directions" do not have any magical, retrospective content. ... <u>It is the interim nature of the order which makes it subject to further retrospective directions</u>. [emphasis added]

[53] In *Bell Aliant*, the Supreme Court also upheld a CRTC decision to order the disposition of funds that had accumulated in a deferral account. The Court rejected the argument that this constituted retrospective rate-setting because the rates had already been finalized. Abella J. pointed out that it was known at the outset that the CRTC would make subsequent orders about how to use the balance in the deferral accounts. At para. 63 she added (citations omitted and emphasis added):

> In my view, the <u>credits ordered out of the deferral accounts in the case before us are neither retroactive nor retrospective. They do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures, since these credits or reductions were contemplated as a possible disposition of the deferral account balances from the beginning</u>. These funds can properly be characterized as encumbered revenues, because the rates always remained subject to the deferral accounts mechanism established in the Price Caps Decision. <u>The use of deferral accounts therefore</u>

> precludes a finding of retroactivity or retrospectivity. Furthermore, using deferral accounts to account for the difference between forecast and actual costs and revenues has traditionally been held not to constitute retroactive rate-setting ...

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[54] Calgary argues that cases such as *Bell Canada 1989, Coseka* and *Bell Aliant* are distinguishable. The first two involved interim rather than final rates. In *Coseka*, it was pointed out at para. 36 that consumers must be aware that interim rates may be subject to change. As for *Bell Aliant*, all the parties knew in advance that the telecommunications companies would be obliged to use the balance of the deferral accounts in accordance with subsequent regulatory decisions: para. 61.

[55] Calgary suggests that gas rates here had long been finalized because the DGA had been reconciled in accordance with the Board's earlier orders that required forecast and actual gas costs to reconciled on a three-month rolling basis (see Decision 2001-75 at p. 64). It adds that when the seasonal or monthly DGA/GCRR process was approved it was not expressed to involve interim rates, therefore by definition the rates must be final: Factum at para 67.

[56] In *Epcor* Fruman J.A. opined that whether deferred accounts are interim or final depends on the facts: para. 15. The material before the Court makes such a determination impossible. Language in the 1988 decision quoted above at para. 4 suggests that the use of the DGA involved interim rates, but that language is vague. In the DGA Decision, the Board noted in section 4.2 ATCO's argument that deferral accounts are by nature interim and therefore not retroactive. Unfortunately, the Board did not express its views on this topic.

[57] Both *Bell Canada 1989* and *Bell Aliant* (which concerned deferral accounts rather than interim rates) illustrate the same preoccupation: were the affected parties aware that the rates were subject to change? If so, the concerns about predictability and unfairness that underlie the prohibitions against retroactive and retrospective ratemaking become less significant.

[58] Were these parties aware that gas rates were potentially subject to change through the use of the DGA? If so, whether the rates are characterized as interim or final, the principles in *Bell Aliant* govern.

[59] The history of DGAs demonstrates that affected parties knew they would be used from time to time to alter gas rates based on later, actual gas costs. Indeed, the Board so found as a fact in the Limitations Decision at p. 4. It adopted the reasoning from that decision in the Reconsideration Decision. The Board's fact findings are not appealable: *Alberta Energy and Utilities Board Act*, s. 26(1).

[60] Reconciliation of the DGA/GCRR would sometimes benefit consumers and sometimes not. Gas rates sometimes changed because of the lack of predictability (volatility) in gas prices and sometimes from other factors such as measuring errors. Whatever the cause, the objective was to ensure that the consumer paid the actual cost of the gas. This legitimate object was accepted by all

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parties. It strengthened the utility regulatory system by ensuring that the utility received a fair rate of return on its rate base.

[61] Therefore, whether the rates should be characterized as final or interim, the use of the DGA in this case did not involve prohibited ratemaking.

Issue 3 - What standard applies to this Court's review of the Board's decisions?

[62] The conclusion that the Board had jurisdiction to make the orders about the use of the DGA, and did not thereby engage in prohibited ratemaking, suggests that the reasonableness standard of review should be applied.

[63] Abella J. employed this standard in *Bell Aliant* because, in her view, the issues went to the heart of the CRTC's specialized expertise, "the methodology for setting rates and the allocation of proceeds derived from those rates, a polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake.": para. 38, see also para. 56. The same point applies here.

[64] Reinforcing this conclusion are the reasons given for applying the reasonableness standard in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 200, 433 A.R. 183 at paras. 15 - 18 (leave to appeal refused [2008] S.C.C.A. No. 347). See also *ATCO Electric*, where the Court determined in its standard of review analysis that "[w]ith ... the widespread use of deferral accounts, determining the appropriate methodology to be used in calculating prudent costs of financing these deferral accounts engages the Board's specialized expertise.": para. 63. Reasonableness is also the standard applied to a gas regulator's decision to permit a utility to recover material and previously unrecorded costs for the provision of gas services: *Natural Resource Gas Ltd. v. Ontario (Energy Board)* (2006), 214 O.A.C. 236, 149 A.C.W.S. (3d) 889.

Issue 4. Has the reasonableness standard been breached ?

[65]

> Reasonableness is a deferential standard ... A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. ... [R]easonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47.

In my view, this standard has been breached.

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[66] The Board's sole justification for permitting ATCO to recoup eighty-five percent of the gas costs it sought from present consumers is found in the following passage of the DGA Decision at p. 11:

> ... the Board must remain mindful of the essential nature of the DGA as a deferral account and the allowances in the past of certain prior period adjustments spanning a number of years. Accordingly, the Board is inclined to allow [ATCO] substantial recovery of the applied for prior period adjustments.

Stripped to its essentials, two reasons emerge: the nature of the DGA as a deferral account and the fact that the DGA had been used in the past to make adjustments over several years.

[67] Presumably the "nature of the DGA" point refers to the Board's historical assessment of the DGA contained in section 2.3, entitled "Nature of DGA Adjustments & Recovery Period". In that section, the Board examined the purpose of the DGA when approved in 1988: "reconciling actual costs of gas incurred by a utility with forecasts that it used in setting a GCRR, i.e. the rate it used to recover the commodity costs of gas from sales customers." In describing the change made in 2001 (altering the reconciliation period from a seasonal to a monthly basis), the Board repeated that the purpose of DGA adjustments was "to allow for forecasting inaccuracies, relative to the timing of actual gas acquisition costs incurred". It is manifest that the costs approved in the decisions under appeal did not fall within the original purpose of the DGA, namely, adjusting for gas price volatility.

[68] That brought the Board to its second point, that "during the approximate 16 years that the DGA has been in place, it has been used to update adjusted imbalance amounts from shippers, producers and interconnecting pipelines.": *Id* at p. 10. Usually those adjustments were made within a reasonable time, although sometimes the periods exceeded one year. This observation boils down to "we previously permitted adjustments over longer periods, so we will do so here".

[69] Set against these two rationales for granting the bulk of ATCO's application are the Board's many other comments:

- DGAs have evolved into a vehicle to fix all possible gas cost errors and pass them on to consumers;
- when first implemented reconciliations of the DGA were not expected to go back further than 12 months. Longer periods were sometimes accepted under special circumstances
- the DGA "was never set up with the intention of permitting all prior period accounting errors, particularly those that would have been subject to ATCO's management and control";
- accounting errors should typically be absorbed by the utility's shareholders;
- the DGA should not be treated as a catch-all for fixing errors, including those with a long history or resulting from human error, when adequate processes have not been in place to capture and correct the problem at an early stage;
- seven years represents a significant lag presenting obvious inter-generational equity issues;

- ATCO had an onus to ensure the System was working properly and was providing correct data;
- it did not appear that ATCO implemented an appropriate and timely review process for System design;
- there was no evidence of actual internal or external audits being performed to ensure the design was valid as the System was being put into service; and
- between 1998 and 2002 there was a lack of oversight by ATCO to test and develop appropriate controls to ensure that the System output generated was as intended.

[70] Mirroring these observations were the Board's reasons for concluding that ATCO should bear fifteen percent of the costs claimed:

- it doubted whether it could rely on ATCO's revised imbalance amounts;
- little on the record demonstrated the extent to which the numbers were faulty, perhaps partly because of ATCO's unilateral actions in destroying data;
- there was no demonstration that the System report was adequately tested at the time of inception;
- the System lacked audits;
- ATCO lacked adequate internal controls and supervisory systems;
- there was inadequate proof of corrections and opening balances; and
- there was a lengthy delay in discovering the errors.

[71] In summary, the Board's own analysis highlights the accumulation of factors that make unreasonable its decision to allow ATCO to recover eighty-five percent of the transportation imbalances through the DGA. Unlike most previous uses of DGAs, these charges did not result from gas price volatility. Nor did they resemble other past uses of DGAs where errors were attributable to measuring equipment problems and where there had been no suggestion of utility fault. Here the failure to levy appropriate gas charges was entirely due to deficiencies within ATCO's own system, exacerbated by a long delay in discovering the problem. ATCO's destruction of data made data verification impossible. As a result of the delays, at least some who were not consumers when the problems originated would have to absorb the costs of ATCO's carelessness. 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.

[72] As outlined in para. 9, previous DGA decisions took account of matters such as the amount of the adjustment, the timeliness of the application, the extent to which the utility acted responsibly, foreseeability of the problem, and whether consumers who received the service would bear the cost of the adjustment. When such factors are applied to this case, it is apparent why the Board's decision is not defensible on its facts.

[73] As the Board intimated, there are compelling reasons why this sort of loss should be borne by shareholders rather than long-after-the-fact consumers. Shareholders have the ability to control

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or at least influence ATCO's management practices. Consumers do not. Requiring consumers rather than shareholders to bear most of the loss does not encourage utilities to conduct operations in a careful, time-sensitive way. The Board itself appropriately observed at p. 5 of the DGA Decision that allowing ATCO (full) recovery "could be considered ... a reward for poor management".

[74] The Board's Limitations Decision at least partly addresses the above concerns because it generally limits DGA claims to a two-year period, except in special circumstances not within the utility's control. That decision is not subject to appeal and it would be inappropriate to comment on it further here. Nevertheless, it seems unlikely that the present DGA adjustments would have passed muster under the Board's criteria in the Limitations Decision.

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Procedural Matters

[75] I agree with Côté J.A's suggestion at para. 238 that the efficient disposition of an appeal can be hindered if parties neglect to provide sufficient copies of Extracts of Key Evidence in appeals like this that require only one copy of the Tribunal's record to be filed. In this case, that difficulty was largely alleviated because the key Board decisions were included in the parties' Books of Authorities.

Conclusion

[76] The appeal is allowed, the orders under appeal vacated and the matter returned to the Board for consideration in accordance with these reasons.

Appeal heard on January 13, 2010

Reasons filed at Calgary, Alberta
this 23rd day of April, 2010

Hunt J.A.

I concur:

Authorized to sign for: Paperny J.A.

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Reasons for Judgment Reserved of
The Honourable Mr. Justice Côté
Concurring in Part

A. Introduction and Issues

[77] This is an appeal from what was the Alberta Energy and Utilities Board, the rate-regulating tribunal for natural gas utilities. (Its name has changed over the years and is not up-to-date in the style of cause, but I will call it "the Commission".) The issue is whether that tribunal could let the utility company recover a lump sum from present consumers because of mistakes in accounting for past gas purchases by the utility company extending back about six years.

[78] Here is an overview of this judgment. Part B describes the odd and lax way in which the respondent utility's problem arose, and the Commission's three decisions about how to handle the utility's ensuing request, and agrees that the Commission's treatment is unreasonable. Part C describes how the Supreme Court of Canada and our Court of Appeal have consistently interpreted the governing statutes and barred retroactive rate-making; and the very limited amendments which the Legislature made in response. Part D describes Alberta's rate-making procedure and law, and shows how the decision under appeal is illegal because retroactive. Part E shows how the deferral accounts used here were created for very different purposes and long since reconciled, remaining almost by oversight. Part F describes the recent ***Bell*** decision and how it does not apply here. Part G similarly distinguishes two other decisions. Part H is about the standard of review. Part I is about the conclusion and remedy, and Part J makes some requests about procedure.

B. Facts

1. ATCO Finds Significant Error

[79] An outsider might suppose that it would not be particularly difficult for a gas public utility to keep track of how much gas it bought, sold or transported, particularly when it does not store any significant amount. Similarly, one supposes that the utility would have accounting records reliably keeping track of what it paid for the various amounts of gas which it got. This case suggests that at some times and places it may not be that easy or straightforward.

[80] One reason might be that the respondent ATCO divides its operations. A second reason may be that gas supply to consumers in Alberta has become more complex in the last generation. No longer is the owner of a pipe necessarily the owner of the gas flowing through it, and no longer is the owner of a local gas distribution pipe running under a street necessarily the vendor of the gas being bought by the consumers located on that street.

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[81] The Commission found a bigger third reason. ATCO had set up some inappropriate accounting systems to handle this situation, inconsistently administered them for years, and throughout made inadequate checks of their operation or adequacy. The Commission so finds in its 2005 decision (pp. 4-5, 7-8, 11-12 A.B. pp. F7-8, F10-11, F14-15).

[82] For many years, ATCO seems not to have realized the depth of these problems. Helped by some gentle prodding by the Commission in late 2003, ATCO and its outside accountants investigated their accounting problem more deeply. By early 2004, they recognized fairly serious accounting errors that ATCO had made in northern Alberta for all of the years 1998, 1999, 2000, 2001, 2002, 2003, and for early 2004. In the south, the problem started a year later than in the north, but also lasted until early 2004.

[83] The amounts were significant. ATCO's recalculations suggested that in southern Alberta its gas costs from 1999 to 2004 had in fact been a total of $11.6 million higher than it had recorded in any of its books or its regular filings with the Commission. In the north, they were almost $2 million lower for 1998 to 2004.

[84] In its first (2005) decision on the subject, the Commission (then the Alberta Energy and Utilities Board) explained the errors as follows.

> AG [ATCO Gas] submitted that there were two distinct aspects of imbalances: the management, control and reporting of other gas owners' imbalances that result from the shipment of other owners' gas through the pipeline network (collectively referred to herein as Transportation Processes), and the recognition of the effect that other gas owners' imbalances have on regulated gas supply procurement and the timing of cost recovery from regulated sales customers (DGA/GCRR Processes).
>
> AG submitted that other gas owners' imbalances were made up of transportation imbalances and exchange imbalances. Transportation imbalances are associated with active transportation contracts, which reflect the physical movement of gas through ATCO's pipeline system. AG described Transportation Processes as including, without limitation, measurement, nomination, allocation, reporting, preparing statements, invoicing and receiving payment from other gas owners who contract for transportation service. AG also noted that exchange imbalances are those associated with active exchange contracts, which reflect a physical swap of gas between ATCO and a counterparty and in which there are no monthly imbalance settlement provisions. (§ 2.1, p. 3, A.B. p. F6)

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* * *

> The Board [now the Commission] agrees with AG that this Application concerns the disconnection that occurred between the true and correct imbalances reported in the Transportation Processes. . . .
>
> (*id.* at p. 4, A.B. p. F7)

* * *

> . . . In addition, the Board notes that ATCO did not appear to take the appropriate action to modify the functionality of the TIS system with respect to Rate 11 delivery input which ultimately led AP [ATCO Pipelines] employees to input inaccurate delivery data in order to 'quiet' an error message.
>
> (*id.* at p. 5, A.B. p. F8)

2. ATCO Proposed to Pass on the Shortfall

[85] As a result of its belated discoveries, ATCO filed with the Commission's predecessor Application #1347852 of May 31, 2004. ATCO proposed a simple solution: to make ATCO's problem the consumers' problem. The rates for gas delivered from 1998 to 2003 had long since been fixed, charged, and paid, and the gas in question long since sold, delivered, billed, and paid for. Yet ATCO now wanted to turn its old long-undiscovered $11.6 million southern shortfall into a new additional lump-sum charge to present southern customers. Conversely, ATCO volunteered to give a rebate of almost $2 million to present northern customers.

3. The Commission's Three Decisions

[86] The Commission responded to ATCO's "error-correction" application in three decisions.

(a) "Imbalance Adjustments" April 2005 Decision # 2005-036

[87] In this decision, the Commission made fact-findings about the causes of the errors, which findings are not challenged on appeal by Calgary or ATCO. They reveal ATCO's multifold and long-lasting accounting inadequacies (pp. 7-8, 12 A.B. pp. F10-11, F15). The Commission found as follows:

> . . . The Board [now the Commission] considers that the error in the design of the TIS Report along with the management practices related to process control, including those related to the TIS Report, are of concern.

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> . . . The Board, however, notes a lack of documented audit evidence that would support the correctness of the imbalances reporting systems in the present case, and is thus concerned with the degree of accuracy that AG [ATCO Gas] contends exists for the present imbalances adjustments. Moreover, the Board is concerned with the amount of time, dating back to 1998, that it took ATCO to find, and ultimately make, the imbalances corrections.
>
> (2005 decision, p. 4, A.B. p. F7)
>
> The Board is troubled by what it considers to be **an apparent lack of diligence exhibited by either of AG or AP or both** of them over the reporting of imbalances in as much as the errors included in the review had occurred since at least 1998.
>
> (*id.* at p. 5, A.B. pp. F8, Emphasis added)
>
> * * *
>
> . . . The Board notes that AG stated in the Application that "ATCO found that the original design specification for the monthly TIS Report was not correct." This acknowledgment would indicate that before the imbalances problem was identified there had been a **lack of system control over, and audit of, the design**.
>
> . . . It appears to the Board that if AP employees had not entered the inaccurate Rate 11 delivery data, the incorrect TIS Report may not have been noticed by AG in the normal course of business, given that **it does not appear that ATCO tested or planned to test the integrity of the report** . . .
>
> (*id.* at p. 5, A.B. p. F8, Emphasis added)

[88] Yet the Commission did little about the utility's various longstanding accounting inadequacies. It merely deducted 15% as a penalty for them. Subject to that deduction, the Commission did as ATCO asked; it ordered the current southern customers to top up ATCO's profits by an amount equal to ATCO's past bookkeeping errors for those five or more past years.

[89] The Commission also allowed ATCO to give the current northern customers a rebate. The Commission did not mention the suggestion that the northern refund bear interest for all the years the utility company had had the funds (January 21, 2005 argument, Commission Record Tab 47, p. 29). Instead, the Commission did the reverse: it dictated that that consumer rebate would be **reduced** by 15% (p. 12, A.B. p. F15). There was no explanation for the reduction, and I cannot think of any logical one. It might have been the Commission's desire for aesthetic facial symmetry between north and south. It seems most unlikely that the Commission intended to penalize the northern consumers for ATCO's shortcomings. Maybe it was just an oversight. After various adjustments, on August 23,

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2005 the Commission fixed the northern refund at $541,000, and the leave to appeal does not cover the northern errors or rebate. No one in the north has appealed.

[90] The Commission noted that since 1987, ATCO has maintained a deferral account. It was originally set up to allow quick reconciliation of unpredictable fluctuating future gas purchase cost estimates, with actual costs for the same period. The Commission said the purpose for the account has nothing to do with the type of errors in question here, and that the accounts were never designed for purposes such as the current errors. See Part E below for details and citations.

[91] Though all the reconciliations of that deferral account had been completed years before, the Commission decided that the new error charge (and rebate) described above would be done through or because of that deferred account.

[92] Apart from background and recitals, the actual reasoning of the Commission in this 2005 decision was brief, and contained little or no explanation beyond that summarized here.

[93] In particular, these 2005 reasons said nothing about the rule against retroactivity, nor whether the governing legislation permits this sort of retroactive adjustment (going back some six or so years). However, the Commission did seem to suggest that such steps are retroactive rate adjustment for past years' errors: (2005 decision, § 2.8, first para., p. 14, A.B. p. F17).

[94] It is probably idle to speculate on the reasons for that significant omission.

[95] The Commission's later 2008 Decision says that no one raised the rule against retroactivity during this first (2004) application (2008 Decision §4.3, p. 7, A.B. p. F31). The Commission may have got that idea from allegations in ATCO's October 5, 2007 argument (Commission Record on present appeal, Tab 60, pp. 2, 5, 6). ATCO also alleged the same thing to this Court in 2007: see ATCO's February 22, 2007 factum filed for that previous appeal (pp. 1, 4, 7, 8, 9, 11; cf. p. 10). And cf. similar allegations in the Commission's February 21, 2007 factum (pp. 5, 6). The Commission evidently did not recall its own file (though its 2004-2005 record was consolidated with its 2007-2008 record).

[96] In fact, the various statements by ATCO and by the Commission alleging Calgary's silence are not correct. Calgary **did** argue the retroactivity issue during the first hearing, especially in its reply written argument of January 28, 2005 (Tab 50 of the Commission's Record). See especially pp. 2-3, quoting s. 40 of the *Gas Utilities Act*, the key legislation. The date, application number, and title of that written argument all confirm that it was filed for this first application which led to this first Commission decision in April 2005. The Commission's 2008 decision says that all argument to the Commission on this first 2004-2005 application had been written, not oral (pp. 2-3, A.B. pp. F5-F6).

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[97] ATCO's inaccurate allegations of Calgary's silence are puzzling. Maybe counsel relied on memory alone. Maybe they interpreted Calgary's written 2004-2005 argument in some unreasonable narrow fashion. And ATCO's 2007 factum may have used terms like "jurisdiction" in a narrow way (e.g. excluding non-jurisdictional Calgary arguments). (See Part D.9. below.) In any event, this is an appeal from the Commission's rehearing, and the "alleged silence" point no longer influences the result (if it ever did).

[98] The City of Calgary sought leave (May 30, 2005) and got leave (July 6, 2006: see 2006 ABCA 180) to appeal from this 2005 Commission decision. The Court of Appeal allowed the appeal. It said the question could not be decided on the record before the court, doubtless relying on ATCO's erroneous factum. The Court sent the matter back to the Commission to rehear and to reconsider: see 2007 ABCA 133, 404 A.R. 317.

[99] On August 23, 2005, the Commission gave decision 2005-093 approving ATCO's computation of the precise amounts ATCO would collect and refund under the April 2005 decision.

(b) "Limitation Period" May 2006 Decision #2006-042

[100] Meanwhile, the Commission itself was properly troubled by the implications of its 2005 precedent. If carried to its logical extreme, it could leave gas rates charged to consumers and payments by past customers forever open to alteration, approaching the lengthy uncertainties in Lord Eldon's Court of Chancery. The Commission therefore ordered a second application about whether the Commission should impose its own limitation period, maybe two years. (It proceeded under a further application which the Commission ordered ATCO to make.) Little was said about the existing limitation period (beginning of the fiscal year of application) found in the *Gas Utilities Act*, and described in Part C below.

[101] The Commission's decision on this limitation-period hearing was that the utilities statutes did not matter or apply, because of the old deferral account. So the Commission thought that the extent of retroactivity was more or less a matter of its own discretion. The Commission ordered that henceforth (not retroactively) there would sometimes be a new two-year limitation period for retroactive rate changes. I say "sometimes", because the two-year time limit would not apply where the adjustment sought was large and there were "special circumstances" not within the utility's control.

[102] It is not clear whether the "special circumstances" phrase referred to what caused the initial problem, or why the application was made after the expiry of two years.

[103] I note that ATCO's limitation-period application was filed after Calgary moved for leave to appeal from the Commission's first decision. And the Commission's reasons on that in May 2006 were almost a year after such leave was sought. The Commission likely knew of those events. But we have to look at the 2006 reasons because they are incorporated into the 2008 decision.

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[104] ATCO filed a motion in the Court of Appeal for leave to appeal this 2006 decision, but by agreement that motion was adjourned from time to time over the years, and was never heard (see 2008 Commission decision, p. 1). That motion was discontinued recently (February 12, 2010). ATCO later argued before the Commission that Calgary's not trying to appeal this 2006 decision somehow estopped it from questioning the 2005 Commission decision which it has twice appealed (October 5, 2007 argument, p. 6, para. 12, Commission Record Tab 60). I cannot see the logic of that, nor do I recall any law to support it (and none was cited). In any event, no such argument was put to the Court of Appeal on this appeal.

(c) "Reconsideration" January 2008 Decision #2008-001

[105] This third Commission decision is the fruit of the rehearing directed by the Court of Appeal, as mentioned above (end of subpart (a)), and the consequent reconsideration application.

[106] The Commission refused to let Calgary file any more evidence, despite the Court of Appeal's 2007 direction. (That point is discussed further in Part E.4 below.)

[107] The Commission reached the same conclusion as it had in 2005. The key issue was retroactivity.

[108] Almost the only significant thing which the Commission said in 2008 about retroactivity was to quote what it had said on the subject in its 2006 limitations decision (subpart (b) above). That is two short paragraphs which read as follows:

> With regard to the issue of retroactive rate-making raised by Calgary, the Board [now the Commission] does not accept the position advanced by Calgary. The Board has broad discretion to set just and reasonable rates and, in the case of setting gas cost recovery and flow-through rates, sets these rates in accordance with the use of DGAs. In doing so, the deferral nature of the DGAs is specifically contemplated and acknowledged when the rates are set. Deferral accounts, by their nature, anticipate adjustments such as the ones at issue in this matter and, as such, cannot be said to constitute retroactive rate-making. The Supreme Court of Canada has approved the use of deferral accounts for gas and has further noted that such a mechanism is a purely administrative matter. In *Epcor Generation Inc. v. AEUB*, 2003 ABCA 374, the Alberta Court of Appeal adopted the same approach and stated that as the deferral account in issue in that decision was not closed, it was not a final order, and was not retroactive rate making or procedurally unfair.

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> Consequently, the Board considers that a DGA has not been subject to any limitation regarding jurisdiction either by way of legislation, past Board decision or court ruling which would have prevented the Board from considering prior period adjustments to a DGA. In fact, the Board has dealt with prior period adjustments to DGAs since their inception in 1987, with the prior periods being of varying lengths.
> (p. 4 of 2006 decision, § 3.1 near end, and quoted on pp. 7-8 of 2008 decision, A.B. pp. F31-32)

A Commission footnote says that the Supreme Court of Canada approval referred to in the quotation is in ***Edmonton v. N.W.U.L.*** [1961] S.C.R. 391.

[109] I am not certain, but the Commission's next 2008 paragraph seems to be about retroactivity as well. So I quote it:

> The provisions of the GUA and PUBA relied on by Calgary authorize the Board [now the Commission] to take into account financial information for the whole of the year in which a tariff application is filed in the event that the Board intends to approve a tariff effective prior to the date on which the tariff application is made. The "prior period" is limited to some period in the calendar year before the date of the application, depending on when the application might be filed in the calendar year. Strictly speaking, deferral accounts are unnecessary to account for financial activity in this period, so the Board does not find Calgary's argument persuasive on this basis.
> (p. 8, A.B. p. F32)

One curious feature of that paragraph is discussed at the end of Part D.6 below.

[110] There is another paragraph in the decision immediately after that one. I am not entirely certain how to interpret it. It contains some assertions and conclusions. But the only actual reason which I can find in it is one. I read it as saying that the Commission has often acted this way, and if it refused to do so now, it would bring into question its previous decisions.

[111] To sum up, the basic real reason given by the Commission was the idea that a deferred account bypasses the ordinary rule against retroactivity.

[112] Martin J.A. gave leave to appeal this 2008 Decision (order of July 2, 2009). That is the present appeal.

4. Unreasonable Decision

[113] Hunt J.A. concludes that the Commission's decision here is unreasonable. I agree with that conclusion, and with the reasons which she gives for finding unreasonableness. Many other things discussed in my reasons would also help to support that conclusion.

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C. Legislative History

1. Introduction

[114] The question of whether the impugned Commission decision violates the law forbidding retroactivity requires examining a number of aspects of the nature and policy of that law. I can best start with the history of the relevant legislation and the court decisions about it. That is what this Part C does.

[115] A half-century's dialogue between courts and the Legislature is outlined in subpart 2. It reveals a very clear picture. The courts found firm legislative limits which the Legislature adjusted only slightly, and otherwise confirmed, basically keeping them to the present day.

2. Chronology

(a) The *Public Utilities Act*, R.S.A. 1955 c. 267, s. 67 gave the Commission (then the Board of the Public Utilities Commissioners) general powers to fix utility rates, but said little express about time limits or retroactivity.

(b) March and August 1959 saw Commission decisions which were then appealed to the Court of Appeal, whose decision is described in (e) below.

(c) April 1959 the Legislature amended (c. 73, s. 9(d)) the *Public Utilities Act*, adding s. 67(8). Undue delay in hearing and deciding an application henceforth lets the Commission give effect to excess revenues or losses, incurred after filing a utility's rate application, when the Commission fixes just and reasonable rates.

(d) Legislature passed new *Gas Utilities Act* as 1960 c. 37. In its s. 31 has identical wording to the *Public Utilities Act* s. 67(8) just discussed (with one trivial exception).

(e) September 22, 1960 Appellate Division decided ***Edmonton v. N.W.U.L. (#2)*** 34 W.W.R. 241, considering items (b) and (c) above. The Supreme Court of Canada varied this decision on April 25, 1961 on other grounds (allowing a purchased-gas adjustment clause): [1961] S.C.R. 392, 34 W.W.R. 600. The Supreme Court of Canada held that utility rates must be based on an estimate of future expenses (p. 612 W.W.R.). It apparently accepted the proposition that until the 1959 amendment, the Commission had no power at all to make retroactive rates or allowances, not even for regulatory delay.

(f) Adoption of *Gas Utilities Act* R.S.A. 1970, c. 158, s. 31, which merely re-enacted 1960 c. 37, s. 31 (item (d) above) with no change.

(g) December 9, 1976: Appellate Division decided ***Northwestern Utilities v. Edmonton*** 2 A.R. 317. Its decision was not novel, and is similar to ***Calgary (City) v. Madison Nat. Gas Co.*** (1959) 28 W.W.R. 353, 360 (Alta. C.A.). The ***N.W.U.L.*** decision reversed a Commission decision, and held that unexpected shortfalls in revenue or unexpected expenses incurred by a utility before the date of the rate application cannot be considered (paras. 6, 25-26, 34). The Supreme Court of Canada affirmed the Appellate Division in late 1978: [1979] 1 S.C.R. 684, 12 A.R. 449. The Supreme Court explained the 1959 amendment: its scope is narrow.

(h) 1977: Legislature amended s. 31 of the *Gas Utilities Act*: see c. 9, s. 5(1), (2). That did not affect pending cases. Old s. 31 became new s. 31(c). The rest of the section was new.

(i) That new s. 31 (of 1977) became R.S.A. 1980, c. G-4, s. 32, with no significant change.

(j) That section became the present R.S.A. 2000, c. G-5, s. 40, with only minor changes in drafting style. The *Public Utilities Act*, R.S.A. 2000, c. P-45, s. 91 contains virtually identical words. Section 40 of the *Gas Utilities Act* now reads as follows:

> **40** In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility,
>
> (a) the Board may consider all revenues and costs of the owner that are in the Board's opinion **applicable to a period** consisting of
>
> (i) the whole of **the fiscal year of the owner in which a proceeding is initiated for the fixing of rates**, tolls or charges, or schedules of them,
>
> (ii) **a subsequent fiscal** year of the owner, or
>
> (iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

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and need not consider the allocation of those revenues and costs to any part of that period,

(b) the Board may give effect to that part of any **excess revenue received or any revenue deficiency incurred** by the owner that is in the Board's opinion applicable to the **whole of the fiscal year of the owner** in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines is just and reasonable,

(c) the Board may give effect to that part of any **excess revenue received or any revenue deficiency incurred** by the owner **after the date on which a proceeding is initiated for the fixing of rates**, tolls or charges, or schedules of them, that the Board determines has been **due to undue delay in the hearing and determining** of the matter, and

(d) the Board shall by order approve

(i) the method by which, and

(ii) the period, including any subsequent fiscal period, during which,

any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.
(Emphasis added)

(Presumably the last three lines should be indented more, but I quote them the way that they appear in the Revised Statutes of Alberta. The equivalent lines are indented more in the *Public Utilities Act*.)

3. Conclusion

[116] That legislative history shows that current s. 40 of the *Gas Utilities Act* is the Legislature's limited response to the decisions of the Court of Appeal and Supreme Court of Canada described above (in subpart 2). So the principle of the Court decisions has not changed. The only small change was that the time limits were extended slightly. Though **later** years' expenses or excess revenue can be considered (if they are consecutive), shortfalls or excesses in **previous** years' expenses or excess revenue are still off-limits (as always). Only shortfalls or excesses of revenues and costs back to the beginning of the fiscal year in which the application is filed, can be considered. That was the precise point in issue in the Court of Appeal decision of 1976 (and Supreme Court of Canada affirmation).

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That is the only legislative amendment to the Court decisions. New para. (d) on methods and periods is vague, but seems to be purely ancillary (on which see the ***Stores Block*** decision discussed in Part D.5 below).

[117] Given this history, this Alberta legislation is incompatible with any Commission power to take into account to base, or adjust, rates on actual shortfalls or excesses of revenues or expenses in a year earlier than the year in which the application by the utility is filed.

[118] Precedent is not the only reason for such rules. The Supreme Court of Canada's and this Court's decisions are based on fairness, certainty and logic. That is explained further below in Part D, which describes those court decisions more fully.

D. The Decision Appealed is Retroactive

1. Introduction

[119] This Part D approaches the whole topic of retroactivity from several directions. All these subtopics interlock. Retroactivity cannot be properly described without showing the basics of setting utility rates.

2. Final Prospective Rate-Making

[120] There are two ways in which one could regulate how much consumers pay for gas from public utilities. The usual and traditional way is to have rates fixed for a period, at least part of which period is in the future. Then one forecasts all the likely expenses (including cost of capital), and sets rates accordingly. There is some risk to the utility company, as it may get fewer revenues or higher expenses than forecast (or both). Conversely, the company also enjoys the chance of making a higher profit, if costs are below forecast, or revenues higher than forecast. That is the traditional way of making utility rates. (See further subpart 6 below.)

[121] That is also the practice with respect to Alberta natural gas rates, and the law requires that procedure. The Supreme Court of Canada explains that clearly in ***N.W.U.L. v. Edm. (City)*** [1979] 1 S.C.R. 684, 12 A.R. 449, on pp. 452 ff. (A.R.). I quote from that judgment (using A.R. para. numbers):

> [4] The Board [now the Commission] is by the [Gas Utilities Act] directed to "fix just and reasonable . . . rates, . . . tolls or charges . . ." which shall be imposed by the Company . . . The Board then estimates the total operating expenses incurred in operating the utility for the period in question. The total of these two quantities is the 'total revenue requirement' of the utility during a defined period. A rate or tariff of rates is then struck which in a defined prospective

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period will produce the total revenue requirement. The whole process is simply one of matching the anticipated revenue to be produced by the newly authorized future rates to future expenses of all kinds. Because such a matching process requires comparisons and estimates, a period in time must be used for analysis of past results and future estimates alike. . . . It is a process based on estimates of future expenses and future revenues. Both according to the evidence fluctuate seasonally and both vary according to many uncontrollable forces such as weather variations, cost of money, wage rate settlements and many other factors. . . .

* * *

[5] While the Statute does not precisely so state, **the general pattern of its directing and empowering provisions is phrased in prospective terms. Apart from s. 31 [now s. 40] there is nothing in the *Act* to indicate any power in the Board to establish rates retrospectively in the sense of enabling the utility to recover a loss of any kind which crystallized prior to the date of the application** (*vide: City of Edmonton et al. v. Northwestern Utilities Limited,* [1961] S.C.R. 392, *per* Locke J. at 401, 402).

[6] The rate-fixing process was described before this Court by the Board as follows:

> The PUB approves or fixed utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. . . . The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the estimates of "forecast revenue requirement". These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. . . .

[7] The statutory pattern is founded upon the concept of the establishment of rates *in futuro* for the recovery of the total forecast revenue requirement of the utility as determined by the Board. The establishment of the rates is thus a matching process whereby

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> forecast revenues under the proposed rates will match the total revenue requirement of the utility. It is clear from many provisions of *The Gas Utilities Act* that **the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods. There are many provisions in the *Act* which make this clear** . . . Section 32 likewise refers to rates "to be imposed thereafter by a gas utility".
>
> * * *
>
> [22] It is conceded of course that the Act does not prevent the Board from taking into account past experience in order to forecast more accurately future revenues and expenses of a utility. **It is quite a different thing to design a future rate to recover for the utility a 'loss' incurred or a revenue deficiency suffered in a period preceding the date of a current application. A crystallized or capitalized loss is, in any case, to be excluded from inclusion in the rate base and therefore may not be reflected in rates to be established for future periods**. (emphasis added)

See also Netz, "Price Regulation: a (Non-Technical Overview)", in *Encyclopedia of Law and Economics* 396 (2000), at 401-03. (A version of that paper is cited in the ***Stores Block*** decision of the Supreme Court of Canada, *infra*.)

[122] The word "losses" above is ambiguous. In such discussions of retroactivity, it does **not** have its ordinary meaning of a business not so much as breaking even and running at a loss. Instead, the "losses" referred to in this particular context mean actually making less money in a period than had been forecast for that period, because expenses proved larger than anticipated, or revenues proved smaller than anticipated. See ***N.W.U.L. v. Edmonton*** (1979), *supra* (p. 455 A.R. para. 10, p. 693 S.C.R.). So it can readily refer to a company which is operating at a profit and making a significant return on its investment.

[123] The above shows that even the small degree of retrospectivity permitted by the 1959 and 1977 *Gas Utilities Act* amendments is more limited than it sounds. Rates come into force in the future, and are intended to reflect estimates of **future** costs revenues and conditions when they are in force. The rule against looking at losses (or extra profits) which occurred before the application date is not arbitrary; in part it reflects that rule of future rate-making. Past ongoing expenses can be looked at when predicting future ones, but past unexpected shortfalls (one-time events) in general can never be recovered. I return to the stages of the rate-making process, and some confusion about it in subpart 6 below.

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[124] That is orthodox and traditional rate-making law: see 1 Priest, *Principles of Pub. Util. Regulation* 75, including n. 102 (1969); Netz, *loc. cit. supra*. And see subpart 4 below. The legislation confirms that law. What was referred to in the earlier court decisions as s. 31 or s. 32 of the *Gas Utilities Act* is now s. 40. It requires "rates, tolls or charges . . . **to be** imposed, observed and followed **afterwards** by an owner of a gas utility." (emphasis added)

[125] The Supreme Court of Canada's 1979 ***N.W.U.L.*** decision then quoted with approval another decision of this Court also explaining the 1959 amendment to the legislation:

> . . . It was to deal with rates prospectively and having done so, so far as that particular application is concerned, it ceased to have any further control. To give the Board [now the Commission] retrospective control would require clear language and there is here a complete absence of any intention to so empower the Board.
> – ***Calgary (City) v. Madison Nat. Gas Co.*** (1959) 28 W.W.R. 353, 19 D.L.R. (2d) 655, 661 (quoted at end of para. 7 (A.R.) of the Supreme Court of Canada's 1979 ***N.W.U.L.*** decision)

[126] The Supreme Court also quoted with approval another decision of this Court on the unfairness of retroactive rate hikes:

> One effect of this ruling is that future consumers will have to pay for their gas a sum of money which equals that which consumers prior to August 31, 1959 ought to have paid but did not pay for gas they had used. In short, the undercharge to one group of consumers for gas used in the past is to become an overcharge to another group on gas it uses in the future. When the Board capitalized this sum, it made all the future consumers debtors to the company for the total amount of the deficiency, payable ratably with interest from their respective future gas consumption.
> – ***Re N.W.U.L.*** (1961) 34 W.W.R. 241, 25 D.L.R. (2d) 262, 290 (quoted in para. 21 (A.R.) of Supreme Court of Canada's 1979 ***N.W.U.L.*** decision)

[127] That danger is acute here, with 2005 customers asked to pay what 1999 customers consumed but allegedly did not pay. And Calgary has a very mobile population and grew rapidly through the early 2000s.

3. Cost-Plus Billing

[128] If one were to ignore all the law above, in theory gas utilities could instead use a different system. Consumers could pay them for gas on a cost-plus basis. Cost-plus is the way that

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government contractors like to be paid, and that law firms often charge. In theory, one could simply set rates for each year after the fact, once all the gas had been consumed, and all the consumption and expense figures were in and verified. In the meantime, consumers would merely pay something on account, and have the actual final figure adjusted later by a refund or extra charge.

[129] Such a full cost-plus system would be novel in public utilities. And probably unworkable if done openly. But, in my view, ATCO's request which the Commission approved here is perilously close to that in all but name. That is not just my speculation. The Commission more or less said so itself, in its 2005 decision (p. 10, A.B. p. F13), and its 2006 decision (p. 2), both quoted in Part E.2 below.

[130] The cost-plus system has dangers. Of course one is the intergenerational expropriation referred to by this Court, and by the Supreme Court of Canada (in its ***N.W.U.L.*** 1979 para. 21 quoted at the end of subpart 2 above).

[131] When I discuss incentives at various places in this judgment, I am not imputing improper motives. A utility company is not a charity, and its directors and officers have a duty to its shareholders to maximize its profits (to the extent that the regulatory bodies and law and honesty permit).

[132] Here is another danger. If the utility ends by making a profit, and there is no automatic adjustment at year end, the utility can hope that no consumer group will make a fuss, and so the company can hang on to the profit. If consumers do apply to the Commission, the utility can suggest that it is too early to tell, and to wait a few years to see if arguable offsetting losses turn up elsewhere. So what revenues to offset against what expenses becomes almost arbitrary. Conversely, if the utility makes a loss at year end, it can apply immediately for an additional payment by consumers. The utility will have recourse to the regulator only when the facts mean that it will win and the consumers will lose. On the evils of changing the rules in mid-game, see MacAvoy and Sidak (2001) 22 Enr. L. Jo. 233, 238. Recall that the Alberta deferred rate account is just a number written in a book. It is not a trust account in a bank, or any other type of segregation of funds; nor is it even funds.

[133] And of course cost-plus billing contains no incentive to be economical. Cf. Netz, *loc. cit. supra*, at 403 ff.

[134] Therefore, routing later claims immediately through an old deferred account to give refunds or extract higher rates, in respect of profits or losses years before, in substance is no fixed rate at all (and so clearly illegal). At best it is simply basing rates to be paid in the future on failure to forecast expenses in past fiscal years. As noted above in Part C.2 and in Part D.2, the legislation forbids that. Section 40 of the current *Gas Utilities Act* (quoted in Part C.2) only lets that process look back to the beginning of the fiscal year in which the rate application was filed. I see no exception there for different accounting methods.

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4. Commission Powers are Confined by Legislative Aims

[135] In Parts C and D.2 above, I showed that the Supreme Court of Canada and this Court consistently barred retroactive rate-making in general, and banned increasing present rates to cover a past unexpected shortfall in particular, and showed how the Legislature affirmed that (with only small changes).

[136] The justice, consistency, and policy underlying those legal rules have since been explained by the Supreme Court of Canada. It also shows how to interpret such legislation. Its latest decision on the Alberta régime in general, and gas utilities in particular, is the "***Stores Block***" decision, cited as ***ATCO Gas and Pipelines v. E.U.B.***, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293, 380 A.R. 1. It clearly sets out the Commission's proper approach.

[137] The Supreme Court there says that how much discretion utilities or other regulatory tribunals have varies from board to board, but each board must respect the limits of its jurisdiction, and can only act in areas where the Legislature has given it authority (paras. 2 and 35). Utilities regulators regulate rates to protect consumers from natural monopolies (para. 3).

[138] The Supreme Court of Canada says that though Alberta's *Alberta Energy and Utilities Board Act* and *Public Utilities Board Act* and *Gas Utilities Act* contain seemingly broad powers, that legislation must be interpreted within the entire context of the statutes, which balance need for consumer protection against owners' private property rights. The main function of the Commission is to fix just and reasonable rates, so ensuring dependable supply (paras. 7, 60). Therefore, imprecise undefined wide statutory provisions letting the Commission make any order, or impose any condition necessary in the public interest, do not give an unfettered discretion. They must be limited to the purpose of the legislation and the context of the regulatory scheme and principles generally applicable to regulatory matters (paras. 46, 48, 49, 50, 51, 60, 61, 64, 73-77). The "power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates" (para. 60).

[139] The Supreme Court then examines the history of the Alberta legislation, which is based on similar American traditional utilities rate-regulation legislation (para. 54). Such "public utilities are very limited in the actions they can take" and the Commission has no "discretion . . . to interfere with ownership rights" (para. 58). The 1995 (temporary) merger of the Public Utilities Commission and the Energy Resources Conservation Board (as the Alberta Energy Utilities Board) did not change that, says the Supreme Court (para. 59).

5. Shareholders' Risk

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[140] The law's time restrictions are neither mechanical, nor trivial. They are bound up with who enjoys windfall profits, and who risks losses or low returns on investment. The Supreme Court of Canada begins by describing the rate-making process:

> The [Commission] approves or fixes utility rates which are **estimated** to cover expenses plus yield the utility a fair return or profit. . . . The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined . . . In Phase II rates are set, which, under normal temperature conditions are **expected** to produce the estimates of '**forecast** revenue requirement'. These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.
> (“***Stores Block***”, 2006 SCC 4, para. 65, quoting the Supreme Court of Canada's 1979 ***N.W.U.L. v. Edm.*** decision, emphasis added)

[141] Then the Supreme Court shows that the object is to leave key risks to the equity holders, the utility shareholders:

> Despite the consideration of utility assets in the rate-setting process, **shareholders are the ones solely affected** when the actual profits or losses of such a sale are realized; the **utility absorbs losses and gains**, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality. (*id.* at para. 69, emphasis added)

[142] Therefore, the Commission cannot act retroactively and offload risk onto consumers:

> . . . the Board [now Commission] was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. . . . **The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by the 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 throughout the various provinces that utilities boards do not have the authority to retroactively change rates** [citing ***N.W.U.L.***, ***Coseka***, and ***Dow*** cases]. But more importantly, it cannot even be

> said that there was over-compensation: the rate-setting process is a speculative procedure in which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility.
>
> (*id.* at para. 71, emphasis added)

[143] Striking for the present appeal is the Supreme Court's discussion shortly before that quotation. It says that the utility is not guaranteed a profit, nor a return on its assets, and is merely given a chance to earn them. The utility company owns the assets, and profits or losses accrue to the company (i.e. shareholders), not to the consumers.

> The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process . . .
>
> (*id.* at para. 67)

The customers have no ownership or equity; only shareholders do:

> Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only 'the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator'. (*id.* at para. 68)

[144] The long history of that policy and system are confirmed by an article (also quoted by the Supreme Court): MacAvoy and Sidak (2001) 22 Enr. L. Jo. 233, 235, 237, 241-42, 243-44, 245-46.

[145] This traditional prospective fixed rate-making provides very healthy incentives for the utility company and its shareholders and management. If the utility company can find ways to hold its expenses below those which were forecast, all the extra profit accrues to the shareholders and cannot later be confiscated. In the long run, that approach will benefit both the shareholders and the consumers. For a useful discussion of incentives, see Kahn, *The Economics of Regulation: Principles and Institutions*, v. 1, pp. 47-54, 101-09 (repr. MIT Press 1998).

[146] Besides incentives, that system also gives fairness to the utility company's shareholders. If applied consistently, it is just for everyone.

[147] Calgary's initial January 21, 2005 argument to the Commission (Tab 47, p. 3), pointed out that ATCO's 2004 error-correction application was in effect a request for a backstop guarantee against unexpected shortfalls in profit, citing previous Commission decisions. The Commission's 2005 decision does not mention that concern. The quotations from the Supreme Court of Canada

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above show the fundamental error in the Commission's 2008 decision now under appeal. And it is also virtually cost-plus billing, as noted in subpart D.3 above.

[148] Indeed, the Commission's own 2005 decision (being reconsidered here) admits that ATCO's proposal "replaced a prospective process where accounting errors, such as those that are the subject of the Application, should typically have been absorbed by the utility's shareholder" (p. 11, A.B. p. F14).

6. Stages of a Rate Hearing

[149] The term "retroactive" is misleading or confusing in some respects. It is conceivable that it led to some of the unexplained aspects of the present situation. Compounding the problem is the fact that several different things are involved. So expanding on what the Supreme Court of Canada said in ***Stores Block*** will increase clarity.

[150] I will outline simply the traditional and proper process to set or amend rates for a public gas utility in Alberta. (Legal authorities are found above, especially in Part C.2 and subparts D.2 and 5.)

> Step A: Utility completes fiscal years #1 and 2, and routinely files or publishes its financial results for those years.
>
> Step B: During fiscal year #3, Utility files an application to the Commission to increase its existing rates to consumers.
>
> (1) This application always includes (and must include) an **estimate** of what expenses, taxes and rate base will be during the (current) fiscal year #3, and during (upcoming) fiscal year #4.
>
> (2) If the Utility wishes, it may choose also to show the Commission that in the past, some of its expenses have been higher than had previously been forecast, or that some of its revenues have been lower than had previously been forecast. However, legislation and case law (see Part C above) allow the Commission to rely upon such discrepancies between past estimates and actual figures (revenue or expenses), only for two possible time periods:
>
> (a) the current fiscal year, during which the application was filed (i.e. fiscal year #3);
>
> (b) any period during which the current rate hearing is still going on, or the rate decision is standing reserved

> and not yet decided (i.e. fiscal year #3, and also year #4 up to date of decision).

> Step C: In Phase I, the Commission sets its own estimate of the expenses and taxes which the Utility will incur, e.g. in year #4, plus a reasonable rate of return on its investments (rate base) for the foreseeable period after the application date. That is a lump sum of future needed gross revenue per year (or month). Then in Phase II, the Commission estimates future gas consumption, and designs a set of rates which it estimates will produce that lump sum of needed gross revenue.

It will be seen from this outline that all rates are future.

[151] Typically, the word "retroactive" is used in this context to refer to something very specific. That is going outside the time limits in step B(2) above. For example, the Commission cannot set a rate which will yield more than the estimated **future** expense, taxes, and return on investment. It cannot do so even if it is proven that the utility earned much less in year #1 (or earlier) than had been estimated, or than the old rates were designed to cover. That is a past loss and is unrecoverable. Similarly, the Commission cannot set future rates which will yield less than estimated future expenses etc. on the ground that in the past year #1 (or earlier) the utility earned more than had been forecast.

[152] Those forbidden acts would not be "retroactive" (or retrospective) in all the common non-technical senses of the word. The common term "retroactive" is appropriate in two senses only. First, all rates should be for the future and known at the time that the consumer decides to consume some (or more) gas. Rates come into force only on the day they are announced (or a later day). (Interim rates are a partial exception, and ignored above for simplicity.) On any given day, a consumer knows what rates apply.

[153] The second meaning of "retroactive" is that already described above: that deviation between past estimates and past actual performance is no ground to change future rates for a later period.

[154] Therefore, one must not confuse two different topics:

> (1) First topic: whether **future** consumption or expenses will be the same as forecast now;
>
> (2) Second topic: whether **past** expenses were the same as previously forecast some years ago.

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The first topic (future uncertainty) is sometimes handled by purchased-gas adjustment clauses or deferred gas accounts for gas (raw material) expenses or allied topics. It is in effect a type of temporary interim rate. But the second topic (past discrepancies from budget) is never legitimately allowed for, so long as it is for a previous fiscal year. *A fortiori*, past accounting errors are even less legitimate a topic for later adjustment of rates (even by later surcharges to consumers or refunds to consumers).

[155] In my respectful view, what the Commission did here (at ATCO's request) is therefore forbidden by binding case law and statute in two respects.

[156] Written argument to the Commission was not exhaustive, and may not have spelled out every implication of these points. Possibly the Commission did not distinguish the "first topic" from the "second topic". Its actual reasons on this topic were not lengthy, but I note two things. In Part B.3(c), I quoted the middle paragraph of the Commission's 2008 reasons ("The provisions of the GUA and PUBA relied on . . ." p. 8, A.B. p. F32.) In the mention of retroactivity, note the phrase there "in the event that the [Commission] intends to approve a tariff effective prior to the date on which the tariff application is made." But no such condition or qualification exists in s. 40 or the case law. The time limit about past under-recoveries applies just as much to rates to come into effect later (as rates almost always do). Parts C and D show that at length. Little in the Commission's 2006 or 2008 reasons reviews or applies the full force of the law recited here in Parts C and D. And the original purpose of the deferred gas accounts (step B(1) above) morphed in 2005 into a repeal of the restrictions in step B(2) above.

7. Interim Rates

[157] For all the reasons above, the only legitimate exception to the bar on retroactivity which I see as even arguable, is interim rates.

[158] An interim order must later be replaced by a final order, and the rate will no longer be open to change. See ***Coseka Res. v. Saratoga*** (1981) 31 A.R. 541 (C.A.), and ***Calgary v. Madison*** (*supra*, Part D.2) at 662-63 (D.L.R.) cited with approval by the Supreme Court of Canada in ***Bell Can. v. R.*** [1989] 1 S.C.R. 1722, 1752h-1754f; and also see p. 17600g-1761a.

[159] ATCO's October 5, 2007 argument (Tab 60, paras. 23-26, p. 9) is about ***N.W.U.L. v. Edmonton*** [1961] S.C.R. 392. But that argument acknowledges that the rates dealt with there which were subject to the "purchased gas adjustment clause" were interim. Note Calgary's reply argument of October 12, 2007 (Tab 65) pp. 6-8.

[160] The term "interim" is ambiguous. But the traditional meaning is just that a full rate hearing would take too long, and the company cannot afford to go on that long under the old rates (especially in inflationary times). So a quick and approximate rate increase is put in, in the expectation these

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new rates will soon be replaced by more careful ones. That usefully leads to an overlapping topic, the purpose of deferral accounts.

[161] In Parts D.8 and E below, I show why the rates in question here were not interim, still less permissibly interim.

8. Function of Deferred Accounts

[162] The legitimate use of deferred gas accounts fits best here. I will discuss the history of these particular accounts below in Part E.

[163] Is a deferred account any exception to all the law given above? Only to a very limited degree. If the Commission sets an **interim** rate which must be later adjusted and made final, then everything done in the meantime under that interim rate is tentative. That creates two needs. First, the utility company's accounts must be flagged to show that. Second, it may be informative and useful to keep track of and total any discrepancies building up in the meantime, such as the difference between anticipated gas costs and actual gas costs. There are doubtless several methods which would meet those two needs; one method is a temporary deferred account to be adjusted and closed out when the final rate is set.

[164] Therefore, a legitimate deferred account is a result, not a cause; a mere tool, not an objective. Such an account does not cause or legitimize rate changes any more than fur hats cause or legitimize winter.

[165] It is one thing to create a deferred account at the outset of an **interim** rate, to specify what amounts it is to record during that period, and then at the end to reconcile and clear out the account by the final rate, in the way ordained at the outset.

[166] It is quite another thing to return later to a fixed **final** rate and change it after the fact by ordering premium payments by (or refunds to) consumers, and then to try to justify that by **creating** for the purpose a **new** deferred account, into which sums will be put retroactively and immediately be removed (by the premium or refund). And in substance it would be the same to find an old page still in the ledger, which had been created for a different specific purpose but long since closed out and reconciled, and then use it. In other words, retroactively to put into that page (account) the new sum and immediately take it out. That is wrong in principle and in law. It is just changing a final rate after the fact, even after the consumption. See Calgary's argument to the Commission of January 21, 2005, p. 2 (Commission Record, Tab 47).

[167] Any deferred account which is mere memorandum (calculation) by itself changes nothing, excuses nothing, and is at best a result, not a cause. But if it is regarded as unallocated funds whose later ownership depends on profits or losses, then it likely violates the Court of Appeal and Supreme Court of Canada rulings in ***Stores Block*** and similar decisions (in Parts D.2 and D.5 above). The

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refund here to the consumers of the unexpected profits plainly falls within that. And the reverse, recouping unexpected profit shortfalls in the deferred accounts, is an even bigger violation of that case law. So for those reasons, I do not see a deferred account as any licence to violate the usual legal rules barring retroactive rates or use of expense overruns too far back.

[168] What if the utility (with or without the permission of the Commission) were ahead of time to set up an unrestricted all-purpose "deferred account" intended to last indefinitely and to permit any rate to be adjusted later because of old events? In my view, that would be tantamount to a purported repeal of s. 40 and the Supreme Court of Canada decisions. No one but the Legislature has power to do that.

[169] ATCO suggested to the Commission that the 1987-1988 deferred gas accounts were not "closed" but "left open" (para. 28, p. 10, ATCO's October 5, 2007 argument, Comm. Record, Tab 60). The words "left open" are ambiguous. The account was still there, but the relevant years had been reconciled (cleared out) years ago. See Part E below, and the Appendix to this judgment. So in the meaningful sense, ATCO's submission was incorrect. It had some accuracy only in an irrelevant sense.

[170] ATCO's same argument (para. 31, p. 11) said that past rates are not changed by the DGA. In a sense, that is of course so. But it says that "future rates reflect, *inter alia*, prior period adjustments occurring . . . in the setting of future rates." That is precisely what the *Gas Utilities Act* and Supreme Court of Canada and Court of Appeal decisions all forbid. See Parts C and D.1-8 above.

[171] I stress that using a deferred account is the only real reason which the Commission gave for its 2008 Decision now under appeal.

9. Jurisdiction

[172] First, I put to one side a red herring. In its reasons under appeal, the Commission states (without citing authority) that there are no fixed rules about retroactivity, only discretion. The Commission says that such issues "are not, however, jurisdictional impediments" (second last para., p. 8, A.B. p. F32). That seems to echo part of what ATCO had argued (October 12, 2007 argument, p. 4, para. 8, Record Tab 64).

[173] The Commission's statement is irrelevant. Errors of law and errors of jurisdiction yield the same result on appeal (if clear and unreasonable). As shown above at great length, retroactivity violates a clear rule of law. This is an appeal, and this Court is not confined to questions of jurisdiction. It has power to reverse decisions of the Commission for errors of law: *Alberta Utilities Commission Act*, 2007, c. A-37.2, s. 29(1).

[174] Now I turn to another topic. I should emphasize that the above portions of my reasons do not find want of jurisdiction or power on the part of the Commission. The preceding parts of my

judgment are not a search for a power. So it cannot be a power which existed somewhere else. My suggestion is not a power, or jurisdiction. Instead, I find a legal statutory prohibition (statutory and judge-made).

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[175] That distinction imports two things. The first is that powers are very different from rights, and lack of power (technically called a "disability") is very different from a duty. A prohibition and a lack of power operate in different spheres entirely. A power is the **ability** to affect other people's legal position. A right or duty has to do with what the law **requires** or **forbids**.

[176] One can have a power but be under a legal duty not to use it, or not to use it a certain way. See *Dias on Jurisprudence*, 53-54, 56-57, 64 (4th ed. 1976) or pp. 33-34, 36-38, 43-44 (5th ed. 1985); *Salmond on Jurisprudence* 229-30 (12th ed. 1966). An example is an agent making a contract forbidden by the principal, but within the agent's authority. Another is a divorced spouse who cuts the children out of his will contrary to a contract with his ex-wife. (Of course, we must remember that the Commission is a tribunal, not a litigant.)

[177] The second thing flowing from rights vs. powers in this case is easy to overlook. I find an applicable statutory (and precedential) prohibition, not mere non-existence of a grant of power. In other words, I rely on the presence of an actual thing, not the absence of something. Silence in one place does not contradict an express statutory provision in another (whether the issue is powers or duties).

[178] Probably that is the key point. Existence of even one relevant statutory grant of power **upholds** a positive power; even one statutory provision **prevents** legal action if the statutory provision is a negative prohibition. So if the issue were whether a tribunal or person had **power** to do something, only one source of the power would be necessary, and would suffice. That the power came only from one source or location, would be irrelevant; one source or many would make no difference. If instead the issue is whether there is a statutory **prohibition**, then again it need only be found in one place. Even one such statutory provision means that the tribunal or person has **no** right, and the law forbids it to act. And the provisions on which I rely bar rates based on past losses or optimistic forecasts, not approve it.

[179] But there is one difference between the two situations. A statutory grant of power permits effective action; a restriction makes action illegal.

[180] An appeal from a tribunal's act will succeed if the tribunal lacked power, **or** if it contravened a statutory or judge-made legal prohibition, **or** both. So a tribunal acting within jurisdiction and with power, must be reversed if it violated a rule of law. The Court of Appeal must quash it.

[181] Here the Commission had and has **power** to regulate rates, to enter into a hearing of some sort, to prescribe accounting methods, and to grant a wide variety of remedies. The remedies which the Committee granted here were familiar and within its **powers**. None of that is the issue.

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[182] The whole issue is what legal rules that hearing was to follow, what considerations or facts were relevant or irrelevant, times for acting, and the limits on reversing earlier decisions. Violation of those legal rules likely produced no nullity. But such violation is illegality, and permits, indeed mandates, appellate reversal.

10. Conclusion

[183] This charge to the southern customers to reimburse ATCO for its various accounting deficiencies is illegal retroactive rate-making for ten reasons.

(a) It is all based on events long before the beginning of the fiscal year of the application, indeed totally outside any rate application. That contravenes all the law set out in Part C (history) and in subparts D.2 to D.6 above. If the adjustment application is even a rate application, it is a May 2004 application, but the adjustments go back to 1998 or 1999.

(b) The rates were final years ago, at the latest when the DGAs were reconciled monthly.

(c) The DGAs themselves were thus reconciled years before.

(d) The DGAs were never intended nor ordered to be used for this purpose. See Part D.8 above, and Part E below.

(e) ATCO's and even the Commission's reasoning would imply that the existence of this one continuous deferred account going back to 1987 or 1988 would leave open all future gas rates back to those years! That would be absurd.

(f) This is just errors from lax accounting, discovered belatedly.

(g) The Commission never even discussed the implications of the fact that on its own fact statements, this is basically cost-plus charges, not fixing rates. The essence of that is at best retroactive rates, at worst no rates at all. See Parts D.2, D.3, and D.5.

(h) The Commission shuffles the risk of shortfalls in profit onto the consumers (or rather different later consumers). See Parts D.3 and D.5.

(i) The Commission's reasons seem to contain errors on their face. See the end of Part D.6.

(j) This is clear and unreasonable error of law. See Part D.9.

E. History of Deferred Gas Accounts

1. Introduction

[184] Since the Commission later saw deferred accounts as a way to bypass the retroactivity rule, the nature and history of the accounts in question here is important.

[185] These accounts are so old that they were set up 22 years ago for different companies which once had the gas franchises which ATCO now enjoys.

2. Creation and Purpose

[186] I quote the Commission's own history of these accounts, to show that they were never intended for the present purposes, and had long since been reconciled (cleared out) for the years in question.

> DGA [deferred gas account] procedures were initially approved by the Board [now Commission] in 1987 and finally approved in 1988 **for the purpose of reconciling actual costs of gas incurred by a utility with forecasts that it used in setting a GCRR [Gas Cost Recovery Rate], i.e. the rate it used to recover the commodity costs of gas from sales customers**. These procedures ensured that customers paid only the actual cost of gas consumed by them. In addition, they ensured that the utility neither profited from nor suffered losses in the course of selling the gas. This premise currently remains in effect for the sale of gas under a regulated rate.
>
> **Initially, reconciliation of the DGA was made on a winter and summer seasonal basis** when the application for the respective period's GCRR was filed. **In 2001, the Board approved a change in the methodology for determination of a GCRR from a seasonal to a monthly basis**. This change in methodology was implemented in April 2002. The purpose of allowing prior period adjustments in the DGA was to allow for forecasting inaccuracies, relative to the timing of actual gas acquisition costs incurred, that would have otherwise impacted the determination of a GCRR.
>
> (2005 decision at p. 8, A.B. p. F11, emphasis added)

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The Board concluded from this prior decision that the DGA was not intended to be a permanent fixture, but was expected to be in place until the volatility of gas prices had decreased to a point where AG could revert to its previous practice of forecasting the gas costs on a prospective basis. The difference between the two practices was that prior to the implementation of the DGA, any difference between forecast and actual was to the account of the shareholder, whereas in the DGA process the differences fell to the account of the customer.

It is clear to the Board that the only purpose of the DGA was to provide a method of correcting the customer rates due to the volatility in the purchase price of natural gas.

(2005 decision at p. 10, A.B. p. F13)

* * *

. . . the Board must remain mindful of the essential nature of the DGA as a deferral account and the allowances in the past of certain prior period adjustments spanning a number of years.

(2005 decision at p. 11, A.B. p. F14)

* * *

Decision E88018, dated March 18, 1988 stated:

> **The DGA procedure was proposed [by AG's predecessors] to be in place until gas costs could be forecast with a reasonable degree of certainty**.

and in a later section also stated:

> [AG's predecessor] contended that once gas prices attain some stability and can be forecast with some degree of accuracy, there likely will be no need for a DGA type account. If a DGA mechanism is not approved, [the predecessor] suggested that there would be significant swings to its earnings. [The predecessor] confirmed that when the first reconciliation proceedings are held, the Board and the Intervenors may examine not only the projected gas costs for the next reconciliation period but also those costs that are related to the period under review. (Tr. p. 488) And further:
>
> > 'There's no attempt in the deferred gas account mechanism that's been proposed to bypass the

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> Board's ability to rule on the prudence of a cost.' (Tr. p. 489)

The Board concludes from this prior decision that **the DGA was not intended to be a permanent fixture, but was expected to be in place until the volatility of gas prices had decreased** to a point where AG could revert to its previous practice of forecasting the gas costs on a prospective basis. The difference between the two practices was that prior to the implementation of the DGA, any difference between forecast and actual was to the account of the shareholder, whereas **in the DGA process the differences fell to the account of the customer**.

It is clear to the Board that the only purpose of the DGA was to provide a method of correcting the customer rates due to the volatility in the purchase price of natural gas.
(*id.* at pp. 9-10, A.B. F12-13, emphasis added, footnotes omitted)

* * *

In some cases, . . . prior period adjustments have been specifically approved for imbalances resulting from measurement errors that have related to periods of over one year.
(2005 decision at pp. 10-11, F13-14)

* * *

Previous to the establishment of the DGAs, a utility treated all estimates for its gas supply, both volume and price, as prospective in its General Rate Application (GRA). The establishment of the DGA provided a means by which a utility could make corrections and adjust for the actual price of the gas supplied and thereby correct the customer rates. The regulated sales rate used to recover the cost of gas was called the gas cost recovery rate (GCRR). Use of the DGA takes into account that, under a regulated gas sales rate, customers pay only the actual costs of the gas consumed by them and **the utility is neither to incur a profit nor suffer a loss** in the course of procuring and selling the gas.

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> **In 1987 parties believed that the DGA would be a temporary feature because the continuing volatility of gas prices was not anticipated**. However, contrary to these expectations, the purpose and need for the use of DGAs has continued. Initially, the DGAs were reconciled twice a year on a winter/summer seasonal basis. During the period from 1987 to March 2002, the Board allowed prior seasonal adjustments to be made in reconciliation of the DGA in respect of the preceding same season.
>
> (2006 decision, p. 2, emphasis added, footnote omitted)

[187] More examples are found in the Appendix.

3. Loose Later Practices

[188] However, ATCO's practices later became lax in a number of respects, and sometimes small adjustments of other types were made in the deferral accounts. That had never been the purpose of the accounts. The Commission described that:

> . . . However, the Board [now Commission] is aware that, during the approximate 16 years that the DGA has been in place, it has been used to update adjusted imbalance amounts from shippers, producers and interconnecting pipelines. Prior period adjustments for various types of corrections have been relatively common occurrences. While the Board and interested parties may not have previously taken issue with these types of corrections, the Board is concerned that the DGA seems to have evolved into a vehicle to fix all possible errors as a cost of gas to be charged to sales customers under a regulated rate.
>
> (2005 decision at p. 10, F13)

* * *

> . . . **The Board believes that, normally, reconciliations were not expected to look back further than 12 months.** As the process evolved, some prior period adjustments were made which extended back further than 12 months. Under special circumstances, for example, involving measuring equipment malfunctions, prior period adjustments involving longer periods have been accepted by the Board. However, the Board considers that **the DGA was never set up with the intention of permitting all prior period accounting errors**, particularly those that would have been subject to ATCO's management and control, **to be processed and rectified through the DGA.**

> **The Board is troubled by the evolutional use of the DGA. The DGA replaced a prospective process where accounting errors, such as those that are the subject of the Application, should typically have been absorbed by the utility's shareholder.** It now appears that the DGA is being treated as a catch-all for fixing errors, including those that have a long history, or appear to be the result of human error, where adequate processes have not been in place to capture and correct the problem at an early stage. Notwithstanding that some prior period adjustments previously approved by the Board may have covered an extended period of time, the Board considers that **seven years represents a significant lag presenting obvious intergenerational equity issues.**
>
> (*id.* at p. 11, F14, emphasis added)

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4. Calgary's Argument

[189] Calgary's factum and book of authorities cite or quote past Commission orders fully confirming the Commission's recitals quoted above (in subparts 2, 3). The appellant also shows that those accounts were promptly reconciled to allow for errors in prediction, and that the Commission gave orders replacing the interim rates initially established with final rates reflecting the reconciliations. After some years, that was done monthly (based on a three-month rolling average).

[190] In written argument filed with the Commission on its 2008 application, ATCO had objected that the Commission should not see a full history of its own orders governing the deferred gas account. That objection is hard to reconcile with the arguments which ATCO had made to the Court of Appeal in the 2007 appeal (need for a fuller record). However, ATCO did not object to that evidence in this new appeal. (ATCO's original argument to the Commission that ATCO lacked time to check old Commission decisions was not made again to the Court of Appeal, and of course became moot long ago.)

[191] Old Commission decisions are not exactly evidence (not really fact) and are not much (if at all) law. They are previous process, and are all about the same utility (or its two predecessors). They are not tendered here to prove facts, but for their directions and decisions.

[192] In the present appeal, the appellant Calgary, the respondent ATCO, and the Commission itself, all reproduced old Commission decisions in their various books of authorities.

[193] Any court can look at its own previous decisions and records. See ***Kin Franchising v. Donco*** (1993) 7 Alta. L.R. (3d) 313, 316 (para. 7) (C.A.); *Alberta Evidence Act*, R.S.A. 2000, c. A-18, s. 42. Additional authorities are found in 3 Stevenson & Côté, *Civil Procedure Encyclopedia*, p. 45-54 (ch. 45, Pt. Z.3) (2003). I see no reason to withhold that power from a formal tribunal like this Commission (with all its powers). See the *Alberta Utilities Commission Act*, 2007, c. A-37.2, s. 11,

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and cf. ***Germain v. Auto Injury App. Comm.***, 2009 SKQB 106, [2009] 7 W.W.R. 509. Especially when the tribunal is an ongoing regulator with constant applications over the rates and accounts of the same handful of companies. This Commission has looked at its previous decisions for many many years. A classic decision of the Supreme Court of Canada says that the Commission can get its information in whatever mode it sees fit: ***N.W.U.L. v. Edmonton*** [1929] S.C.R. 186, 193. And if the Commission can take notice, why cannot the Court of Appeal take such judicial notice on appeal from the Commission?

[194] Furthermore, it was ATCO itself which began all this, and its application to that end expressly submitted that the Commission should make the "adjustments" (surcharges) to consumers by looking back to the Commission's old approval of DGAs. (See ATCO's application of May 31, 2004, § 4.1 "History", present Commission Record Tab 1, pp. 4-5.)

[195] Therefore, it is not surprising that the Commission did **not** decline to look at any previous decisions by itself. Instead it recited and quoted a number of them in its 2005 original decision, and in its 2008 decision reconsidering that. The Commission did **not** say (in 2005 or 2008) that it (or Calgary) lacked evidence about this.

[196] The Commission's public website gives ready access to some decisions from 1996 to 1999, and many thereafter. Quicklaw also reports its decisions from 2002. Print copies of all Commission decisions (to 1999) are available in one Law Society Library and (to 2008) in the Alberta Government Library. (The University of Alberta law library has some Commission decisions.) The Commission will supply copies on request. So the text of past decisions is not open to doubt. Anyone can access them to check the accuracy of quotations or summaries.

[197] Therefore, the Commission was correct to inspect its past decisions on DGAs. I have amplified my recitals of this history by quoting two or three additional passages from old Commission decisions (pointed out by ATCO in its October 12, 2007 argument, Tab 64, p. 3, quoting decision 2005-036). I have also described some additional passages from Calgary's argument of October 5, 2007 to the Commission (Tab 61): see an Appendix to this judgment. The description has been checked against the original Commission decisions.

[198] In any event, the old controversy about taking notice of the former Commission orders has no effect on the result, because those additional references to past orders reinforce but do not change the factual picture painted by the Commission itself in the 2008 decision now under appeal.

F. The *Bell Telephone* Decision of the Supreme Court of Canada

1. Introduction

[199] Counsel cited ***Bell Canada v. C.R.T.C. (Bell Aliant)***, 2009 SCC 40, [2009] 2 S.C.R. 764. It involved telephone companies' infrastructure under federal legislation.

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2. Legislation

[200] The Canadian Radio-television and Telecommunications Commission no longer regulates telephones under traditional rate-regulating legislation. Now it must follow Canada's *Telecommunications Act*, 1993 c. 38, whose objectives, duties, and powers are vastly broader, and cover more than telephones.

[201] I will outline some features of the *Telecommunications Act*, which have no equivalent in Alberta's 1999-2007 legislation applicable to gas utilities or their rates (the *Alberta Energy and Utilities Board Act*, the *Gas Utilities Act*, and the *Public Utilities Act*.)

[202] The *Telecommunications Act* imposes on the C.R.T.C. a mandatory duty to implement a number of very wide and deep policy objectives when it exercises any of its powers or performs any of its duties (s. 47(a)). Among those mandatory objectives are to

– safeguard, enrich and strengthen the social and economic fabric of Canada . . . (s. 7(a))

– enhance . . . efficiency and competitiveness, at the national and international levels . . . (s. 7(c))

– promote . . . ownership and control . . . by Canadians. (s. 7(d))

– promote the use of Canadian transmission facilities . . . within Canada . . . and points outside . . . (s. 7(e))

– foster increased reliance on market forces . . . (s. 7(f))

– stimulate research and development . . . and encourage innovation . . . (s. 7(g))

– respond to the economic and social requirements of users . . . (s. 7(h))

– contribute to the protection of . . . privacy (s. 7(i))

[203] The C.R.T.C. also has unusual statutory powers. It can require any telecommunications company to provide any service in any manner (s. 35(1)) or to construct any facility (s. 42(1)). And (most apposite here), the Commission can require the company to "contribute . . . to a fund to support continuing access by Canadians." (s. 46.5(1)). Therefore the C.R.T.C. has positive proactive

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duties going far beyond fair prices (rates), reliability of service and supply, or even safety, of one company.

3. The Supreme Court's Decision

[204] The Supreme Court of Canada (and the Federal Court of Appeal) confirmed the C.R.T.C.'s decision to follow a scheme which it ordered a few years before. That was not to reduce excessive phone rates (for competition reasons), but instead to hold a portion of the revenue in profitable urban markets in a special account to be later spent on infrastructure improvements to benefit consumers.

4. Is the Supreme Court of Canada Decision Distinguishable?

[205] I have concluded that the ***Bell*** decision can and should be distinguished here, for the following eight reasons.

(a) Different Legislative Objectives and Powers and History

[206] The Supreme Court of Canada itself expressly distinguished Alberta's *Gas Utilities Act* and said that the federal C.R.T.C. has broader objectives and power than does Alberta's Commission. See the ***Bell*** case, paras. 17, 22, 36, 39-43, 45-48, 50-53, 55, 57, 72, 74-75 and 77. The Supreme Court of Canada even distinguishes decisions about the C.R.T.C. in earlier years when that tribunal was governed by the more traditional type of rate-of-return regulation like the Alberta system. (In those days the old system was mandated for telephone companies by the *Railway Act*.) See the ***Bell*** decision at paras. 39-46, and 62. See subpart 2 above. To the same effect is para. 41 of the Federal Court of Appeal decision (2008 FCA 91) which the Supreme Court of Canada affirmed.

[207] In particular, the Supreme Court of Canada pointed out that traditional rate regulation is a two-way contest between the interests of the utility company and its particular consumers. The C.R.T.C. (on the other hand) has to meet objectives for all Canadians in all parts of Canada, e.g. fostering competition: see paras. 45 and 47. What is in issue in the present dispute between Calgary and ATCO is the limited traditional type of rate-making power. See the precise passages in Court of Appeal and Supreme Court of Canada decisions, describing and mandating that Alberta scheme, quoted in Parts C and D above.

[208] The present ATCO appeal is about a price (rate or revenue) fair as between the utility and the consumer; nothing more. Though the ***Bell*** decision's origin had a little to do with such questions, the actual ***Bell*** decision was about increasing access and competition, and dictating to the various telephone companies compulsory long-term infrastructure competition.

[209] See also subpart (b) below, on "price-cap regulation".

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[210] There is an even more striking distinction between the C.R.T.C. and Alberta's Commission. For most of its history, the Commission has been separate from the Energy Resources Conservation Board. The rate regulator, the Alberta Utilities Commission, is now again separate. The broader policy about the industry and its physical form is no part of the Commission's functions, as illustrated by the Genesee power plant decision: ***Alberta Power v. Public Utilities Bd.*** (1990) 102 A.R. 353 (C.A.). Though the Energy Resources Conservation Board had decided that the new second Genesee power plant was needed and gave a permit to build it, after the plant was built, the Public Utilities Board (now the Commission) could and properly did exclude it from the rate base as not "used or required to be used".

[211] Alberta's two tribunals were temporarily merged effective February 15, 1995 (by 1994 c. A-19.5). But the merger ended effective January 1, 2008 (by 2007 c. A-37.2), before the decision under appeal. Furthermore, the **legislation** for the two tribunals remained separate even during the period of the merged tribunal, 1995-2007.

[212] See also ***Barrie Pub. Utils. v. Cdn. Cable TV Assn.***, 2003 SCC 28, [2003] 1 S.C.R. 476, 225 D.L.R. (4th) 206 (paras. 9-19).

(b) Different Purposes for Setting Up Deferred Accounts

[213] I must stress that in ***Bell***, the C.R.T.C. was using an entirely new type of utility regulation (invented in the United Kingdom in the 1980s). It is called price-cap regulation. Unlike traditional rate (price) regulation, this does **not** fix rates; in order to give incentives, it merely sets a maximum and makes sophisticated allowances for the result. The difference between the two types of regulation is explained by Netz, *loc. cit. supra*, at 417 ff., especially p. 425-28.

[214] One cannot just look at the title of an account, or fixate upon a name like "deferred". One must find the purpose and operation of the account in question. See Part D.8 above.

[215] From the outset, the account described in the ***Bell*** decision was designated expressly to decide later who would own or use the money contained in it. See the Supreme Court of Canada decision, paras. 6, 8-9, 22 (and the Federal Court of Appeal's paras. 43 and 52.) That surplus sum was expected to arise, and did arise, from continuing to charge high urban rates, despite a new theoretical or tentative cap on rates. The difference (surplus) was to be collected and held in the new fund (account) (para. 6). That was a scheme very different from the Alberta fixed-rate scheme. Too many such statements in the Supreme Court's ***Bell*** decision emphasize the fund's very different purpose to list them fully; some are found in its paras. 37, 57, 61, 63, 64, 66, and 67.

[216] The Alberta accounts (DGAs) had very different purposes. They came from an old short-term system for handling very unpredictable raw material costs (gas field prices). It seems to have been an accident, oversight or happenstance (not a Commission order) that they lasted for years. See the detailed history above in Part E.

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(c) Alberta Balance Was Largely the Product of a Single "Adjustment" Entered After the Fact Years Later, not an Ongoing Thing

[217] Alberta's deferral account had already been reconciled years earlier, i.e. settled. I doubt that it still "existed" in any real sense in 2004, still less that the 1998 or 1999 parts did. Revisiting the old Alberta deferral account was just a device invented years later when a long-standing and ongoing error was finally discovered: see Parts B.1, 2 and 3(a), and D.3 and D.8 above. Here the Commission let the utility use an old account which had been set up for one temporary purpose to be used for a totally different purpose than that contemplated before.

[218] Conversely, in the ***Bell*** case, the C.R.T.C. managed an existing fund of money growing steadily. The C.R.T.C. largely and in principle confirmed its original purpose.

(d) Encumbered Fund vs. Deficit

[219] The ***Bell*** judgment and C.R.T.C. order were a final decision about ownership of surplus funds which previously had encumbered or provisional ownership. See the Supreme Court of Canada decision, paras. 63, 65.

[220] However, ATCO's account was on balance (and entirely in the south) a deficit, not a surplus. A deficit cannot have an owner, nor be encumbered. Still less was any deficit intended or ordered to have either here.

(e) Limited Term in *Bell*

[221] The ***Bell*** account had a definite beginning and end, forecast at the outset (2001-7 but later ended early, in 2006). See the Supreme Court of Canada decision, para. 9, cf. paras. 10-13.

[222] In ***Bell***, the rates were confirmed and adjusted once and for all, to prevent any further accumulations of reserve funds. The fund (account) was to be closed out and cease to exist: see the Supreme Court of Canada decision, paras. 13 and 15 end.

[223] But the Alberta Commission's 2005, 2006, and 2008 decisions allowed the old gas companies' deferred accounts to be available in future to do it all again (though usually not beyond two years). See Part B.3 above.

(f) The *Bell* Rates Were in Effect Interim, Whereas ATCO's were Final

[224] This is stated by the Federal Court of Appeal's decision, paras. 50-52, and by the Supreme Court of Canada's decision, para. 61.

(g) *Bell* was Confined to Certain Geographic Areas

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[225] The funds in the telephone companies' deferred accounts were confined to excess revenue in geographic areas where more competition was needed. Structural changes were needed and so the C.R.T.C. authorized them. Those areas were residential local services in non-high-cost serving areas basket (mostly urban): see ***Bell*** paras. 4, 6, 10. But in the present ATCO appeal, all (later) gas customers simply got a retroactive rate increase (or refund).

(h) *Bell* Refunds were Incidental

[226] In principle, the C.R.T.C. ordered the telephone companies to spend all the reserved segregated funds on service improvements (handicapped services and more broad-band capacity). Refunds to customers were just incidental amounts which could not be spent: see the Supreme Court of Canada's decision, paras. 14, 15, and 20.

[227] But the only use or remedy even suggested before Alberta's rate-making Commission was a second charge (or refund) to the customers for the same old gas long since consumed.

G. Other Distinguishable Decisions

[228] The Commission's decision and some factums cited ***Epcor Generation v. A.E.U.B.***, 2003 ABCA 374, 346 A.R. 281 (one J.A.). Note that a power to change rates retroactively there was conceded; here it is in issue. The rate was agreed there to be interim (paras. 12, 14, 15), not final as here. Calgary's argument to the Commission in the present case (October 12, 2007, Tab 65, p. 2) quotes statements by the Commission in ***Epcor*** confirming that. The proposed dispute on which leave was sought was only over details, indeed unique sharing ratios (***Epcor***, para. 13), not retroactivity itself as here (paras. 9-10). That motion dealt with a defined time and topic only: the 2000 pool price of electricity. And many issues were factual (paras. 23 ff.). It was a decision by only one Justice of Appeal on a motion for leave, not an appeal. ***Epcor*** is not on point.

[229] One other case cited is ***Re Board of Commissioners of Public Utilities (Ref. re s. 101 Public Utilities Act)*** (1998) 164 N. & P.E.I.R. 60 (Nfld. C.A.). This was a split decision. It involved Newfoundland legislation on regulation of electric utilities. Except for the broad outlines, that legislation bears no resemblance to Alberta legislation regulating gas activity rates.

[230] The majority of the Newfoundland Court of Appeal held that setting a rate of return for a utility was not just a step in calculations leading to fixing rates (prices). They held that it set a ceiling for rate of return, and if the later actual rate of return exceeded that ceiling, the Commission could later adjust rates to offset that. Such a rate-of-return ceiling enforced later is emphatically not the Alberta practice or legislation. Nor can I reconcile that view with the Supreme Court of Canada's later decision in the ***Stores Block*** case, *supra*. Indeed the Newfoundland Court of Appeal largely proceeded on its own interpretation of its legislation, and scarcely mentioned any of the Supreme

Court of Canada decisions cited above (and none of the Alberta Court of Appeal decisions). I do not find the majority decision persuasive. It is distinguishable, in any event.

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H. Standard of Review

1. Conflicting Precedents on This

[231] First, the Supreme Court of Canada held that the standard of review was correctness: ***Barrie Pub. Utils. v. Cdn. Cable TV Assn.***, 2003 SCC 28, [2003] 1 S.C.R. 476, 225 D.L.R. (4th) 206 (paras. 9-19). Then it gave a somewhat different decision, as follows. Whether the Commission has a given power is determined on appeal on the standard of correctness, but if it is found to have that power, the actual method used to carry out the power attracts a more deferential approach: "***Stores Block***" case, ***ATCO Gas and Pipelines v. E.U.B.***, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293, 380 A.R. 1.

[232] I am reluctant to try to create my own ***Pushpanathan*** analysis here, and then use it to decide which Supreme Court of Canada decision to follow, or to try to distinguish one of the Supreme Court of Canada decisions.

2. Standard Does Not Matter Here

[233] Nor need I do so here, for it would not affect the result. Even on the reasonableness tests, the decision of the Commission under appeal is unreasonable and does not survive. That is so for the reasons given in Part D.10 ("Conclusion") and Part F above. None of those topics is discretionary. The legal limits here are statutory or based on binding precedent, and go to the very nature of the process. The errors are fundamental, and ones of basic principle. Parts D.4, D.5 and D.6 show that. The Commission cannot be acting reasonably when it departs from the fundamental principles laid down by the Legislature and the courts for the Commission to follow. It did depart seriously here, and its decision is unreasonable. See also Part D.9 above.

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I. Conclusion

[234] It is now about 12 years since the accounting errors in question began, and about six years since ATCO sought relief from the Commission. The Commission has held three hearings on the topic and has declined to hear more evidence. I would fear denying justice by delaying justice, were we merely to tell the Commission to reconsider the topic in yet a fourth hearing.

[235] I would have allowed the appeal, and vacated so much of the Commission's 2005 and 2008 orders as allows the (southern) recovery of former costs or expenses. I would have directed the Commission under the *Alberta Utilities Commission Act* s. 29(14), that the law requires it to dismiss that part of ATCO's application entirely. There was no appeal, nor leave to appeal from the (northern) rebate to consumers.

[236] I would have awarded costs of the appeal to the City appellant payable by ATCO. There should be no costs to or from the Commission, even though its factum went rather far into the merits. But I would caution the Commission that doing that endangers its position in various respects. See ***N.W.U.L. v. Edmonton*** [1979] 1 S.C.R. 684, 708-09, paras. 36-37.

J. Procedure

[237] The appeal book contains a fuzzy scan of the three Commission decisions in question, and of some court orders. In future, documents should either be printed from electronic copies, or sharp photostats should be made from originals. In contrast, the Commission's filed record has perfect clarity.

[238] The Commission filed one copy of its record, as directed by s. 29(10) of the *Alberta Utilities Commission Act*. Rule 537.1 then contemplates that counsel for the appellant will file multiple copies of Extracts of Key Evidence to supplement the Appeal Digest, reproducing only those parts of the full record that are needed (by all parties) to dispose of the appeal. If the appellant overlooks including something, the respondent can also file Extracts of Key Evidence. No party filed any extracts here. A panel contains three justices, usually based in two different cities, so the absence of individual sets of Extracts hinders the efficient disposition of the appeal.

[239] The appellant's citations of court cases included no reported citation. That violates the Consolidated Practice Directions, para. D.1(b). In future it would help this Court to have at least one publisher's (or website) citation (as well as the neutral cite).

Appeal heard on January 13, 2010

Reasons filed at Calgary, Alberta
this 23rd day of April, 2010

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Appearances:

B.J. Meronek, Q.C.
for the Appellant (Applicant) City of Calgary

J.P. Mousseau
P. Khan
for the Respondent (Respondent) A.E.U.B.

H.M. Kay, Q.C.
L.E. Smith, Q.C.
L.A. Goldbach
for the Respondent (Respondent) ATCO Gas and Pipelines Ltd.

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Appendix

More History of Deferred Gas Accounts

N.W.U.L. = Northwestern Utilities
C.W.N.G. = Canadian Western Natural Gas

1987 — Orders E87051 and E87052 (July 3): Commission approved in principle applications by ATCO's predecessors to establish a Deferred Gas Accounting and Reconciliation procedures, to be in place until cost of buying gas could be forecast with reasonable certainty.

1988 — Decision E88018 and Order E88019 (March 18): Commission held (on N.W.U.L. and C.W.N.G. rates) that the Gas Cost Recovery Rate was interim and would change at least two times/year. Seasonal rates were to be established, but the Commission would monitor the reconciliations more frequently: monthly. The actual review and finalization would be done two times each year. The cumulative actual balance in the DGA on each March 31 and each October 31 would be refunded to or collected from customers through the GCRRs in the ensuing season.

Thereafter in 1988 further Commission orders did reconcile those accounts two times/year for each gas company.

1989-1991 — Further Commission orders also in effect reconciled the accounts. Decision C90041 (December 7, 1990) confirmed the system. Some of these orders said that the rates remained subject to review. Interim Order E89020 (April 4, 1989) said that DGA balances should be minimized, and so any significant increase in gas supply costs between normal application dates should lead to an application by C.W.N.G. for a change in the GCRR.

1994-1997 — By Decision 94072 (October 28, 1994) DGA reconciliations for C.W.N.G. were to be annual, not semi-annual. GCRRs were from time to time approved. Order U97010 (January 16, 1997) quoted and reiterated Order 89020 (of April 4, 1989), which in turn summarized Order 88018. Order U97052 (May 7, 1997) re C.W.N.G. said that the DRA calculation method meant that under- or over-recovery in one-half year cumulated in the DGR would be collected or refunded in the next one-half year's period, given normal weather and accuracy of sales forecasts. This would substantially maintain intergenerational equity. Order U97053 (May 7, 1997) for N.W.U.L. gave final approval of the company's GCRR for 2-1/2 months.

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	Decisions U97129 and U97130 (October 31, 1997): Commission reconciled C.W.N.G.'s and N.W.U.L.'s actual gas cost recoveries.
1998	Decision U98067 (April 13) accepted C.W.N.G.'s reconciliation and refused requests to re-examine the DGA process. Order U98071 (May 4) confirmed C.W.N.G.'s summer GCRR as final.
1999-2000	Various interim orders. Order U2000-161 (April 17) made ATCO Gas-South's GCRR final. More interim orders made for both companies. Order U2000-308 (October 27) deferred acceptance of ATCO North's (former N.W.U.L.'s) reconciliation and set a new interim rate.
2001	Order U2001-001 (January 24) left GCRR rates for ATCO South as interim. Order U2001-002 (January 24) was similar for ATCO North. Order U2001-061 (March 28) was similar; as were Orders 2001-062 (March 28) and U2001-448 (December 14). In 2001 the Commission held a hearing re methods to set the GCRR. Decision 2001-075 (October 30) (on methodology) described the existing procedures (reconciliation two times/year) (pp. 3-4), but noted the DGA balances had become large. The Commission decided (p. 64) to switch to monthly written reconciliations to minimize DGA balances. A three-month rolling period would be used for reconciliations.
2002	Decision 2002-026 (April 18) (p. 3) recited the Commission's duty and power to fix "the appropriate final share of the deferral account balances due from each customer class". On p. 4 the Commission said it had been hoped under- and over- recoveries in the DGA would balance out but unexpectedly they had not. But in principle, rates should be established prospectively.
2003	Decision 2003-106 (December 18) (p. 135) said that for the DGA and reconciliation the GCFR would be revised monthly.

In the Court of Appeal of Alberta

Citation: Atco Gas and Pipelines Ltd v Alberta (Utilities Commission), 2014 ABCA 28

Date: 20140120
Docket: 1201-0090-AC
Registry: Calgary

2014 ABCA 28 (CanLII)

Between:

Atco Gas and Pipelines Ltd.

Appellant

- and -

Alberta Utilities Commission and Office of the Utilities Consumer Advocate

Respondents

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Peter Martin

Reasons for Judgment Reserved
of The Honourable Madam Justice Conrad
Concurred in by The Honourable Mr. Justice Martin

Concurring Reasons for Judgment
of The Honourable Mr. Justice Berger

Appeal from the Decision by
Alberta Utilities Commission
Dated the 16th day of March, 2012
(Decision 2012-068)

2014 ABCA 28 (CanLII)

Reasons for Judgment Reserved
of the Honourable Madam Justice Conrad

Introduction

[1] The appellant, Atco Gas and Pipelines Ltd. [Atco] appeals from a decision of the Alberta Utilities Commission [Commission], Decision 2012-068, removing certain assets related to Atco's salt cavern storage facilities from the rate base effective July 2009. The decision arose from Atco's application to dispose of certain assets it had determined were no longer used or required in the operations of the utility.

Issues

[2] Leave to appeal was granted on two grounds:

i. Did the Commission err in setting an effective date for removal of the Salt Cavern Excess Assets from the rate base at July 1, 2009?

ii. Did the Commission err by requiring Atco to bear the costs and burdens attributed to non-utility use of portions of a single, indivisible asset originally acquired for the purposes of the utility?

Decision

[3] The appeal is dismissed.

Issue one:

[4] The Commission did not err in law by making its decision to remove assets from the rate base effective July 1, 2009; nor was its decision unreasonable.

Issue two:

[5] This issue deals with the removal of a portion of an asset from the rate base where that portion is no longer required for utility purposes. There is little authority on this issue and every case will have to be dealt with on its circumstances.

[6] Depending on the specific facts and circumstances, the decision to remove a portion of an asset from the rate base and the method of doing so may raise many considerations including such matters as: whether the asset can be physically, practically or legally divided; ease of division; associated costs involved and who should pay them; length of time the asset has been in the rate base; whether the divided portion has other potential uses; and generally whether

exclusion of a portion of an asset from the rate base is just and reasonable in all the circumstances.

[7] Here it was common ground that the eastern portion of the quarter section currently in the rate base was no longer required for operational purposes. The Commission determined to remove value for that portion from the rate base and the land was then available for Atco's separate use. The Commission also consented to future disposition in the event the utility eventually determined a sale was desirable on the understanding that the utility pay any associated costs of subdivision.

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[8] The standard of review is one of reasonableness and in all the circumstances of this case, I cannot say that the decision is unreasonable.

Background

[9] Atco Gas and Pipelines Ltd is a gas utility within the meaning of the *Gas Utilities Act,* RSA 2000, c G-5, regulated by the Commission pursuant to that Act, the *Gas Utilities Designation Regulation*, AR 257/2007, the *Public Utilities Act,* RSA 2000, c P-45, and the *Alberta Utilities Commission Act,* SA 2007, c A-37.2. The Commission regulates the rates and tariffs of the two divisions of Atco Gas and Pipelines Ltd, namely, Atco Gas which operates the gas distribution utility and Atco Pipelines which operates a natural gas transmission utility. This appeal arises from an application of Atco Gas division. The Commission determines revenue requirements and utility rate base, and sets rates pursuant to sections 36 and 37 of the *Gas Utilities Act.*

[10] Under section 26(2)(d) of the *Gas Utilities Act,* a disposition of an asset by Atco outside the ordinary course of business requires the prior consent of the Commission.

[11] Decision 2012-068, under appeal, arises from Atco's application pursuant to section 26(2)(d) for Commission approval of the disposition of certain salt cavern assets to an affiliated company. It was intended that the balance of the salt cavern assets were to remain in the rate base, revenue requirement and rates.

[12] The decision under appeal has a long procedural history. Atco originally acquired the salt caverns land in the early 1980s to store natural gas to meet peak winter demand periods. In 2007, Atco estimated 75 per cent of the salt cavern lands had no foreseeable regulated gas transmission use due to the existence of alternative, less costly means to store natural gas. The net book values for the lands and related pipeline assets were close to $4 million.

[13] Atco's efforts to dispose of certain portions of the salt caverns began on October 1, 2007, when it filed its 2008-2009 general rate application with the Commission (then the Alberta Energy and Utilities Board). That application proposed, effective December 31, 2007, to remove from the rate base and customer rates certain assets Atco described as the "Identified Salt Cavern Assets" on the basis the assets were no longer used or required to be used to provide utility

service. At that time, the Identified Salt Cavern Assets were larger in scope and size than the assets subsequently included in Atco's April 27, 2011 application giving rise to this appeal.

[14] On November 6, 2007, the Board ordered Atco to revise its general rate application and include the Identified Salt Cavern Assets in the general rate as the Board viewed the unilateral removal of the Identified Salt Cavern Assets from the rate base as a disposal under section 26(2)(d) of the *Gas Utilities Ac*t, requiring the Board's consent (Decision 2012-068 at para 22). Atco re-filed, and on February 1, 2008, Atco applied for approval to transfer the Identified Salt Cavern Assets to a non-utility affiliate. This proceeding was held in abeyance as the Commission had initiated an industry-wide inquiry to consider the impact of recent case law on utility asset dispositions.

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[15] Atco wrote the Commission on July 21, 2008, stating that based on this court's decision in *Atco Gas and Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2008 ABCA 200, 433 AR 183; leave to appeal refused, [2008] SCCA No 347 [the *Carbon* decision], Atco had decided not to sell the Identified Salt Cavern Assets. Atco again indicated it wanted to remove the Identified Salt Cavern Assets from the rate base, but Atco would maintain ownership of the assets.

[16] On July 30, 2008, the Commission replied and restated its position that an application under section 26(2)(d) was required to determine whether the assets could be removed from the rate base (Decision 2012-068 at para 29).

[17] Atco appealed the Commission's orders of November 6, 2007 and July 30, 2008 preventing Atco from removing the assets from the rate base. On June 30, 2009, this court held that ceasing use was not a disposition falling within section 26. Thus, a utility company that owns an asset included in the rate base calculations but no longer necessary for regulated utility business, could remove the asset from the rate base without obtaining consent from the Commission under section 26 of the *Gas Utilities Act*: *Atco Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2009 ABCA 246, 464 AR 275; leave to appeal refused, [2009] SCCA No 401 [the *Salt Caverns* decision]. In so deciding, this court held that section 26 did not apply to the ending of a use where no third party transfer or sale is contemplated because a "disposition" of the asset would not occur. That decision noted that no harm would be done because a removal from use would still be subject to the Commission's assessment of prudence. If the Commission found that removal was imprudent, it "could make some adjustment of values in rate base or in the expenses or return on investment, so that rates approved would not make the consumers pay rates based on that types of imprudence" (para 53).

[18] Subsequent to the *Salt Caverns* decision, by letter dated July 17, 2009, Atco requested the Commission to confirm that Identified Salt Cavern Assets could be removed from its negotiation discussions relating to its 2010-2012 revenue requirements. The restriction was removed by Decision 2009-111 on July 24, 2009 on several conditions including the provision of information to the Commission so it could determine the prudence of the removal.

[19] In Decision 2009-033, the Commission approved a negotiated settlement agreement with respect to Atco's 2008-2009 revenue requirements. This settlement agreement specifically precluded issues related to the Identified Salt Cavern Assets.

[20] In Decision 2010-228, the Commission approved a negotiated settlement agreement with respect to Atco's 2010-2012 revenue requirements. The Identified Salt Cavern Assets were assigned a placeholder status (reserving the issue of the salt cavern assets for future determination) to prevent unduly delaying the proceeding.

[21] On January 22, 2010, after several negotiated settlements failed to decide the fate of the Identified Salt Cavern Assets, the Commission approved Atco's request to deal with the salt cavern assets in a separate proceeding. Those proceedings gave rise to Decision 2012-068 -- the decision now under appeal.

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Decision 2012-068

[22] The Commission found that the proposed disposition of surplus assets did not offend the "no-harm test" traditionally employed by it and its predecessors as rates and services would not be adversely impacted. It determined, however, that the portion of the salt cavern assets no longer "used or required to be used to provide utility service" under section 37 of the *Gas Utilities Act* was broader than the Surplus Assets listed in Atco's April 2011 application.

[23] As a result, the Commission directed Atco to remove from the rate base and revenue requirements the "Surplus Assets" (SW 34-55-21-W4M quarter section, a disposal well on that land and a water system transporting water from the North Saskatchewan River) and the "Additional Assets" (the eastern half of SE 34-55-21-W4M quarter section and the well located on the land). The decision also ordered the "Related Assets" (water infrastructure, brine disposal infrastructure and control fluid infrastructure) be removed from the rate base and revenue requirements. Collectively, the assets ordered to be removed were referred to as the "Salt Cavern Excess Assets".

[24] The Commission also directed that if Atco wished to dispose of the Related Assets and the Additional Assets, including subdivision of the SE 34-55-21-W4M in the Additional Assets, the Commission approved such disposition, with all costs, including subdivision to be borne by Atco's shareholders.

[25] The Commission backdated the effective date of the removal of the assets to July 1, 2009, the day following issuance of the *Salt Caverns* decision, on the basis that Atco knew at that time that it did not require the Commission's consent to remove the assets from the rate base.

Standard of Review

[26] As a specialized and expert tribunal charged with the administration of a comprehensive set of legislation regulating all aspects of the energy industry in the Province of Alberta, decisions of the Commission are entitled to a high degree of curial deference. Decisions

requiring the interpretation of its governing statutes and regulations, and the application of its experience and expertise, will be measured on a standard of reasonableness: *Coalition of Citizens Impacted by the Caroline Shell Plant v Alberta (Energy and Utilities Board)* (1996), 187 AR 205 at para 14 (CA).

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[27] There is no true jurisdictional issue and there was no breach of the rule against impermissible retroactive rate making.

[28] I am satisfied that the standard of review for the two issues on this appeal is one of reasonableness.

Issue 1: Did the Commission err in setting an effective date for removal of the Salt Cavern Excess Assets from the rate base at July 1, 2009?

[29] A regulatory authority fixes just and reasonable rates pursuant to sections 36 and 37(1) of the Act which reads as follows:

> 36 The Commission, on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,
>
> > (a) fix just and reasonable individual rates, joint rates, tolls or charges or schedules of them, as well as commutation and other special rates, which shall be imposed, observed and followed afterwards by the owner of the gas utility,
> >
> > (b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a gas utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Commission,
> >
> > (c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed thereafter by the owner of the gas utility,
> >
> > (d) require an owner of a gas utility to establish, construct, maintain and operate, but in compliance with this and any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Commission the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the gas utility reasonably warrants the original expenditure required in making and operating the extension, and

> (e) require an owner of a gas utility to supply and deliver gas to the persons, for the purposes, at the rates, prices and charges and on the terms and conditions that the Commission directs, fixes or imposes.

> 37(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility, the Commission shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

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[30] As set out in *Salt Caverns* at para 20, a regulatory authority looks at two components when fixing just and reasonable rates, namely:

(1) current expenses and taxes, and

(2) an annual amount constituting a just and proper return on capital invested in the utility.

[31] As a result, the amount of capital invested and attributed which becomes part of the rate base is extremely important to both the consumers and the utility. This has led to considerable litigation over valuations of items and designation of assets appropriately within the rate base. At the end of the day, the Commission has the final say on whether an asset is included, or not included, in the rate base. See: *Salt Caverns* at para 22; *Alberta Power v Alberta (Public Utilities Board)* (1990), 102 AR 353 (CA).

[32] Arguments on appeal centered on this court's recent decisions in *Carbon* and *Salt Caverns*. *Carbon* dealt with issues arising from a gas storage facility at Carbon, Alberta, where the facility started out as a producing gas field and was converted to a storage reservoir. Eventually the facility was no longer required for gas storage and issues surrounding removal from the rate base were raised on appeal to this court. The Board had concluded that the Carbon storage facility played no role in the appellant's gas distribution system and its only present contribution was to generate revenue that would reduce rates. The Board noted that ordinarily revenue generation on a stand-alone basis would likely not satisfy the use or required to use test for inclusion in the rate base. It found, however, that the Carbon storage facility was unique, due to its historical role as both an operational part of the system and as a source of revenue from leasing of surplus capacity. As a result of this historical uniqueness, the Board included the Carbon facility within the rate base, notwithstanding its only use was for revenue generation.

[33] This court found the Board's decision unreasonable. The court defined the question before the court as an "extricable question of law: whether revenue generation by the Carbon storage facility qualifies as a 'use' under the proper interpretation of the statute" (para 21). The court concluded that the phrase "used or intended to be used" to provide service are only those assets used in an operational sense and not merely used for revenue generation or accounting for the revenue.

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[34] *Carbon* found at para 29 that the concept of assets becoming "dedicated to service" and so remaining in the rate base forever is inconsistent with the decision in *Atco Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 69, [2006] 1 SCR 140 [the *Stores Block* decision] and would fetter the Board's discretion to deal with changing circumstances. In *Stores Block*, the Supreme Court of Canada found that regulation of the gas utility does not give the end customers an ownership interest in the assets of the utility.

[35] At para 30 in *Carbon*, this court held:

> 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: *Store 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.

[36] In *Carbon*, no operational use existed, and the court found that mere revenue generation, or accounting for revenue, was not a service. As a result, the Board's decision to include the Carbon facilities in the rate base was found to be unreasonable.

[37] In *Salt Caverns,* this court paraphrased from the *Carbon* decision at para 14:

> In any event, to the extent to which the answers to the legal issues raised in the first and second questions on which leave was granted are not premature, they are largely resolved by this court's recent decision in "*Carbon*" where the Court held that that the Board had no jurisdiction to include in rate base, assets which were not being used or required to be used in providing service to the public, in an operational context. Past or historical use of assets does not permit their inclusion in rate base unless they continue to be used in the system.

[38] As a result of that language, the Commission and the respondent Utilities Consumer Advocate [UCA] argue that if there is no jurisdiction to include assets not being used in the utility operations, then prior orders that included such assets are a nullity. In my view, the court in *Salt Caverns* was not intending to expand upon the *Carbon* decision by use of the word jurisdiction, but was merely summarizing *Carbon* in a general way. I do not read *Carbon* as suggesting that this is a jurisdictional issue such that past orders of the Board which included assets of no operational use were a nullity. Rather, the court found accounting for revenue and revenue generation standing alone are not part of the utility service, and that they should not be included in the rate base.

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[39] The decision in *Salt Caverns* is important here. In that case, the court addressed the question of whether unilateral withdrawal of assets from utility service and the rate base was a "disposition" under section 26(2)(d), requiring commission approval. The court concluded that the scope of the language of section 26(2)(d) referred to giving up ownership, in whole or in part. It found that the words do not refer to starting or stopping a particular use, acquiring or losing a need, or to objects becoming useful or useless. In the end, the court found that the language did not apply to ending a use. Interestingly, in arriving at this decision the court stated at paras 51-53:

> So I interpret the words of s. 26 as not applying to ending a use. If that produced an absurd result, or crippled the Commission's power to regulate rates, then one might have to look harder at s. 26 and even try to stretch its words.
>
> But I see no *hiatus* here. It is common ground that as part of a normal rate hearing, the Commission can and must decide what items (property) are to be considered part of the rate base and given a value on which the utility company is entitled to recover a return on investment: s. 37 of the *Gas Utilities Act*. . . .
>
> Indeed, counsel for the appellant stressed to us what the Commission could do when hearing a rate application if it found want of due prudence in starting or stopping the use of some asset in the regulated utility. It could make some adjustment of values in the rate base or in the expenses or return on investment, so that rates approved would not make the consumers pay rates based on that type of imprudence.

[40] Determining usefulness will depend upon meeting the traditional criteria for what is, and what is not, in the rate base and does not involve a section 26 application because the property has not been disposed.

[41] These authorities indicate that, at least on a go forward basis, assets no longer used or required for use should not be included in the rate base, and the utility can unilaterally remove such assets from the rate base without the consent of the Commission. But, at the end of the day, the Commission will have the final say on whether property is, or is not, required for the use or future use of the utility as that falls squarely within its legislative mandate. In addition, a commission has the right to make whatever adjustments are necessary to compensate for imprudent removal of such assets in the interim.

[42] This reasoning was confirmed by McFadyen JA in *Calgary (City) v Alberta (Utilities Commission)*, 2010 ABCA 158, 487 AR 191. This was a leave to appeal application following the *Carbon* and the *Salt Caverns* decisions. In the *Calgary (City)* case, the Commission ordered assets removed from the rate base and adjustment to the rate base as of April 1, 2005, when the applicant had first indicated to the Commission that the asset was not used, or required to be used, in providing service to the public. The Commission backdated the removal of the asset from the rate base. In refusing to grant leave to appeal, McFadyen JA stated at para 23:

> Although the Commission may require that the utility prove that the asset is no longer being used in its operations, and that the cessation of use of the asset is not imprudent, absent proof of imprudence, **the adjustment date must be the date on which the utility, in fact, stopped using the asset, not the date on which the Commission agreed that the asset was no longer being used**. (Emphasis added.)

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[43] Atco asserts that the effective date for removal of surplus assets should be within 30 days of the decision on its application, regardless of the closing date of the surplus assets transaction. It says Atco was penalized for complying with the Commission's earlier express directions, and for the uncertainty created by the Commission's refusal to communicate acceptance that the assets should be removed from the rate base. Although the Commission had been acting on a misapprehension of the law, Atco says that does not alter the fact its assets were effectively frozen.

[44] Atco says the facts in *Carbon* are distinguishable. In *Carbon,* the appropriate date for removal of assets was found to be the date management first determined the assets were not required for utility operations. In that case, however, the Commission authorized utilization of the assets for non-utility purpose pending determination of the issue. Thus, revenue was not lost in *Carbon*, whereas here, the Commission's directions resulted in no revenue from the non-utility assets. Atco argues that any date earlier than 30 days from the present decision without compensation yields an artificial, perverse result and is unreasonable.

[45] Atco also submits that the principle against retroactive ratemaking should be mechanically applied, and that backdating the removal of the salt cavern assets to July 1, 2009, without using a deferral account or interim rate, is a violation of the principle against retroactive ratemaking. It says the Commission erred in law.

[46] The respondent UCA takes a different position. It argues that the effective date for removal of the assets must be September 1, 2007, the date Atco first determined that the assets were no longer required for operational purposes. UCA argues once assets serve no utility purpose, there is no jurisdiction to retain them in the rate base and any decisions which included them are void. UCA says that since customers cannot share any revenues earned from assets with no valid operational purpose, nor share in any gain on the sale of such surplus assets, customers should not be forced to pay for assets once they are determined to be surplus. (See *Carbon* at para 30; *Stores Block* at para 69.) The UCA argues that it is irrelevant if the assets were earning income to Atco's benefit, or incurring costs to its account, during this time. Rather, the only issue is whether the assets were being used or required for operations of the utility. If not, they should be excluded, and there was no jurisdiction to include the assets in the rate base from September, 2007.

[47] The Commission was alive to and considered the arguments, and concluded that July 1, 2009 should be the effective date for removal of the Salt Cavern Excess Assets from utility service, rate base, revenue requirement and rates. Atco was directed to refund to customers all

amounts collected through rates associated with those assets from and after that date. In arriving at its decision, the Commission considered the facts, the submissions and the law.

[48] The Commission has broad, discretionary powers to set just and reasonable rates: *Gas Utilities Act*, sections 36 and 37. The Commission is required to balance the interests of the public while acting in a fair manner towards the utility. This regulatory compact between the Commission and Atco is well known:

> 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.
>
> *Stores Block* at para 63

[49] Discussing the statutory requirement to set just and reasonable rates, the Supreme Court of Canada noted:

> Rate regulation serves several aims — sustainability, equity and efficiency — which underlie the reasoning as to how rates are fixed:
>
> > . . . the regulated company must be able to finance its operations, and any required investment, so that it can continue to operate in the future . . . Equity is related to the distribution of welfare among members of society. The objective of sustainability already implies that shareholders should not receive "too low" a return (and defines this in terms of the reward necessary to ensure continued investment in the utility), while equity implies that their returns should not be "too high". (R Green and M Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities: A Manual for Regulators* (1999), at 5)
>
> *Stores Block* at para 62

[50] Fairness to customers requires that the rate base include only assets used or to be used for operation of the utility and not assets with no production value. At the same time, the Commission has an obligation of fairness to the utility. The Commission recognized the effect of its directions to Atco when it selected a July 1, 2009 implementation date.

[51] I do not accept Atco's submission that the Commission erred in law by engaging in prohibited retroactive ratemaking. Whether a decision is impermissible retroactive ratemaking is an issue of fact. (See *Atco Gas, Re*, 2010 ABCA 132, 477 AR 1, discussed below.) There are two fundamental policy concerns behind retroactive ratemaking. With regard to the utility, retroactive ratemaking is unfair because a utility relies on certain rates to make business

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decisions. To change them after the fact could cause unexpected results for the utility: Yvonne Penning, "Can Economic Policy and Legal Formalism Be Reconciled: The 1986 Bell Rate Case" (1989) 47 *U Toronto Fac L Rev* 607 at 610. With regard to consumers, retroactive ratemaking redistributes the cost of utility service by asking today's customers to pay for expenses incurred by yesterday's customers: "Can Economic Policy and Legal Formalism Be Reconciled" at 610. Clearly, that should be avoided.

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[52] In this case, removing the salt cavern assets from the rate base or revenue requirement would cause a decrease in rates and a benefit for customers, not an increase after the fact. Thus, retroactivity to July 1, 2009 works in favour of customers from that date forward. The question here involves the question of fairness to the utility.

[53] Where a utility has knowledge that assets are not required for operational purposes, and knows it can unilaterally remove them, the utility must also be taken to know that the rates will be subject to change as a result of the non-inclusion of those assets in the rate base. It has the choice to remove the assets and utilize them in other revenue generating operations. Once there is knowledge, the harm of retroactive ratemaking from the utility's perspective vanishes.

[54] Retroactive ratemaking was considered by this court in *Calgary (City) v Alberta (Energy and Utilities Board)*, 2010 ABCA 132, 477 AR 1 at paras 46-47 [*Deferred Gas Accounts* decision], where it confirmed the problems surrounding retroactive ratemaking by a regulatory authority:

> Generally, ratemaking and rates must be prospective: *Coseka Resources Ltd v Saratoga Processing Co* (1980), 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., Re* (1978), [1979] 1 SCR 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 & Telecommunications Commission)*, [1989] 1 SCR 1722 at 1749. Utility regulators cannot retroactively change rates 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.

[55] The *Deferred Gas Accounts* decision of this court, following *Stores Block*, set down guiding principles for determining whether ratemaking was impermissibly retroactive.

[56] Simply because a ratemaking decision has an impact on a past rate does not mean it is an impermissible retroactive decision. The critical factor for determining whether the regulator is engaging in retroactive ratemaking is the parties' knowledge. Hunt JA stated at para 57:

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> Both *Bell Canada 1989* [*Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722] and *Bell Aliant* [*Bell Canada v Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 SCR 764] (which concerned deferral accounts rather than interim rates) illustrate the same preoccupation: **were the affected parties aware that the rates were subject to change?** If so, the concerns about predictability and unfairness that underlie the prohibitions against retroactive and retrospective ratemaking become less significant. (Emphasis added.)

[57] If a utility is aware that a rate is interim and subject to change, then a regulator's revision of the rate will not be disallowed for impermissible retroactive ratemaking. This was the conclusion reached by the Supreme Court of Canada in *Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722, 60 DLR (4th) 682 [*Bell Canada 1989*].

[58] According to the Supreme Court of Canada in *Bell Canada 1989* at 1756, alteration of an interim rate by a regulator is simply a function of regulators who have the mandate to ensure rates and tariffs are, at all times, just and reasonable.

[59] In this appeal, the Commission expressly reserved the issue of the salt cavern assets, among others, from the revenue requirement determination: Commission's Decisions 2009-033 and 2010-228. Atco says the use of a placeholder (reserving the issue of the salt cavern assets for future determination) was not enough to enable the Commission to revisit the matter in subsequent years. Atco submits that the terms "interim rate order" and "deferral account" are well understood by all parties and that the use of the word "placeholder", without more, is not enough to achieve the same purpose as interim rates and deferral accounts. I do not agree. Atco had all the information it required by June 2009 to know that it was not entitled to revenue from inclusion of those assets in the rate base.

[60] In 2009 and 2010, as permitted under the *Gas Utilities Act*, Atco engaged in negotiation of issues related to the salt cavern assets and revenue requirements. The resulting Negotiated Settlements in 2009 and 2010 expressly reserved making a decision about removing the salt cavern assets from the revenue requirement because the parties were addressing the matters in separate proceedings. The Negotiated Settlements (found in the Commission's Decision 2009-033 and Decision 2010-228) set Atco's revenue requirement for 2009 and 2010. Atco knew that the Negotiated Settlements only represented a partial rate, subject to the determination of the proceedings relating to the salt cavern assets. This is apparent when in 2010 the parties to the Negotiated Settlements agreed to not delay the rate setting proceedings for the sake of determining the fate of the salt cavern assets:

> In a letter dated January 22, 2010, the Commission agreed with all parties that the present proceeding should not be delayed as a result of any issues regarding the Identified Salt Cavern Assets. The Commission granted [Atco's] request to deal with the Identified Salt Cavern Assets in a separate, subsequent proceeding. Given that the removal of Identified

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> Salt Cavern Assets would constitute a change to revenue requirement which would ultimately be reflected in a change to rates, the Commission considered that any such Identified Salt Cavern Assets proceeding would be a rate-setting proceeding.
>
> Decision 2010-228 at para 26

[61] Not only did Atco agree to deal with the salt cavern assets in a separate proceeding, it was aware that the revenue requirement would change as a result of removal of the assets. Although there was no discussion about interim rates or deferral accounts, Atco had knowledge that the impact of the subsequent proceeding could result in a different revenue requirement. It not only can be taken to have known that it could remove the assets from the rate base, but the reservation of the issue of the salt cavern assets for a future proceeding certainly supports the Commission's finding here.

[62] Slavish adherence to the use of interim rates and deferral accounts should not prohibit adjustments in a case such as this. Regulators have a broad, discretionary authority when ratemaking. The relevant question here is whether the utility knew from the actions or words of the regulator that the rates were subject to change. Atco clearly knew since 2007 that the identified salt cavern assets were not being used or required for operations of the utility. Atco's submission that a commission can only change rates if it used an interim rate or deferral account misapprehends the reason why deferral accounts and interim rates can be retrospectively altered by a regulator. The question here is not whether the regulator used the name "deferral accounts" or "interim rates" but whether Atco was aware that the rate could be altered retroactively.

[63] The Commission recognized the problem it had created by refusing to allow removal of excess salt cavern assets and therefore elected not to set the date before July 1, 2009. It awarded Atco compensation on a *quantum meruit* basis for the period January 1, 2008 to June 2009. But by July 1, 2009, Atco not only knew the excess assets were not required for operations, it was aware it could unilaterally remove them. It could, at that time, have withdrawn the assets and utilized them prudently in any manner short of disposition as defined under section 26. As a result, it was Atco's decision to freeze the use of the assets by not unilaterally withdrawing them once *Salt Caverns* issued. It should have recognized that rates would change.

[64] I reject the UCA's argument that it was a jurisdictional error not to order an implementation date of September 2007, when Atco first indicated the assets were no longer used or would be used for utilities services. Moreover, given the history of this matter, the uncertainty of the law, and the Commission's acceptance of its role in directing the assets not be removed, the Commission's choice of a later date is reasonable. The Commission was exercising its broad, discretionary power to set just and reasonable rates when it selected the implementation date as it is entitled to do.

[65] In summary:

1. Assets not being used or required to be used for utility service are not to be included in the rate base; and

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2. a utility has the responsibility to withdraw assets from the rate base once the assets are no longer used or required to be, and no Commission approval is required. Such removal is, of course, subject to a prudency review by the Commission.

This decision falls squarely within the Commission's mandate, it is not unreasonable and is owed deference by this court. The appellant has failed to show that the Commission erred in law or acted unreasonably in exercising its discretionary power, and this ground of appeal must be dismissed.

Issue 2: Did the Commission err by requiring Atco to bear the costs and burdens attributed to non-utility use of portions of a single, indivisible asset originally acquired for the purposes of the utility?

[66] The Commission included the eastern portion of the undivided SE quarter of section 34, township 55, range 21-W4M in the assets found no longer used or required for providing utility service (the Additional Assets) and excluded them from the rate base. The Commission held that since no more salt caverns are to be developed, and the water pipeline is not necessary to maintain the existing caverns, then the Additional Assets should also be removed from the rate base. It is common ground that these assets are not required for operations, but Atco argues this quarter section is an undivided asset that should not be notionally divided for rate base purposes. The Commission rejected that argument and held that customers should not be burdened by the costs attributed to the unused portion of the land and well just because Atco chooses not to subdivide or use the land in some other manner.

[67] The Commission held that subdivision of this quarter section is not required to remove part of the asset from the rate base, finding it could remove a proportional amount of the book value of the land and non-depreciable assets. It stated at para 100:

> [Atco] is free then to make whatever use of the Additional Assets and Related Assets it may wish to for its own purposes. Given that it is not necessary to subdivide the property to remove the value of the Additional Assets and the Related Assets from rate base and revenue requirement, the cost of any subdivision of the property which [Atco] may wish to pursue for its own purposes or to dispose of the property should be for the account of [Atco] shareholders.

Both the Additional Assets and unused infrastructure (the Related Assets) were to be removed from the rate base. In addition, the Commission agreed that if Atco wished to proceed with a subdivision of the eastern portion of the quarter section and dispose of that land, the Commission consented to such a disposition under section 26(2)(d) of the *Gas Utilities Act,* on the basis that the costs of any subdivision would be borne by Atco.

[68] Atco says that the decision is unreasonable. It says that part of the asset is still required for the rate base, the asset has always been in the rate base, and the Commission cannot exclude a portion of an asset from the rate base without bearing the costs of such removal.

[69] The issue here is unique in that Atco does not want to proceed with subdivision due to costs of that subdivision. It involves the removal from the rate base of a portion only of a legally undivided asset, namely, a quarter section of land already in the rate base. The quarter section is an undivided parcel of land originally acquired in the 1980s for the purpose of establishing salt caverns on its western half and ensuring sufficient land for further salt caverns to the east, if and when required. Since then, other storage methods negate the need for future salt caverns. The existing salt caverns located on the westerly portion of the SE 34-55-21-W4M continue to have use for future utility service, but the eastern half of the quarter section and the well located on that land have no further use or expected use in operations.

[70] In its 2008-2009 General Rate Application and its earlier application, Atco had included the Additional Assets among those it sought to remove from the rate base, indicating that it wished to transfer the eastern portion of the quarter section to a non-utility affiliate, Atco Energy Solutions Ltd. This is notable as it is some evidence of an alternative use of this portion of land. By the 2011 application, the County of Strathcona had increased the development levy resulting in subdivision costs estimated at $1.2 million. As a result, Atco said that its affiliate no longer had any interest in acquiring the land.

[71] Atco takes the position that the quarter section is one indivisible asset acquired for utility purposes. As the asset is, and has historically been, used in operations and included in the rate base, it should remain there unless the cost of subdivision is borne by the ratepayers. Atco submits that the whole asset is properly in the rate base and the Commission cannot divide an undivided asset into portions for the purpose of excluding the value and costs associated with that portion from the rate base.

[72] At a minimum, Atco says that if the Commission wants to separate the value and costs associated with the eastern half from the rate base that should be accomplished by a legal subdivision of the property, which, if directed by the Commission, should be a cost recoverable from ratepayers as the utility would not voluntarily incur such a cost.

[73] I am satisfied that the Commission cannot order Atco to legally subdivide its quarter section of land. The authorities provide that an asset owned by a utility is the utility's private property. (See: *Stores Block*; *Salt Caverns*). While the Commission has the power under section 26 to block the sale of an asset in the rate base, it does not have the converse authority to interfere with property rights and order the sale of an asset. The Commission, therefore, cannot order the property be subdivided in order to treat the unused portion as no longer part of the rate base.

[74] In *Atco Gas and Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2009 ABCA 171, 454 AR 176 [the *Harvest Hills* decision], this court considered the regulatory board's jurisdiction to appropriate proceeds of sale from lands not used nor required to be used to provide service. Relying on the *Stores Block* decision, this court held at para 29 there was no power to allocate proceeds from a sale or interfere with ownership rights where the asset is no longer needed to provide service to customers.

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[75] Nonetheless, the Commission can make decisions about assets in the rate base. It is mandated to fix just and reasonable rates pursuant to section 36 of the *Act*. In so doing, section 37 grants the Commission jurisdiction to determine the rate base and decide what assets are used or required to be used in providing utility service as described by this court in *Salt Caverns* at paras 28 and 31:

> Can it be reasonably argued that this regulatory power is confined to ruling on adding new items to the rate base, but inapplicable to excluding old or unused items? No. Phillips, [*The Regulation of Public Utilities* (Public Utilities Reports, 1992)] at 302 quotes another established textbook and lists items which regulatory commissions may exclude from the rate base. They include obsolete property, property to be abandoned, overdeveloped property and facilities for future needs, and property used for non-utility purposes.
>
> . . .
>
> The paragraphs above show that the rate-regulation process allows and compels the Commission to decide what is in the rate base, i.e. what assets (still) are relevant utility investment on which the rates should give the company a return. The traditional test is whether they are used or required to be used, and (as will be seen below) nothing in the legislation changes that.

[76] The Commission is also required under section 37(2) to give due consideration to:

> (a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and
>
> (b) to necessary working capital.

[77] Thus, the Supreme Court of Canada in *Stores Block* described the Board's responsibility as "maintaining a tariff that enhances the economic benefits to consumers and investors of the utility" (para 64). A commission must consider the symmetry of risk and return for both the utility and its customers. As stated by the majority in *Stores Block* at para 69:

> Assets are indeed considered in rate setting, as a factor, and utilities cannot sell an asset used in the service to create a profit and thereby restrict the quality or increase the price of service. Despite the consideration of utility assets in the rate-setting process, shareholders are the ones solely affected when the actual profits or losses of such a sale are realized; the utility absorbs losses and gains, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality.

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[78] In addition, the Commission has discretion to act in the public interest when customers would be harmed or face some risk of harm. As described by the majority in *Atco Ltd v Calgary Power Ltd*¸ [1982] 2 SCR 557 at 576:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. . . . This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board.

[79] The Supreme Court of Canada in *Stores Block* held that while the Board could not allocate or appropriate sale proceeds, it had other options within its jurisdiction when a sale would affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future, such as not approving a sale. Additionally, the Board could attach conditions. The majority at para 77 suggested, "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." But *Stores Block* also held that the ratepayers could not enjoy any of the profits of the sale, notwithstanding that through rates the ratepayers pay for or contribute to the acquisition of the asset.

[80] In *Harvest Hills*, this court (at para 34) was of the view that the Board may impose conditions where it had a valid concern to guard against land speculation.

[81] Similarly, in *Salt Caverns*, this court considered the possibility of a commission adjusting values of property in the rate base where it had a concern that the use or disuse of some asset lacked prudence. It stated at paras 52-53:

> It is common ground that as part of a normal rate hearing, the Commission can and must decide what items (property) are to be considered part of the rate base and given a value on which the utility company is entitled to recover a return on investment: s. 37 of the *Gas Utilities Act*. . . .
>
> Indeed, counsel for the appellant stressed to us what the Commission could do when hearing a rate application if it found want of due prudence in starting or stopping the use of some asset in the regulated utility. It could make some adjustment of values in the rate base or in the expenses or return on investment, so that rates approved would not make the consumers pay rates based on that type of imprudence.

[82] *Harvest Hills* focussed on the issue of disposition of land that had already been subdivided, so division was not contested. In this case, the Commission authorized a disposition under section 26(2)(d), but did not order the land divided. Rather, it removed the value it attributed to the eastern portion of the quarter section no longer required for utility service purposes. In doing so, it was determining the rate base including the property still in use for

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utility service pursuant to section 37, as it is entitled to do. Atco was free to use that substantial portion of land as it saw fit. There was no evidence suggesting it had no alternative uses.

[83] The parties did not direct the court to any authority governing principles surrounding the removal of a portion of an asset from the rate base. In my view, those principles should be developed incrementally. While I recognize the general principle that assets which cease to have a utility purpose should be withdrawn from the rate base, the question still remains: "what is the asset?" Considerations for the Commission will vary with the facts and circumstance of the case, and in particular, the nature of the asset. Depending on the facts, the decision to remove a portion of an asset from the rate base may raise many considerations, including such matters as whether an asset can be physically, practically or legally divided; ease of division; associated costs involved and who should pay them; length of time the asset was in the rate base; whether the divided portion has other potential uses; whether separation of part of an asset sterilizes the remainder; and in general, what is just and reasonable in the circumstances. The list is neither definitive of factors to be considered, nor will every case require consideration of all criteria. The fact situation could vary from an easily divisible asset to a physical plant where the portion not required for operational use has no other functional purpose, yet costs associated with the unused and unneeded portion. Is an undivided plant two assets for the rate base purposes?

[84] In this case, the land had been in the rate base since 1982. As a result the utility had received a return on its investment for some time. The parties were in agreement that the eastern portion of this land and the well were not needed for the operations of the utility. Could it have other uses? The asset here is a tract of land. The Commission concluded that Atco was free to engage in other uses for the unused portion of land, if it chose not to sell. No evidence suggested that this land had no other use, short of subdivision and sale, nor that the eastern portion of the quarter section (some 80 acres) would be sterilized for other use so long as the western portion remained in the rate base. Indeed, Atco's earlier application for approval to remove for sale to a related company is evidence supporting a finding of other uses.

[85] Atco sought, at a minimum, that the subdivision costs be borne by the ratepayers but the Commission was not prepared to place that burden on the ratepayers. It authorized other uses, obviously concluding that subdivision was unnecessary for all uses.

[86] Since the authorities have established that ratepayers cannot share in any of the sales of assets, it follows that holding property within the rate base, once its use has expired, works to the detriment of the ratepayer. The recent principles set down in *Stores Block* and *Carbon* make it clear that ratepayers have no opportunity to share in the better times when land values rise, so it is important to protect the ratepayer by ensuring only proper assets remain in the rate base. In judging reasonableness, it is important to remember that since ratepayers cannot share in sale proceeds of utility assets, their protection for fair treatment lies in excluding assets not required for utility operations from the rate base.

[87] Other choices for dealing with this quarter section might have been selected by the Commission. For example, perhaps the Commission could have elected to keep the whole asset

in the rate base and ensure prudent non-utility use of the eastern half and share in that revenue because the asset remains in the rate base. While the authorities suggest that an asset cannot be kept in the rate base for the purpose of earning non-utility revenue, those cases were dealing with assets no longer required for utility purposes. I do not read the authorities as denying flexibility where a portion of an asset is required for utility operations and removal of the balance of the asset is not just or reasonable. I do not need to make that decision here in view of the Commission's decision to remove value of the eastern half from the rate base.

[88] The Commission obviously considered the eastern portion and the balance of the quarter section as two assets for rate purposes. That decision is a reasonable one on the facts of this case.

[89] In summary:

1. Fair treatment for ratepayers requires exclusion of assets not required for utility operations from the rate base.
2. The standard of review of a commission's decision to remove an asset from the rate base is one of reasonableness.
3. The Commission's decision to treat the quarter section of land as two assets for the rate base purposes and direct the utility to remove the costs of the non-utility use portion from the accounting determination of the rate base and revenue requirement was not unreasonable on the facts and circumstances here, and I see no basis for appellate intervention.

Conclusion

[90] The appeal is dismissed.

Appeal heard on June 11, 2013

Reasons filed at Calgary, Alberta
this 20th day of January, 2014

Conrad J.A.

I concur:

Martin J.A.

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Concurring Reasons for Judgment of
The Honourable Mr. Justice Berger

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[91] I have had the advantage of reading in draft form the Reasons for Judgment Reserved of Conrad J.A. of November 22, 2013.

[92] Application of the principles that emerge from the reported cases cited by counsel support dismissal of the appeal. They are the following:

1) Section 37 of the ***Gas Utilities Act***, RSA 2000, G-5 requires an asset to have an operational purpose in providing utility services to be included within the rate base. The cost of assets without an operational purpose in providing service to the public cannot be included in the rate base and in customer rates.

2) Section 26 of the ***Gas Utilities Act*** does not require the consent of the Commission prior to a utility removing an asset from the rate base.

3) It follows that a utility may, without obtaining prior Commission approval, remove an asset from the rate base at the time that the utility management considers that the asset is no longer used or required to be used, or will soon become no longer used or required to be used, in an operational sense to provide regulated utility services.

4) The Commission has no jurisdiction to include in the rate base assets which are not being used or required to be used in providing service to the public in an operational context: ***Atco Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)***, 2008 ABCA 200, 433 A.R. 183 (the "***Carbon*** decision"); ***Atco Gas and Pipelines Ltd. v. Alberta (Utilities Commission)***, 2009 ABCA 246, 464 A.R. 275 (the "***Salt Caverns*** decision"). See also the comments of McFadyen J.A. in ***Calgary (City) v. Alberta (Utilities Commission)***, 2010 ABCA 158, 487 A.R. 191.

   [I appreciate full well that my colleague takes a different view with respect to the use of the term "jurisdiction" in this context. With great respect, I prefer the commentary of Jones and Villars, *Principles of Administrative Law*, 5th ed. (Edmonton: Carswell, 2009) at p. 149 on the issue of when a decision is *ultra vires* and void:

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> "The question sometimes arises whether an *ultra vires* act is void or merely voidable. The answer is important in order to determine whether the delegate's action has any legal effect prior to the declaration by the court that it is *ultra vires*. In principle, all *ultra vires* administrative actions are void, not voidable, and there are not degrees of invalidity ... Although people may have acted on the assumption that the delegate did have authority to do the impugned action, the effect of the court's granting of judicial review must be to declare that that was an erroneous state of affairs, that the delegate never has jurisdiction to do the particular action in the manner complained of." (footnotes omitted)

After all, review by this Court is confined to errors of law or jurisdiction thereby limiting the Court to a determination as to whether actions of the inferior tribunal are void.]

5) When the assets cease to have a utility purpose, the utility is obliged to withdraw the assets from regulated service without first obtaining Commission approval.

6) The Commission has no jurisdiction over non-utility assets that are located within a single indivisible quarter-section of land originally acquired for the purposes of the utility when it would not have such jurisdiction if the non-utility assets were physically separated from utility assets.

7) It is not open to the Commission to compel the utility to physically sub-divide a quarter-section in order for the Commission to determine that customers should not be obligated to pay for non-utility assets located within that quarter-section.

8) When assets no longer have an "operational purpose" within the meaning of paras. 25 and 27 of the ***Carbon*** decision and paras. 14 and 56 of the ***Salt Caverns*** decision, it is open to the Commission to direct the utility to remove the cost of the additional assets and the related assets from the regulatory accounting determination of rate base, revenue requirement and customer rates.

9) It is the utility and its shareholders that must bear the burden of any losses on disposition of an asset and any decrease in value in property originally acquired by the utility to provide utility service. (See para. 69 of ***Atco Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)***, [2006] 1 S.C.R. 140). In other words, the cost of any sub-division of the property or

> its disposition is for the account of the utility's shareholders. (My colleague would afford the Commission some latitude. Given the statutory framework, I would not. The utility alone absorbs losses and gains).

[93] In concurring in the result, I find it unnecessary to comment further on the fulsome reasons of my colleague.

Appeal heard on June 11, 2013

Reasons filed at Calgary, Alberta
this 20th day of January, 2014

____

Berger J.A.

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Appearances:

H.M. Kay, Q.C.
N.M. Gretener
for the Appellant

B.C. McNulty
for the Respondent Alberta Utilities Commission

T.D. Marriott
for the Respondent Utilities Consumer Advocate

2014 ABCA 28 (CanLII)

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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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.**

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Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2009-0113

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 North Bay Hydro Distribution Limited for an order approving just and reasonable rates to be effective July 1, 2009.

BEFORE: **Ken Quesnelle**
Presiding Member

DECISION AND ORDER

September 8, 2009

North Bay Hydro Distribution Limited (North Bay) filed an application with the Ontario Energy Board on April 21, 2009, under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B), seeking approval for a proposed schedule of rate riders to be effective July 1, 2009. The Board assigned file number EB-2009-0113 to the application.

The Board issued a Notice of Application and Written Hearing on May 26, 2009. The Vulnerable Energy Consumers Coalition (VECC) and Hydro One Networks Inc. (Hydro One) were approved as intervenors.

Procedural Order No. 1 was issued on June 18, 2009. The Board made provision for written interrogatories and for submissions. VECC and Board staff filed interrogatories and made submissions. Hydro One filed interrogatories, but made no submission. North Bay's reply submission was filed on August 11, 2009. The full record is available at the Board's offices.

THE APPLICATION

Background

North Bay requested disposition of a total of $2,029,825 of its Retail Service Variance Account ("RSVA") balances as of December 31, 2008. North Bay also requested the disposition of carrying charges associated with the above balances of $17,149 for the period of January 1, 2009 to through June 30, 2009. The total overall requested disposition is $2,046,974.

In its application, North Bay stated that Board Regulatory Audit staff initiated a review of North Bay's Account 1588 (RSVA Power) in 2008 due to the balances associated with this account being higher than the industry average. On December 2, 2008, following the review, Board Regulatory Audit staff issued a final letter and stated that North Bay should correct the entries in Account 1588 in accordance with the Account Procedures Handbook.

Following the Board Regulatory Audit staff review, North Bay engaged the services of a consultant to conduct a review of all five RSVAs[1]. As a result, North Bay's consultant,

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1 Account 1580, Account 1582, Account 1584, Account 1586 and Account 1588

E360, provided the corrected balances which covered the period May 2002 to December 2008 and also recalculated the carrying charges. These corrected RSVA balances and carrying charges had been audited by North Bay's external financial Auditors, BDO Dunwoody LLP.

Board staff had no concerns with the calculations. VECC made no comments on the calculation of the balances; however VECC took the position that an adjustment regarding the allocation for the Account 1588 Global Adjustment sub-account is required.

VECC noted that North Bay proposed to allocate the total balances of Account 1588 to each class. Since the Global Adjustment sub-account is established to track the Global Adjustment for non-RPP customers only, VECC submitted that the balances from the Global Adjustment sub-account should be recovered based on the non-RPP load associated with each class. VECC further submitted that the rate riders should be based on the response to VECC's interrogatory[2] which reflected VECC's proposed form of recovery. In its reply submission, North Bay accepted the rate riders as submitted by VECC.

Significance of the Balance

North Bay submitted that the outstanding balance of $2,029,825.46 is of great significance to it and provided the following comments in that regard[3]:

a) The RSVA balances represent true costs that were incurred by the Applicant but were inadvertently not passed along to customers for recovery;
b) Using deferral accounts to identify and track costs for recovery at a future period is a standard industry practice;
c) The balance of $2,029,825.46 (comprised of $2,110,574 principal less $80,749 in a credit against carrying charges) represents approximately 2 years of net income for the Applicant's business;
d) Put another way, the balance is equivalent to almost 3 months of distribution revenue;
e) The balance, if written off would result in the distribution business reporting a significant net income loss; and

[2] Response to VECC interrogatory # 3 (c)
3 Page 9 of application – Manager's Summary

f) The balance is material and, as discussed below, recovery of the balance will be used to assist in financing the costs of certain major capital projects planned for 2009 and 2010.

Retroactivity

North Bay's evidence included corrections made to its RSVA balances for the period prior to December 31, 2004. Board staff's submission noted that the Board had approved North Bay's request for recovery of regulatory assets as of December 31, 2004 in its 2006 Electricity Distribution Rate (EDR) decision. Board staff submitted that the Board may wish to consider the retroactive nature of North Bay's request. Board staff submitted that in the Board's decision on Northern Ontario Wires' (NOW) 2009 EDR application, the Board had disallowed NOW's requested correction to the balances of its Account 1571 (one of its variance accounts) as of December 31, 2004. Board staff further noted that the Board decision on Lakefront Utilities Inc.'s (Lakefront) 2008 EDR application had stated that the proposed adjustment to its error on Account 1570 would result in significant retroactivity and accordingly denied the adjustment.

In its reply submission, North Bay submitted that it should be permitted to make corrections to the RSVA balances in order to ensure that the costs were properly passed through. North Bay submitted that the RSVAs track the differences between the amounts paid by North Bay to the IESO for items such as electricity, transmission services and wholesale market services and the amounts billed to its customers. Therefore, the amounts tracked in RSVAs are considered to be a pass-through to customers. North Bay further stated that both the Report of the Board on Electricity Distributors' Deferral and Variance Account Review Initiative[4] (EDDVAR Report) and the Report of the Board on Transition to International Financial Reporting Standards[5] (IFRS Report) indicated that pass-through accounts do not require a prudence review. As a result, North Bay submitted that the Board's role should be to ensure North Bay's practices had been corrected and that the corrected balances for these pass-through accounts are recovered.

North Bay further submitted that the cases cited by Board staff did not support staff's position concerning the recoveries sought in its application. The RSVA accounts for which North Bay is seeking adjustments are pass-through accounts which are ongoing

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[4] Report of the Board, EB-2008-0046
[5] Report of the Board, EB-2008-0408

and will remain to be used to accrue for ongoing variances. By contrast, in North Bay's view, the cases referenced by Board staff, involve accounts that are neither pass-through nor ongoing in nature (Account 1571 for NOW and 1570 for Lakefront). As such, in North Bay's view these cases are not supportive of an "out-of-period" finding, as suggested by Board staff.

Board staff submitted that if the Board accepted the adjustment for the RSVA balances prior to 2005, this adjustment would, in effect, vary the Board's RP-2005-0020/EB-2005-0397 decision. That decision disposed of North Bay's RSVA balances as of December 31, 2004 on a final basis. Staff noted that the deadline for seeking any variance to that decision had long passed.

North Bay submitted that in the past, the Board had exercised its discretion to vary its own decision after the expiration of the 20-day period. North Bay cited the Board Decision on the Toronto Hydro-Electric System Limited third tranche Conservation and Demand Management Plan in which the Board varied its Decision one and a half years after the original Decision (RP-2004-0203/EB-2004-0485/EB-2006-0145).

Board staff also noted that if the Board decided to allow North Bay's RSVA balances to be disposed for the period January 1, 2005 to December 31, 2008 only, North Bay would refund the amount of $503,506.69 plus interest to its customers.

In its reply submission, North Bay rejected this suggestion on the basis that it would penalize North Bay for its efforts to correct its account practices and urged the Board to approve its application. North Bay submitted that the corrected balances for these pass-through accounts should be recovered.

Recovery period

In its original application, North Bay requested approval for proposed rate riders to be effective July 1, 2009 and a disposition period of three years. VECC submitted that it would be appropriate to change the effective date to November 1, 2009, which would coincide with the change in RPP rates.

In its reply submission, North Bay agreed with VECC's proposal and requested that the proposed rate riders be effective for the period November 1, 2009 to October 31, 2012.

BOARD FINDINGS

For the reasons that follow the Board denies the applicant's request to establish rate riders for the purpose of collecting revenues based on corrected RSVA account balances.

In support of its request, North Bay provided the following:

- A detailed record of the original account balances contrasted against the corrected balances to illustrate the variance that forms the basis of the relief sought as well as the chronology of events that resulted in the corrections.
- Its position regarding the significance of the corrected balances in terms of the quantum in relation to its net income and distribution revenue.
- Details on the intended use of the funds and the concomitant benefits to its customers.

North Bay also noted that due to its stable population base there is little risk of intergeneration cross subsidy.

On the issue of the correction of the account balances, the Board accepts that certain account balances submitted for the purpose of establishing the 2006 rates were incorrect. The record is clear that errors in accounting were made and that a substantial effort has been made to establish accurate balances, based on the correct accounting methodologies and entries. The applicant appears to have taken due care and effort to reform certain accounting procedures to be compliant with the Accounting Procedures Handbook.

As to the significance of the balances, North Bay contends both in its original application and in its reply submission that the money it proposes to collect by way of rate riders is to be applied to needed capital projects within the applicant's service area. At paragraph four of its reply submission North Bay states the following:

"To be clear, the money recovered is not being used to enrich the utility or its shareholder – it is being put back into the system that serves the Applicant's customers."

The Board agrees that the amount proposed to be collected is significant. However, the applicant's position on this point is not clear to the Board. The applicant submits that the

Board should consider the negative impact on the financial status of the utility and at the same time submits that the recovery sought is not to be used to enrich the utility.

These seemingly contradictory contentions may arise from the applicant's understanding, as it is characterized in the application that the corrected account balances represent monies currently owed to the utility.

While no party took issue with the intended use of the sought after money, for reasons that follow the Board will not opine on the appropriateness of the applicant's proposed spending in the context of this application.

The main area contested in the application is the issue of retroactivity. Board staff submitted that the Board may wish to consider the retroactive nature of North Bay's request and cited recent Board decisions where the Board denied requests similar to North Bay's. North Bay responded by noting that the "pass through" nature of the accounts in its application should be considered and that the balances represent its true costs.

In the normal course a utility need not concern itself with the fluctuations in RSVA account balances driven by timing differentials between the incurrence of costs and the collection of offsetting revenues. The purpose of the account is to track the variance with the intent to dispose of the balances in a manner that keeps the applicant whole. However, once the rates, including any associated riders from the clearance of the RSVAs or any other account, have been determined to be final the Board has little, if any, power to alter these rates retroactively.

The applicant has not demonstrated any financial hardship that may have been as a result of the incorrect balances being cleared. The applicant submits that the rationale for allowing the prior period adjustment is that RSVA balances are intended to be a "pass trough" and essentially immune from any retroactivity concern. The Board does not differentiate its treatment of the RSVA accounts from any other component of the approved rates in its consideration of retroactivity. The reasonable rate-payer confidence in the continuation of rates deemed final are diminished equally irrespective of the impetus of the retro-activity.

In support of its request the applicant submits that the intended use of the recovered amounts will be of benefit to the customer due to system improvements. The Board

does not consider the establishment of a future need to be sufficient grounds to warrant a prior period adjustment. There are other more appropriate processes to establish the revenues required for future spending.

A central function of cost of service rate making is the matching of future revenues with anticipated reasonably incurred future costs. In a typical rate setting exercise an applicant determines what its reasonably incurred costs will be in the future period for which the applied for rate will be charged. The applicant provides its rationale for the level of spending that underpins its revenue requirement and the Board sets rates in accordance with what it considers to be just and reasonable. It is a holistic process that considers all expected revenues and all expected costs to determine the appropriate rates.

North Bay's 2006 rates were established on the basis of what was thought to be a true account of its expected future costs and revenues. The fact that for 2006 rates North Bay chose to use a historic test year as a proxy for future costs does not alter the concept that rates were established on a prospective basis to match future revenues against future reasonably incurred costs.

North Bay cited the Board's desire to maintain the use of deferral accounts in support of its claims. It is not rational to conclude that the Board's desire to maintain the use of deferral accounts suggests that the final disposition of deferral accounts is anything less than final.

The Board notes that the 2007 rate setting process was a mechanical process that continued the 2006 rates with some inflation related adjustments. The Board initiated a rate setting framework for the electricity distribution sector that provided an opportunity to distribution companies to apply for rates on a cost of service basis for the 2008 rate year or any subsequent year. North Bay did not elect to seek increases to its rates in 2008 or 2009 to cover the costs of these activities but does intend to apply for new rates for 2010 on a cost of service basis. There is no evidence that North Bay was forced to delay capital spending due to lack of revenue or any evidence as to why North Bay did not apply for a rate increase earlier if it saw a need to increase its spending.

The Board expects North Bay to establish its stated needs in the context of its overall spending in its 2010 cost of service rate application. The disposition of the account

balances for the time period January 1, 2005 to December 31, 2008 would also more appropriately be done in the context of that rate setting proceeding.

As Board staff noted, a decision to allow North Bay's RSVA balances to be disposed for the period January 1, 2005 to December 31, 2008 only would result in North Bay refunding the amount of $503,506.69 plus interest to its customers.

North Bay submitted that a finding of the Board that disallowed the prior period adjustment but required North Bay to dispose of the corrected balance would penalize North Bay for its efforts to correct its account practices. The Board does not agree with North Bay's characterization. The application of sound rate setting principles results in a fair and transparent process that protects the interests of both ratepayers and the utility alike. While North Bay is to be commended for its efforts, there is a basic expectation that a licensed franchise holder will provide the Board with an accurate account of its financial affairs for rate setting purposes.

The Board is not driven by a need for a symmetrical treatment of ratepayers and utilities in situations where correction of utility mistakes is required. The utility has control of its books and records and has the responsibility to ensure mistakes do not occur. For this reason the Board could find in favour of the ratepayer in certain situations and not find in favour of the utility if the utility was in the same situation.

The Board notes that North Bay has identified spending requirements to maintain service to its customers. The Board further notes that North Bay has not considered it necessary to apply for a cost of service rate increase to provide the funds for these requirements before now. The filing of its rate application for 2010 rates provides the appropriate and timely opportunity to seek the revenues it claims are required. In this way North Bay's ratepayers will be afforded the opportunity to provide comments that are informed by North Bay's total spending plan.

North Bay's request to clear the RSVAs using corrected balances for the period prior to January 1, 2005 is therefore denied. The Board has already issued a final decision related to these balances, and it will not retroactively alter these balances. The Board also chooses to not clear the RSVA balances from January 1, 2005 forward at this time. The Board will consider the disposition of these balances either through its quarterly review of commodity deferral accounts pursuant to s. 78(6.1) of the Act, or in North Bay's next rates case. The request for the disposition of the carrying charges

associated with the balances from January 1, 2009 to June 30, 2009 is therefore also denied at this time.

COST AWARDS

The Board may grant cost awards to eligible stakeholders pursuant to its power under section 30 of the Ontario Energy Board Act, 1998. When determining the amount of the cost awards, the Board will apply the principles set out in section 5 of the Board's Practice Direction on Cost Awards. The maximum hourly rates set out in the Board's Cost Awards Tariff will also be applied.

THE BOARD DIRECTS THAT:

1. VECC shall file with the Board and forward to North Bay its cost claim within 26 days from the date of this Decision.

2. North Bay shall file with the Board and forward to VECC any objections to the claimed cost within 40 days from the date of this Decision.

3. VECC shall file with the Board and forward to North Bay any responses to any objections for cost claims within 47 days of the date of this Decision.

4. North Bay shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

DATED at Toronto, September 8, 2009

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Ontario Energy Board **Commission de l'énergie de l'Ontario**

EB-2013-0022

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 Veridian Connections Inc. for an order or orders approving or fixing just and reasonable distribution rates related to Smart Meter deployment, to be effective November 1, 2012.

AND IN THE MATTER OF a Motion to Review and Vary by Veridian Connections Inc. pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* for a review by the Board's Decision and Order in proceeding EB-2012-0247.

BEFORE: Marika Hare
Presiding Member

DECISION AND ORDER
ON MOTION TO REVIEW
April 25, 2013

INTRODUCTION

On January 23, 2013, Veridian Connections Inc. ("Veridian") filed with the Ontario Energy Board (the "Board") a motion for request to review and vary (the "Motion") the Board's Decision and Order dated October 25, 2012 (the "Decision") in respect of Veridian's smart meter application (EB-2012-0247) (the "Final Disposition Proceeding"). The Board assigned the Motion file number EB-2013-0022.

The Motion sought to extend the time for filing the Motion with the Board and vary the

Board's EB-2012-0247 Decision to permit Veridian to recover an additional $478,224 in revenue requirement related to 2009 amortization expenses associated with smart meter capital expenditures made in 2006, 2007, and 2008. The recovery is to be made through amendment of the existing Smart Meter Disposition Riders ("SMDRs") commencing on May 1, 2013 and continuing until April 30, 2014.

The Board issued its Notice of Motion to Vary and Procedural Order No. 1 on March 6, 2013. The Board granted intervenor status and cost award eligibility to the Vulnerable Energy Consumers Coalition ("VECC"), as it was the only intervenor in Veridian's smart meter rate proceeding under EB-2012-0247. The Board also determined that the most expeditious way of dealing with the Motion was to consider concurrently the threshold question of whether the matter should be reviewed, as contemplated in the Board's *Rules of Practice and Procedure* (the "Rules"), and the merits of the Motion.

The Board established a timetable for Veridian to file any additional material in support of the Motion, followed by written submissions by VECC and Board staff, and a reply submission by Veridian.

Veridian submitted additional material in support of its Motion on March 13, 2013. Board staff filed its submission on March 22, 2013. Veridian filed its reply submission on April 3, 2013. VECC did not file any submission.

For the reasons that follow the Board grants the extension of time for filing the Motion and finds that the threshold test has been met. The Board has reviewed the Motion materials and the Decision, and for the reasons set out below has determined that it will not grant the relief requested.

BACKGROUND

On October 2, 2009 Veridian applied to the Board for approval of 2010 rates on a Cost of Service basis (EB-2009-0140) (the "Interim Disposition Proceeding"), within which Veridian applied for interim disposition of smart meter-related revenue requirement amounts. As part of the Interim Disposition Proceeding, the capital expenditures associated with smart meter investments up to December 31, 2008 were included in Veridian's rate base effective January 1, 2010. Accordingly, going forward from January 1, 2010, the revenue requirement associated with smart meter capital expenditures up to December 31, 2008 was included in base rates.

Even after taking into account the interim clearance of smart meter amounts as approved by the Board in the Interim Disposition Proceeding, the 2009 amortization amounts related to smart meter capital investments made prior to January 1, 2009 were neither: a) included in base rates; nor b) recovered as part of the interim clearance.[1]

The Smart Meter Model (the "Model") issued by the Board along with Guideline G-2011-0001: Smart Meter Meter Funding and Cost Recovery – Final Disposition, issued December 15, 2011, and used by Veridian in its smart meter application EB-2012-0247 did not specifically address the fact that the 2009 amortization related to the pre-2009 smart meter capital expenditures remained outstanding and unrecovered either through an earlier rate rider or through approved distribution rates.

On May 31, 2012, Veridian applied for final disposition of smart meter-related amounts under Board file number EB-2012-0247. As part of that proceeding Veridian used the Board's Model to calculate the revenue requirement to be cleared.

The application sought approval for the final disposition of Account 1555 and 1556 related to smart meter expenditures. Veridian requested SMDRs and Smart Meter Incremental Revenue Requirement Rate Riders ("SMIRRs") effective November 1, 2012.

On October 25, 2012, the Board issued its Decision in the EB-2012-0247 proceeding and found that Veridian's documented costs, as revised in responses to interrogatories, related to smart meter procurement, installation and operation were reasonable. The Board approved the recovery of the costs for smart meter deployment and operation as of December 31, 2011. The Board directed Veridian to establish the SMDRs based on an 18-month recovery period to April 30, 2014, and to accommodate within the SMDR the applicable SMIRR amount related to the period from May 1, 2012 to October 31, 2012.

Veridian filed its Draft Rate Order and provided the following summary table outlining the SMDR and SMIRR rate riders as originally filed, as revised as per interrogatories and as recalculated pursant to the Board's Decision.

[1] Motion for Request for Review and Variance filed by Veridian, January 23, 2013, paragraphs 5 & 6

Class	SMDR ($/month for 18 months)			SMIRR ($/month until new rates set under rebasing)		
	As Filed	Update-Board Staff IR#13	Update - Board Decision	As Filed	Update-Board Staff IR#13	Update - Board Decision
Residential	$0.97	$0.83	$0.55	$0.98	No Change	$ 1.25
GS < 50 kW	$2.45	$4.15	$3.45	$2.46	No Change	$ 3.17

Board staff filed comments on the draft Rate Order on November 5, 2012 and agreed that Veridian had appropriately reflected the Board's findings in its draft Rate Order and proposed Tariff of Rates and Charges.

The Board issued Veridian's final Rate Order on November 15, 2012.

Veridian is now asking the Board through its Motion to allow for recovery of smart meter capital expenditures in the amount of $478,224, inclusive of Payment In Lieu of Taxes ("PILs") impacts, through the amendment of the existing SMDR. The amended SMDR is proposed to commence on May 1, 2013 and to continue until April 30, 2014.

Issues Before the Board

1. Extension of time

As noted by Veridian in its Motion materials, Veridian discovered the gap in recovery of smart meter expenses on January 9, 2013 during preparation of its regular year-end accounting working papers. It was during this process that Veridian realized that, with respect to the costs incurred by Veridian in relation to smart meter implementation it had not yet recovered the 2009 amortization expense related to pre-2009 smart meter capital expenditures, totalling $528,859 (before accounting for PILs impacts) and recorded in Account 1556.

As a result of the timing of Veridian's discovery of this amount for which it had not sought recovery it was not in a position to file its Motion within the prescribed 20 days specified in the Rules, which expired on or about November 14, 2012. Accordingly, Veridian asks that the Board use its discretion to extend the time period for filing a request for review.

The Board notes that parties are expected to respect the Board's deadlines and comply with the Rules, however the Board understands that the error was not identified by Veridian until after the 20 day period had expired and Veridain filed its motion immediately after becoming aware of the error. The Board therefore will use its discretion to hear the Motion, despite the timelines being exceeded.

2. Motion to Review and Vary

Veridian's Motion seeks to vary the Decision so that Veridian may recover an additional $478,224 in revenue requirement related to 2009 amortization expense of $528,859 associated with smart meter capital expenditures made in 2006, 2007, and 2008, less a credit to Grossed-up Taxes/PILs of $50,635.

Veridian requests revisions to its SMDR as outlined below.

Rate Class	Currently Approved Rate Rider	Requested Revision to Rate Rider effective May 1, 2013
Residential	$0.55	$0.83
Residential – Urban Year Round	$0.55	$0.83
Residential – Suburban Year Round	$0.55	$0.83
General Service Less Than 50 kW	$3.45	$4.59

Veridian bases its Motion on the following grounds:

1. There is an identifiable error in the Decision and that there are inconsistent findings in the Decision. The error is material and relevant to the outcome of the Decision. The omission of the 2009 amortization is a calculation error that should be remedied through a variance of the original Decision.

2. Veridian also notes that as part of the EB-2012-0247 proceeding, Veridian completed the Board's Model to calculate the revenue requirement to be recovered. However, the Model, in its design, did not anticipate any gap (i.e., unrecovered amounts from a reviewed and approved interim recovery, and final disposition of smart meter-related amounts in relation to amortization expense of installed smart meters.

The Threshold Test

The application of the threshold test was considered by the Board in its Decision on a Motion to Review the Natural Gas Electricity Interface Review Decision (the "NGEIR Review Decision"). The Board, in the NGEIR Review Decision, stated that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raise a question as to the correctness of the order or the decision, and whether there is enough substance to the issues raised such that a review based on those issues could result in the Board varying, cancelling, or suspending the decision. Further, in the NGEIR Decision, the Board indicated that in order to meet the threshold question there must be an “identifiable error” in the decision for which review is sought and that “the review is not an opportunity for a party to reargue the case”.

In addition to the test set out in the NGEIR Review Decision, Rule 45.01of the Board’s Rules provides that, with respect to a motion for review the Board may determine, with or without a hearing, a threshold question whether the matter should be reviewed before conducting any review on the merits.

Rule 44.01(a) sets out some of the grounds upon which a motion may be raised with the Board:

> Every notice of motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:
>
> > (a) Set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
> > i. error in fact;
> >
> > ii. change in circumstances;
> >
> > iii. new facts that have arisen;
> >
> > iv. facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

The Board also notes that in the NGEIR Review Decision it was established that the Board has the necessary discretion to supplement the above list of grounds upon which a motion to review and vary may be raised in an appropriate case.[2]

[2] EB-2006-0322/EB-2006-0338/EB-2006-0340, Motions to Review the Natural Gas Electricity Interface Review Decision, May 22, 2007, page 15

The Board received submissions from Veridian and Board staff. Board staff submitted that the threshold test has not been met arguing that none of the grounds listed in Rule 44.01 had been established. Veridian argued that the threshold had been met and that the Motion had merit.

The Board discusses each of the grounds set out in Rule 44.01 below with respect to the facts as presented in this Motion.

i. Error in fact

Veridian argued that a combination of what it would characterize as unusual circumstances relating to the multi-proceeding approach to the recovery of its smart meter-related revenue requirement led to an error in the calculation of the rider that was intended to fully compensate Veridian for costs incurred in the deployment and operation of smart meters. Veridian also submitted that the error related to the failure of the SMDR to compensate Veridian for 2009 Amortization Expenses related to 2006, 2007, and 2008 smart meter Capital Expenses in the amount of $478,223.79.

Veridian stated that the error it is seeking to have corrected is not related to the omission of evidence that, had it been before the Board prior to the Decision may or may not have influenced the exercise of the Board's discretion or judgment with respect to the prudence of Veridian's smart meter-related expenditures. Veridian noted that it is asking the Board to correct a clear error in the calculation of the recovery that necessarily follows from the Board's analysis of the prudence of Veridian's spending.

Board staff submitted that in demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. Board staff submitted that the Board's Decision is consistent with the evidence provided by Veridian.

Veridian argued in its reply submission that Board staff has admitted that there is an error in the Decision when it accepted that the $478,223.79 amount should have been factored into the SMDR calculation as it is an outcome of the smart meter capital expenditures approved by the Board.

The Board finds that Veridian has failed to demonstrate that the findings are contrary to

the evidence that was before the Panel, that the Panel failed to address a material issue or that the Panel made inconsistent findings. The Board finds that the Decision was correct based on the evidence presented by Veridian in its pre-filed materials and during the proceeding.

ii. Change in circumstances

The Board finds no change in circumstances and notes that neither Veridian nor Board staff made any submissions with respect to this aspect of the threshold test.

iii. New facts that have arisen

Both Board staff and Veridian acknowledged that the review of accounting year-end working papers did result in the discovery of the amount of $478,224 now claimed by Veridian. The amortization expenses claimed in this Motion are for the previously installed and approved smart meters for the discrete time period of 2009. The Board notes that these amounts were at the time both unaudited and outside of the test year for 2010 rates.

In its submission Board staff noted that Veridian is asking the Board to address a calculation error that was made when implementing the Board's approval of Veridian's smart meter capital expenditures through an SMDR.

Board staff acknowledged that the Model did not explicitly contemplate Veridian's circumstances, but submitted that the use of the Model does not preclude the need for other calculations to accommodate the special circumstances of any particular distributor or its application. Further, Board staff submitted that Veridian should have been aware that there was an amount missing prior to filing its application, as the expenses documented in the Model would have been diferent than the principal balances in Account 1556 for OM&A, and specifically, depreciation. Veridian was in the best position to identify the missing depreciation expense during that proceeding and it should not be incumbent on the Board, Board staff, or VECC as the intervenor to recognize this oversight.

Veridian stated that it only discovered the gap in recovery of smart meter expenses on January 9, 2013 during preparation of its regular year-end accounting working papers. It was during this process that Veridian realized that, with respect to the costs incurred

by Veridian in relation to smart meter implementation it had not yet recovered the 2009 amortization expense related to pre-2009 smart meter capital expenditures, totalling $528,859 (before accounting for PILs impacts) and recorded in Account 1556.

Veridain submitted that the omission of the 2009 amortization is a calculation error that constitutes a new fact and that the omission of the $478,224 should be remedied through a variance of the original Decision.

The Board finds that this is a new fact for the purpose of the threshold test. This amount was not previously in evidence, nor was the fact that amortization for 2009 had never been addressed nor that the total amount in the account was not cleared. The Board therefore finds that the threshold test for reviewing the Decision has been met.

The Merits of the Motion

Both Board staff and Veridian agree that the amount of $478,224 that Veridian is now seeking recovery of in its Motion is both material and is not in dispute. It is also submitted by Veridian and agreed to by Board staff that the amount should have been factored into the SMDR calculation as it is an outcome of the smart meter capital expenditures approved by the Board.

The Board notes that it has been consistent in allowing for the full recovery of the prudently incurred revenue requirement for approved smart meters deployed in accordance with the Government's regulations.[3] However, the Board finds that the failure to include the $478,224 for recovery in the EB-2012-0247 proceeding was an error on the part of Veridian. Veridian itself submitted that it was an omission to not include the 2009 amortization expenses.

Previous decisions of the Board when dealing with distributors' errors in calculations have resulted in disallowance of the correction, when in the distributor's favour. For example, in the North Bay Hydro decision[4] the Board found that "[t]he utility has control of its books and records and has the responsibility to ensure mistakes do not occur." As a result, the Board in that decision denied the application of North Bay Hydro.

The Board finds some parallels in this situation. Veridian should have been aware of

[3] EB-2012-0081, Cambridge and North Dumfries Hydro Inc., July 26, 2012, page 9
[4] EB-2009-0113, North Bay Distribution Ltd., September 8, 2009

the correct amount of the smart meter expenditures, including amortization expenses. The Board's Guideline G-2011-0001 and Smart Meter Model make it clear that it is the responsibility of the distributor to amend the models as appropriate.[5] The Board expects a utility to provide the Board with accurate accounting for rate setting purposes. Veridian has control of its books and records and has the responsibility to ensure mistakes do not occur. The Board will not adjust for this error.

A second very important factor is with respect to retroactive rate-making. If the Board were to allow recovery this would result in retroactive ratemaking in that Veridian is asking to recover an additional $478,224 in revenue requirement related to 2009 amortization expense through revisions to the SMDR which were established in a Final Rate Order. The courts have made it very clear that retroactive rate-making, the adjustment to rates after a final rate order has been issued, is not allowed. Rather, the principles of certainty and finality are a necessary component of effective rate regulation. To allow Veridian to correct a calculation error after a final rate order was issued would require the Board to engage in retroactive ratemaking, which is contrary to the legal principles upon which the Board performs its legislated mandate.

DATED at Toronto, April 25, 2013
ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

[5] Guideline G-2011-0001 and the associated Board-issued models contemplate that a smart meter cost recovery application will cover all costs up to and including the prospective test year to appropriate calculate the SMDR and SMIRR to recover all historical and prospective costs until the distributor's next cost of service application. This thus consists of both audited and unaudited actuals historically and to the bridge year, and forecasts for part of the bridge and test years. This avoids the need for a further application to review audited stub period costs.

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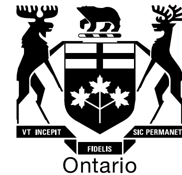

EB-2014-0043

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 Enbridge Gas Distribution Inc. for an order or orders approving or fixing rates for the sale, distribution, transmission and storage of gas.

BEFORE: Marika Hare
Presiding Member

Allison Duff
Member

DECISION AND ORDER
April 10, 2014

Enbridge Gas Distribution inc. ("Enbridge") filed an application with the Ontario Energy Board (the "Board") on February 13, 2014 under section 36 of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c. 15, (Schedule B) for an order giving final approval for Rider C commodity unit rates that were approved on an interim basis in the Board's EB-2013-0406 Decision and Interim Order, dated December 20, 2013.

Enbridge's EB-2013-0406 application was filed in accordance with the Quarterly Rate Adjustment Mechanism ("QRAM") process for a rate adjustment relating to gas costs effective January 1, 2014 (the "QRAM proceeding"). In that application, among other things, Enbridge proposed a refund of $10.1 million from the Gas Acquisition – Commodity and the Gas in Inventory Re-valuation components of the Purchased Gas Variance Account ("PGVA"). Enbridge indicated that the $10.1 million should have been refunded to sales (i.e. system gas) service customers in prior QRAMs but was not, due to errors in the calculation of account balances. Enbridge described the errors as "mechanical" as the formulae within Excel spreadsheet models were incorrect.

The Board's decision in the QRAM proceeding for January 1 gas costs was issued by delegated authority. The decision indicated that the proposed refund of $10.1 million raised possible issues of rate retroactivity that were not typically dealt with by a delegated authority; therefore, a refund of $10.1 million, contained in the commodity components of Rider C, was approved, but on an interim basis, subject to a separate application to be filed by Enbridge.

Enbridge filed this application to finalize the interim Rider C. As part of its application Enbridge filed the Decision and Order of the Board in the QRAM proceeding as well as the evidence on the record in that proceeding. The Board granted intervenor status to all intervenors in the QRAM proceeding and provided parties with the opportunity to file comments and interrogatories. All parties were invited to make submissions on whether the $10.1 million refund constitutes retroactive ratemaking.

The Industrial Gas Users Association ("IGUA") and Board staff filed submissions on March 6, 2014. Each supported Enbridge's proposal to refund the money.

Board Findings

Based on the facts of the case, the Board agrees with Enbridge and the parties that the money should be refunded to customers.

Enbridge has acknowledged that it committed an unintentional error which resulted in over $10 million being incorrectly recovered from customers.

The parties support Enbridge's proposal and there is no disadvantage to customers from this approach.

The Board acknowledges that Enbridge's QRAM orders were final in EB-2012-0352 and EB-2013-0045 and that Rider C is an out-of-period adjustment. However, the Board has considered the facts of this case in the context of the *MCI Telecommunications v. Public Service Commission*[1], a United States decision referenced in Board staff's submission. While the facts of the cases are distinguishable, the conclusions are the same. An out-of-period adjustment can be justified if it ensures a utility does not profit on account of its own errors.

[1] *MCI Telecommunications v. Public Service Commission*, 840 P.2d 765 (Utah 1992)

THE BOARD ORDERS THAT:

1. The Rider C commodity unit rates approved on an interim basis in the Board's EB-2013-0406 Decision and Interim Order, dated December 20, 2013, are considered final.

COST AWARDS

The Board will issue a separate decision on cost awards once the following steps are completed:

1. IGUA shall submit their cost claims no later than 7 days from the date of issuance of this Decision and Order.

2. Enbridge shall file with the Board and forward to IGUA any objections to the claimed costs within 21 days from the date of issuance of this Decision and Order.

3. IGUA shall file with the Board and forward to Enbridge and response to any objections for cost claims within 28 days from the date of issuance of this Decision and Order.

4. Enbridge shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings to the Board must quote the file number, **EB-2014-0043**, be made electronically through the Board's web portal at https://www.pes.ontarioenergyboard.ca/eservice/, in searchable / unrestricted PDF format. Two paper copies must also be filed at the Board's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at http://www.ontarioenergyboard.ca/OEB/Industry. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Daniel Kim at daniel.kim@ontarioenergyboard.ca and Board Counsel, Maureen Helt at maureen.helt@ontarioenergyboard.ca.

ADDRESS

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DATED at Toronto, April 10, 2014

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary