EB-2018-0085

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application by Ontario Power Generation Inc. pursuant to section 78.1 of the *Ontario Energy Board Act, 1998* for an Order or Orders determining payment amounts for the output of certain of its generating facilities for the period from January 1, 2017 to December 31, 2021;

AND IN THE MATTER OF a motion by Ontario Power Generation Inc. pursuant to Rule 40 of the Ontario Energy Board's Rules of Practice and Procedure for an order or orders to vary the Decision and Order EB-20160152.

COMPENDIUM OF ONTARIO POWER GENERATION INC.
(on Motion to Review and Vary)

April 10, 2018

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TAB1

Ontario Energy Board
Commission de l'énergie de l'Ontario

DECISION AND ORDER

EB-2016-0152

ONTARIO POWER GENERATION INC.

Application for payment amounts for the period from January 1, 2017 to December 31, 2021

BEFORE: Christine Long
Vice Chair and Presiding Member

Cathy Spoel
Member

Ellen Fry
Member

December 28, 2017

This interpretation of the regulation is not consistent with the approach the OEB has taken in the past. When the OEB considers dispositions of the CRVA balances, it will review the variances from the forecast and actual amounts and will make a determination of prudence on the actual amounts over forecast. The OEB sees no reason to change its approach for the DRP. To do so would frustrate the purpose of the regulation.

Parties raised the argument that due to the way the CRVA was set up, OPG could undertake some spending that was not prudent, however so long as the total Unit 2 cost was less than $4.8 billion, the OEB would have no way to track and disallow that imprudent spending. The OEB recognizes that this risk exists, as it does with spending on any large project. The OEB finds that this risk is mitigated by the fact that in that event, underspending will have to occur in some other areas of the project to achieve the overall budget. OPG also does not deny that "imprudent costs could occur if the right actions are not taken."[50] It is for this reason that the OEB has carefully considered OPG's proposed budget for DRP and satisfied itself that the proposed $4.8 billion budget is appropriate.

For all of the above reasons, the OEB does not agree with the arguments made by parties for reductions to the in-service amounts. The OEB approves the in-service amounts for Unit 2 and the campus plan projects as proposed by OPG.

The OEB adds that OPG has planned a staggered approach – Unit 2 will be completed before the refurbishment of the next unit begins. The OEB expects that there will be unit over unit efficiencies. This expectation is consistent with OPG's position that it will benefit from "lessons learned" on each unit.

5.3.2 Treatment of DRP Costs in the CRVA

OPG OPG proposed that if actual additions to rate base are different from forecast amounts, the cost impact of the difference would be recorded in the CRVA, and any amounts greater than the forecast amounts added to rate base would be subject to a prudence review in a future proceeding. OPG's position is that the success of the Unit 2 refurbishment (including the campus plan projects) should be measured on a total envelope basis. That is, as long as Unit 2 is completed at or under the total $4.8 billion budget (and the campus plan projects are completed on budget), there would be no further prudence review of Unit 2 spending.

[50] OPG Reply Submission page 58.

Regarding restoration costs, OPG's evidence is that the shutdown in 2020, as previously anticipated, would have caused the cost of ongoing operations to decline starting in 2017.[90] OPG states that the restoration costs proposed are necessary to restore ongoing operating and maintenance programs to normal levels for the 2017 to 2020 period to enable PEO to go forward. For example, OPG states that outage requirements that were set to decline will now need to be reinstated. As well, both OM&A and capital projects will need to be restored to the levels required to continue to operate safely and reliably for two to four additional years and to improve plant reliability during that time. Restoration costs include labour costs, "non-portfolio" projects to address life cycle aging of equipment and regulatory requirements resulting from PEO and costs of the two year planned outage schedule for routine inspection and maintenance.[91]

The submissions on these test period restoration costs and operating costs in 2021 range from zero (SEC and GEC) to approval of all costs (PWU and Society). The PWU submission states that the only potential basis to disallow any part of the proposed costs is Pickering's relative cost performance in benchmarking, although the PWU has reservations regarding the Pickering benchmarking results.

In considering whether the proposed Pickering restoration costs and operating costs in 2021 are reasonable, the OEB has reviewed historical costs and Pickering's performance against other nuclear operators. Some parties have argued that the OEB should consider cost effectiveness from a system planning perspective including comparison with other generation options. As noted above, the OEB finds that this is not within scope.

The OEB is making findings on the prudent costs of restoration in the test period and operation of Pickering in 2021, to allow for the operation of Pickering from 2017 to 2021 as is currently expected by the system planner.

The base, project and outage OM&A disallowances are reviewed in section 5.6 – Nuclear OM&A. Project capital is reviewed in section 5.2, and corporate support costs are reviewed in section 5.8.

Depreciation

Except in calculating depreciation (including the depreciation on asset retirement costs), OPG has prepared its application on the basis that PEO will go forward as currently planned. OPG is proposing that any adjustments to depreciation arising from the

[90] Exh F2-2-3 pages 6 and 7.
[91] Exh F2-3-1 page 2.

OPG. O. Reg. 53/05 provides that the OEB must accept the "need" for the DRP, so there is no risk that the OEB will find in some later proceeding that it was not required and refuse to allow it to be added to rate base. This regulation also provides that OPG will recover its DRP costs not already in payment amounts through the CRVA, so long as they are prudent, even if the units are never returned to service. This is a protection not provided to other utilities the OEB regulates.

The OEB finds that given the planning, the approval of the spending in this proceeding and the regulatory protections afforded OPG, the DRP does not materially increase OPG's business risk.

Pickering Extended Operations

Concentric suggests that there are risks associated with Pickering Extended Operations, such as a determination that it may not proceed, and the risk of recovery of expenditures incurred in that event. Given the OEB's decision in this case regarding PEO, these risks are unlikely to materialize. PEO also enjoys many of the same protections as the DRP. PEO enabling expenditures have been approved in this proceeding, and any variances will be recovered through the CRVA.

Revenue deferred under rate smoothing

Rate smoothing is required by O. Reg. 53/05. The OEB finds there is no real risk, as suggested by OPG's cost of capital witness, that having implemented a rate smoothing plan required by regulation, the OEB would not allow OPG to recover the deferred rates.[132]

OPG and Concentric argued that risk is also increased due to the impact on OPG's cash flow. However, the OEB notes that OPG has not identified any concerns with it being able to obtain necessary financing for DRP and other operations, nor has it forecasted increased debt costs for capital financing over the period. OPG and the markets are aware of the risks, but are also aware of the protections provided through regulation and through the OEB's rate-regulatory mechanisms, such as deferral and variance accounts.

In the OEB's view, the rate smoothing that will ultimately be approved will provide adequate recoveries for OPG to manage its cash flow and other credit metrics during the five-year plan term, and that OPG and its lenders are aware of and are compensated with respect to deferred revenue which will, subject to prudence review,

[132] Exh C1-1-1 Attachment 1 page 28.

12 IMPLEMENTATION

OPG seeks approval for nuclear payment amounts to be effective January 1, 2017 and for each following year through to December 31, 2021. OPG seeks approval for hydroelectric payment amounts to be effective January 1, 2017 to December 31, 2017 and approval of the formula used to set the hydroelectric payment amounts for the period January 1, 2017 to December 31, 2021. The OEB issued an order on December 8, 2016, declaring the current nuclear and regulated hydroelectric payment amounts interim effective January 1, 2017.

A January 1, 2017 effective date for new payment amounts was supported by OEB staff and the Society. OEB staff submitted that the application was filed on May 27, 2016, shortly after 2015 audited results were available, and that OPG met the schedule set out in Procedural Order No. 1.

SEC, LPMA, CCC and VECC submitted that the effective date should be the first day of the month following the issue of the payment amounts order. The intervenors argued that OPG should have filed this complex application earlier in order for the OEB to approve a January 1, 2017 effective date. The intervenors noted that the time between filing and payment amounts order for the previous proceeding, EB-2013-0321, was 447 days. The intervenors also referred to the EB-2013-0321 decision in which the OEB did not approve the requested January 1, 2014 effective date. In that decision the OEB stated that its general practice is for final rates to become effective at the conclusion of the proceeding, and that this practice is predicated on a forecast test year.

OPG replied that the intervenors' references to the EB-2013-0321 filing date are misplaced as the application started as an incomplete filing. OPG argued that an earlier filing in this proceeding would have required large scale updates to the application. An earlier filing would not have included audited 2015 results and would not have reflected the release quality estimate for DRP, the final business case for PEO, the amended Bruce Lease agreement or the amendment to O. Reg. 53/05. OPG submitted that it struck an appropriate balance between providing the best available information and the proposed effective date.

In response to cross-examination by SEC, OPG filed undertaking J23.1 which provides the impact of the scenario should the OEB approve an effective date of September 1, 2017. OPG would collect the interim payment amounts until August 31, 2017 and would begin collecting payment amounts and riders approved by the EB-2016-0152 decision beginning on September 1, 2017. The undertaking response assumed that the OEB approved the full year revenue requirement, and OPG would record in the RSDA the difference between the interim and approved payment amounts on a WAPA basis for

the period January 1 to August 31, 2017. SEC argued that the OEB should refuse to allow this interpretation of O. Reg. 53/05. OEB staff submitted that the purpose of the RSDA is to allow for the smoothing that the OEB determines, and that the RSDA does not relate to effective date.

As a solution, SEC submitted that the OEB could determine that the revenue requirement for the period January 1, 2017 to the effective date is equivalent to that resulting from current payment amounts.

OPG replied that its position is based on section 5.5 of O. Reg. 53/05 which clearly provides that the RSDA will record entries starting January 1, 2017.

As noted in the deferral and variance account section, and the smoothing section, OPG seeks disposition of 2015 year-end account balances using two year payment amounts riders commencing January 1, 2017. OEB staff submitted that the OEB could consider a later start date.

Findings

The OEB approves an effective date of June 1, 2017. OPG filed a substantial application on May 27, 2016, as well as three impact statements, the last on March 8, 2017. It is unrealistic of OPG to expect that a final decision would be rendered and a payment amounts order processed in time for January 1, 2017 payment amounts. OPG filed a complicated application which was comprised of a Custom IR application for its nuclear facilities, an IRM application for its regulated hydroelectric facilities, a review of DRP and consideration of PEO. OPG should have known that it would take more than seven months for the OEB to consider the application, render a decision and finalize a payment amounts order.

OPG submits that it struck a balance between filing current information and taking into account the time required for the processing of an application. Specifically OPG notes that if it had filed prior to May 27, 2016, it would not have been able to include audited 2015 results, the release quality estimate for DRP, the final business case for PEO, the amended Bruce Lease agreement or the amendment to O. Reg. 53/05. The OEB notes that the completion of some of these items was largely in the control of OPG. Knowing that it was filing a major payment amounts application, OPG could have taken steps to ensure that the inclusion of these elements in the application was possible. The OEB also notes that OPG filed three significant updates after the application was filed (two of which were under OPG's control). The fact that OPG filed significant updates runs counter to OPG's argument that it filed in May 2016 with a view to minimizing updates to the application.

It is the common practice of the OEB to establish new rates and payment amounts prospectively. However, as this has been a complicated case involving a lengthy submission and decision writing process, the OEB has decided it will not make payment amounts effective after this Decision is rendered.

The smoothing of payment amounts, as required by regulation, will help lessen some of the impact of the payment amounts on ratepayers during the test period. However, it will not totally alleviate the fact that ratepayers will have consumed power for the last seven months of 2017 (and for a period into 2018) at the existing rates and will now, after the fact, have to pay a new rate for those periods.

In arriving at the June 1, 2017 effective date, the OEB has attempted to balance the revenue requirement needs of OPG and rate certainty expected by ratepayers.

The OEB finds that the new smoothing requirement in the regulation does not require that the OEB approve an effective date as of January 1, 2017. To do so would run contrary to the OEB's mandate to set just and reasonable payment amounts. Smoothing is a mechanism used to minimize the impact of changes in payment amounts and how they will be collected from ratepayers. It does not affect the OEB's mandate to set the payment amounts, one aspect of which is to determine the effective date of new payment amounts. The regulation may state that smoothing take place over the entire period of the five-year term, but the OEB does not read the regulation to state that the new payment amounts must commence effective January 1, 2017 in order for that to occur. Had the regulation intended to require an effective date of January 1, 2017, it could have simply said so. The total 2017 rates will still be used to calculate smoothing – they will be based on five months at the old rates and seven months at the new rates.

Given the passage of time, in addition to the 2017 payment amounts, the OEB will be finalizing the hydroelectric payment amounts for 2018.

OPG shall file a draft payment amounts order reflecting the payment amount setting determinations in this Decision for nuclear based on the parameters established for the five-year term, and for hydroelectric based on the 2017 and 2018 parameters. Similar to its approach in its application, OPG may use appropriate assumptions for hydroelectric payment amounts for years three to five of the term for purposes of establishing the WAPA.

The draft payment amounts order will include the final revenue requirement and final production forecast for the nuclear facilities, and the final hydroelectric rate setting mechanism and 2017 and 2018 parameters, as reflected in the findings made by the OEB in this Decision. OPG shall include supporting schedules and a clear explanation

of all the calculations and assumptions used in deriving the amounts used, and final unsmoothed payment amounts.

A revised Revenue Requirement Work Form shall be filed that reflects both the application and the OEB Decision.

The draft payment amounts order shall reflect all the implementation date scenarios described in section 11, Payment Amount Smoothing.

With regard to the calculation of the forgone revenue rider for the period starting June 1, 2017 to the implementation date, the nuclear forgone revenue should be based on the monthly forecast production underpinning the application and approved by the OEB. The hydroelectric forgone revenue shall be based on pro-rating the 2015 actual regulated hydroelectric production.

OPG is directed to provide a full description of each deferral and variance account as part of the draft payment amounts order. Accounting orders shall be filed for the new accounts approved in this Decision.

The schedule for the filing of the draft payment amounts order – and for submissions on the draft – is set out below in the Order section.

It is the OEB's expectation that OPG will file an application comprising the disposition of the next set of deferral and variance accounts, including OPG's proposal for the Pension and OPEB Cash vs. Accrual Differential account (that will address with detailed evidence OPG's proposal for the accounting method to be used going forward), at the same time as the implementation of the 2019 hydroelectric payment amounts.

The OEB will set out the process for cost claims for intervenor costs since May 30, 2017 in the final payment amounts order.

TAB2

Ontario Energy Board

Commission de l'Énergie de l'Ontario

EB-2006-0322
EB-2006-0338
EB-2006-0340

MOTIONS TO REVIEW THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION

DECISION WITH REASONS

May 22, 2007

> Every notice of motion... shall set out the grounds for the motion that raise a question as to the correctness of the order or decision...

Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.

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. It is not enough to argue that conflicting evidence should have been interpreted differently.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

In the Motions proceeding, APPrO stated that its position was and continues to be narrower than what was described by the NGEIR panel. APPrO was not seeking high deliverability storage. Rather, it was seeking services that would allow generators to manage their gas supply on an intra-day basis. It is not operationally possible for the generator to increase the rate at which gas can be delivered in and out of the storage space with deliverability from a supplier other than Union. Moreover, APPrO asserted that the frequent nominations windows required for such service are only available in Ontario from the utilities. Since this is a monopoly service, then it should be offered at cost.

Union argued that APPrO has not brought forward any new facts or changes in circumstance, nor has it demonstrated any error in the Board's original decision. It also stated that APPrO's assertion that high-deliverability storage is only available from the utility is demonstrably wrong and that there was sufficient evidence that high deliverability storage is available from others. Union disagreed with APPrO's position that deliverability could not be separated from storage space. Although this is correct in the physical context, Union submitted that there were substitutes for deliverability and storage space and gas-fired power generators could acquire their intra-day balancing needs from sources other than the utilities. This according to Union was clearly addressed in the original proceeding and considered by the Board in its decision and APPrO was simply seeking to re-argue its position that had already been fully canvassed.

Enbridge pointed out that any de-linking of storage and deliverability that occurred was as a result of the settlement agreed to by APPrO and the power generators with Enbridge. The settlement states that the allocation methodology for gas-fired generators' intra-day balancing needs is based on the assumption that high deliverability storage is available to those customers in the market.

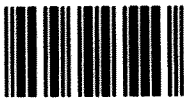
APPrO has also raised an issue with some aspects of Rate 316 offered by Enbridge. Rate 316 was part of a proposal submitted by Enbridge during the NGEIR proceeding in response to generators' need for high deliverability storage service. As a result of the

Settlement Proposal, Enbridge's Rate 316 provides an allocation of base level deliverability storage at rolled in cost along with high deliverability storage at incremental cost to in-franchise gas fired generators. Section 1.5 of the Settlement Proposal indicates that generators are entitled to an allocation of 1.2% deliverability storage at rolled-in cost based rates.

Findings

In the Board's view, it is unclear from the NGEIR Decision whether the NGEIR panel took the implications of the Union settlement agreement into consideration. The NGEIR Decision does not provide sufficient clarity regarding the issues raised by APPrO. It appears that there are some practical limitations faced by gas-fired generators in that presently they can only access certain services from the utility. Although Union asserted that it is demonstrably wrong to suggest, as APPrO has, that "high-deliverability storage is only available from the utility" and that "there was sufficient evidence that high deliverability storage is available from others" this was not the finding expressed in the NGEIR Decision. In fact, at page 69 of the NGEIR Decision, the NGEIR Panel acknowledged this by stating that: "These services are not currently offered, indeed they need to be developed, and investments must be made in order to offer them." On the other hand, APPrO asserted that only TCPL offers some intra-day services but only in some parts of Ontario through a utility connection or a direct connection with TCPL. To the extent that APPrO's facts may be correct, there is sufficient question whether the NGEIR Decision erred by requiring that monopoly services be priced at market.

For these reasons, and given the potential material impact on power generators, the Board finds that the alleged errors raised by APPrO with respect to Union are material and relevant to the outcome of the decision, and that if the error is substantiated by a reviewing panel and corrected this could change the outcome of the decision. The Board will therefore pass this matter to a reviewing panel of the Board to investigate and make findings as it sees fit.



TAB3

Ontario

Ontario Energy Board
Commission de l'énergie de l'Ontario

DECISION AND ORDER

EB-2014-0369

ONTARIO POWER GENERATION INC.

Motion to review and vary the Decision with Reasons on the 2014-2015 payment amounts (EB-2013-0321)

BEFORE: Ken Quesnelle
Presiding Member

Cathy Spoel
Member

January 28, 2016

both must accept the responsibility for some portion of the additional cost. OPG and Strabag ultimately negotiated a settlement and OPG paid Strabag $40 million.

In the 2014-2015 payment amounts decision, the OEB found that the payment was not prudent and disallowed $28.0 million in relation to the settlement of the Strabag claim.

Threshold Test

OEB staff and most of the parties argued that the motion should be dismissed at the threshold stage as there was no new evidence in OPG's notice of motion. Parties submitted that OPG made the same arguments in its submissions to the OEB in the 2014-2015 payment amounts proceeding.

OPG agreed that the arguments made in its motion submission were the same as the arguments made in the 2014-2015 payment amounts proceeding. OPG argued that given that the grounds for the motion are based on OPG's contention that the OEB decision contained errors it would be peculiar if the submissions were different. OPG stated that the implication of having a different submission when the grounds for the motion are based on an alleged error is that the applicant had misidentified what the issue was in the original arguments.[2]

The OEB accepts that OPG's arguments on this motion repeat arguments made in the 2014-2015 payment amounts proceeding. OPG used these same arguments in expressing its contention that the analysis and reasoning in the payment amounts decision demonstrates that the original panel misinterpreted OPG's original argument and the evidence before it. The OEB does not consider that to be inappropriate.

OPG grounded its motion to review and vary this part of the decision on the assertion that an error had been made in interpreting evidence and this led to a decision that is inconsistent with the evidence.

The interpretation of the evidence pertaining to this part of the motion is a key factor in the payment amounts decision that if found to be incorrect would change the outcome of the decision. The OEB finds that the grounds for this part of the motion have substance and has therefore considered its merits.

[2] Motion Hearing Transcript pages 153,154

TAB4

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Ferme Jean Bélanger inc. c. Commission de protection du territoire agricole | 2018 QCCS 560, 2018 CarswellQue 1000, EYB 2018-290669 | (C.S. Qué., Feb 19, 2018)

2015 SCC 45, 2015 CSC 45
Supreme Court of Canada

ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)

2015 CarswellAlta 1745, 2015 CarswellAlta 1746, 2015 SCC 45, 2015 CSC 45, [2015] 3 S.C.R. 219, [2015] A.W.L.D. 3680, [2015] A.W.L.D. 3682, 20 Alta. L.R. (6th) 292, 21 C.C.P.B. (2nd) 1, 257 A.C.W.S. (3d) 728, 388 D.L.R. (4th) 515, 475 N.R. 83, 602 A.R. 1, 647 W.A.C. 1, J.E. 2015-1511

ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd., Appellants and Alberta Utilities Commission and Office of the Utilities Consumer Advocate of Alberta, Respondents

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

Heard: December 3, 2014
Judgment: September 25, 2015
Docket: 35624

Proceedings: affirming *ATCO Utilities, Re* (2013), 7 C.C.P.B. (2nd) 171, 93 Alta. L.R. (5th) 234, (sub nom. *Atco Gas and Pipelines Ltd. v. Alberta Utilities Commission)* 584 W.A.C. 376, 556 A.R. 376, 2013 ABCA 310, 2013 CarswellAlta 1984, Frans Slatter J.A., Peter Costigan J.A., Peter Martin J.A. (Alta. C.A.); affirming *ATCO Utilities, Re* (2011), 2011 CarswellAlta 1646, Anne Michaud Chair, Bill Lyttle Member, Moin A. Yahya Member (Alta. U.C.)

Counsel: John N. Craig, Q.C., Loyola G. Keough, E. Bruce Mellett, for Appellants
Catherine M. Wall, Brian C. McNulty, for Respondent, Alberta Utilities Commission
Todd A. Shipley, C. Randall McCreary, Michael Sobkin, Breanne Schwanak, for Respondent, Office of the Utilities Consumer Advocate of Alberta

Subject: Corporate and Commercial; Public; Employment
Related Abridgment Classifications
Public law
IV Public utilities
IV.5 Regulatory boards
IV.5.b Regulation of rates
Public law
IV Public utilities
IV.5 Regulatory boards
IV.5.d Miscellaneous
Headnote
Public law --- Public utilities — Regulatory boards — Miscellaneous
Regulated companies applied to include their full pension costs in their revenue requirements — Companies argued that their pension policies were prudent, made in good faith by third party, and consistent with industry standards, and that they should be allowed to include all of their pension costs in their rates — Utilities commission denied companies permission to include certain pension costs in their estimates of revenue requirements — Commission found that evidence

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45 While the *RRR Regulation* makes a specific reference to the recovery of "prudent" costs, I do not read this prudence requirement as implying a presumption of prudence and application of a no-hindsight rule. Regarding the "no hindsight" element, the statutory provisions do not use "prudent" to describe the decision to incur the costs, but rather to describe the costs themselves. Although s. 4(3) of the *RRR Regulation* uses the term "incurred", it is used to indicate that the provision applies to costs incurred by the utility. No temporal inference can be drawn from the use of "incurred" in this context; it is not used in a manner that calls for examination of the prudence of the decision to incur certain costs. The inquiry under s. 4(3) of the *RRR Regulation* rather asks whether the costs themselves can be said to be "prudent". The *GUA* does not include a requirement that a no-hindsight rule must apply in assessing whether costs are prudent, nor does the text of the *GUA* or the *RRR Regulation* imply such a rule. Regarding a presumption of prudence, s. 44(3) of the *GUA* stipulates that the utility has the burden to establish that the rates are just and reasonable. Like the *EUA*, this in turn places the burden of establishing the prudence of costs on the utility.

(3) Conclusion With Respect to Statutory Requirements of the EUA and GUA

46 Though the statutes do contain language allowing for the recovery of "prudent" costs, the *EUA* and the *GUA* do not explicitly impose an obligation on the Commission to conduct its analysis using a particular methodology any time the word "prudent" is used. Further, reserving any opinion on whether the term "prudently incurred" might require a particular no-hindsight methodology, in this particular case the bare use of the word "prudent" does not, on its own, mandate a particular methodology.

47 It is thus apparent that the relevant statutes may reasonably be interpreted not to impose the ATCO Utilities' asserted prudence methodology on the Commission. The existence of a reasonable interpretation that supports the Commission's implied understanding of its discretion is enough for the Commission's decision to pass muster under reasonableness review: *McLean*, at paras. 40-41. Thus, the Commission is free to apply its expertise to determine whether costs are prudent (in the ordinary sense of whether they are reasonable), and it has the discretion to consider a variety of analytical tools and evidence in making that determination so long as the ultimate rates that it sets are just and reasonable to both consumers and the utility.

C. Characterization of the Costs at Issue: Forecast or Committed

48 As explained in *OEB*, understanding whether the costs are committed or forecast may be helpful in reviewing the reasonableness of a regulator's choice of methodology: see para. 83. Committed costs are those costs that a utility has already spent or that were committed as a result of a binding agreement or other legal obligation that leaves the utility with no discretion as to whether to make the payment in the future: para. 82. If the costs are forecast, there is no reason to apply a no-hindsight prudence test because the utility retains discretion whether to incur the costs: para. 83. By contrast, the no-hindsight prudence test may be appropriate when the regulator reviews utility costs that are committed: paras. 102-05.

49 Determining whether particular costs are committed or forecast turns on factual evidence relevant to those costs as well as on legal obligations that may govern them. Factual evidence may take the form of details regarding the structure of the utility's business, relevant conduct on the part of the utility, and the factual context in which the costs arise. Legal issues may relate to any contractual, fiduciary or regulatory obligations that grant or bar discretion on the part of the utility in incurring the costs at issue. Where the regulator has made an assessment of whether the costs are committed or forecast, that assessment is owed deference by this Court.

50 On the basis of the evidence and the arguments before it, the Commission found that the "COLA amount ha[d] not yet been awarded for 2012 because consideration of the COLA adjustment occurs towards the end of the calendar year": *Decision 2011-391*, at para. 93. The Commission concluded that there was enough time from the date *Decision 2011-391* was published on September 27, 2011 to the end of the calendar year for the ATCO Utilities and their parent CUL "to prospectively decide whether to separately fund any difference CUL may choose to pay beyond the COLA level

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58 CUL may have exercised that discretion in such a way as to avoid saddling its regulated subsidiary with costs it knew would not be recovered. Accordingly, while the ATCO Utilities were required to make contributions reflecting a post retirement pension increase of 2.25 percent into the DB plan pursuant to the 2009 Actuarial Report, the COLA applied to benefit payments for 2012 was not committed when the Commission issued its *Decision 2011-391*. This is so because at the time *Decision 2011-391* was published, CUL had yet to set COLA for 2012.

59 It was not unreasonable for the Commission to decide, without applying a no-hindsight analysis, that 50 percent of CPI (up to a maximum of 3 percent) "represent[ed] a reasonable level for setting the COLA amount for the purposes of determining the pension cost amounts for regulatory purposes" in 2012: *Decision 2011-391*, at para. 92.

D. Considering the Impact on Rates in Evaluating Costs

60 The ATCO Utilities argue that in considering the prudence of the COLA costs the Commission was preoccupied with the aim of reducing rates charged to customers.

61 As discussed above, a key principle in Canadian regulatory law is that a regulated utility must have the opportunity to recover its operating and capital costs through rates: *OEB*, at para. 16. This requirement is reflected in the *EUA* and *GUA*, as these statutes refer to a reasonable opportunity to recover costs and expenses so long as they are prudent. A regulator must determine whether a utility's costs warrant recovery on the basis of their reasonableness — or, under the *EUA* and *GUA*, their "prudence". Where costs are determined to be prudent, the regulator must allow the utility the opportunity to recover them through rates. The impact of increased rates on consumers cannot be used as a basis to disallow recovery of such costs. [10] This is not to say that the Commission is not required to consider consumer interests. These interests are accounted for in rate regulation by limiting a utility's recovery to what it reasonably or prudently costs to efficiently provide the utility service. In other words, the regulatory body ensures that consumers only pay for what is reasonably necessary: *OEB*, at para. 20.

62 In this case, the Commission did emphasize the effect that reducing the COLA would have on the ATCO Utilities' unfunded liability. It is also true that a lower unfunded liability based on an actuarial report using a 50 percent COLA instead of 100 percent would mean a lower revenue requirement, and thus lower rates passed on to consumers. However, I do not agree with the ATCO Utilities' submission that the Commission, in considering the effect of COLA on the utilities' unfunded pension liability, was basing its disallowance on concerns about rate hikes for consumers. Regulators may not justify a disallowance of prudent costs solely because they would lead to higher rates for consumers. But that does not mean a regulator cannot give any consideration to the magnitude of a particular cost in considering whether the amount of that cost is prudent.

63 Indeed, it seems axiomatic that any time a regulator disallows a cost, that decision will be based on a conclusion that the cost is greater than ought to be permitted, which leads to the inference that consumers would be paying too much if the cost were incorporated into rates. But that is not the same as disallowing a cost *solely* because it would increase rates for consumers. In this case, the Commission found it unreasonable for the ATCO Utilities to receive payments to cover a COLA of 100 percent while they carried a large unfunded liability on their books, in part because of evidence from comparator companies that COLA figures of less than 100 percent were common, and because of the Commission's finding that a COLA of 100 percent was not necessary to ensure that the ATCO Utilities could attract and retain employees. While this conclusion carries with it the consequence that rates will be lower as a result, the Commission reasoned from the prudence of the costs themselves, not from a desire to keep rates down, to arrive at its conclusion to disallow costs. I find nothing unreasonable in the Commission's reasoning in this regard.

VI. Conclusion

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TAB5

The Canadian Radio-Television and Telecommunications Commission *Appellant*

v.

Bell Canada *Respondent*

and

The Attorney General of Canada, the Consumers' Association of Canada, the Canadian Business Telecommunications Alliance, CNCP Telecommunications and the National Anti-Poverty Organization *Interveners*

INDEXED AS: BELL CANADA v. CANADA (CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION)

File No.: 20525.

1989: February 21; 1989: June 22.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

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

In March 1984, Bell Canada filed an application with the CRTC for a general rate increase. To prevent a serious deterioration in Bell Canada's financial situation while awaiting the hearing and the final decision on the merits, the CRTC granted Bell Canada an interim rate increase of 2 per cent effective January 1, 1985. The interim rate increase was calculated on the basis of financial information provided by Bell Canada. In its decision, however, the CRTC clearly expressed the intention to review this interim rate increase in its final decision on Bell Canada's application on the basis of complete financial information for the years 1985 and

Le Conseil de la radiodiffusion et des télécommunications canadiennes *Appelant*

c.

Bell Canada *Intimée*

et

Le procureur général du Canada, l'Association des consommateurs du Canada, l'Alliance canadienne des télécommunications de l'entreprise, Télécommunications CNCP et l'Organisation nationale anti-pauvreté *Intervenants*

RÉPERTORIÉ: BELL CANADA c. CANADA (CONSEIL DE LA RADIODIFFUSION ET DES TÉLÉCOMMUNICATIONS CANADIENNES)

N° du greffe: 20525.

1989: 21 février; 1989: 22 juin.

Présents: Les juges Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier et Cory.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit administratif — Compétence du CRTC — Ordonnance du CRTC enjoignant à Bell Canada d'accorder un crédit forfaitaire à ses abonnés — Ordonnance visant à remédier à l'imposition de taux provisoires approuvés par le CRTC en 1984 et 1985 et jugés excessifs en 1986 — Le CRTC avait-il compétence pour rendre cette ordonnance? — L'ordonnance du CRTC imposant des taux provisoires peut-elle être révisée rétroactivement? — Le pouvoir du CRTC d'imposer des taux «justes et raisonnables» à Bell Canada comporte-t-il la réglementation de ses revenus? — Loi sur les chemins de fer, L.R.C. (1985), chap. R-3, art. 335(1), (2), (3), 340(5) — Loi sur les transports nationaux, L.R.C. (1985), chap. N-20, art. 52, 60, 66, 68(1).

En mars 1984, Bell Canada a présenté au CRTC une demande de majoration tarifaire générale. Afin d'empêcher que la situation financière de Bell Canada ne se détériore gravement avant l'audience et la décision finale sur le fond, le CRTC a accordé à Bell Canada une majoration tarifaire provisoire de 2 pour 100 entrant en vigueur le 1er janvier 1985. Le calcul de la majoration tarifaire provisoire s'est fait à partir des données financières fournies par Bell Canada. Dans sa décision, toutefois, le CRTC a clairement manifesté l'intention de réviser cette majoration tarifaire provisoire dans sa décision finale portant sur la demande de majoration tari-

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time, its own final decisions on a *proprio motu* basis. Similarly, s. 61 provides that the appellant is not bound by the wording of any complaint or application it hears and may make orders which would otherwise offend the *ultra petita* rule:

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

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

60. . . .

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

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

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

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

finales, et ce, de sa propre initiative. De même, l'art. 61 prévoit que l'appelant n'est pas lié par le texte d'une plainte ou d'une requête qu'il entend et peut rendre toute ordonnance qui pourrait par ailleurs porter atteinte à la règle de l'*ultra petita*:

61. Sur toute requête présentée à la Commission, cette dernière peut prendre une ordonnance accordant cette requête en totalité ou en partie seulement, ou accorder un redressement plus étendu ou tout autre redressement de griefs, en sus ou au lieu de celui qui a été demandé, selon que la chose lui paraît juste et convenable, aussi amplement à tous égards que si la requête eût été faite pour obtenir ce redressement partiel, différent ou plus étendu.

Le paragraphe 60(2) de la *Loi sur les transports nationaux* permet également à l'appelant de rendre des ordonnances provisoires:

60. . . .

(2) La Commission peut prendre, tout d'abord, au lieu d'une ordonnance définitive, une ordonnance provisoire, et se réserver la faculté de donner de plus amples instructions soit à une audition ajournée de l'affaire, soit sur une nouvelle requête.

Enfin, l'art. 66 de la *Loi sur les transports nationaux* lui permet de réviser ses décisions antérieures, qu'elles soient finales ou provisoires:

66. La Commission peut réviser, abroger ou modifier ses ordonnances ou décisions, ou peut entendre à nouveau une demande qui lui est faite, avant de rendre sa décision.

Il ressort clairement de l'économie de la *Loi sur les chemins de fer* et de la *Loi sur les transports nationaux* que l'appelant s'est vu conférer de vastes pouvoirs afin de garantir que les taux et tarifs de téléphone soient justes et raisonnables en tout temps. L'appelant peut réviser les taux de son propre chef ou à la demande d'une partie intéressée. L'appelant n'est même pas lié par le redressement demandé et peut rendre toute ordonnance s'y rapportant pourvu que les parties aient reçu un avis suffisant des questions à traiter à l'audience. N'était-ce du fait que l'appelant a le pouvoir de rendre des ordonnances provisoires, on pourrait affirmer que les pouvoirs de l'appelant en la matière ne sont limités que par le délai nécessaire pour examiner les demandes, se préparer aux

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tions, prepare for hearings and analyse all the evidence. However, the appellant does have the power to make interim orders and this power must be interpreted in light of the legislator's intention to provide the appellant with flexible and versatile powers for the purpose of ensuring that telephone rates are always just and reasonable.

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

IV—The Decision of the Court Below

In the Federal Court of Appeal, the respondent in this Court argued that in order to find statutory authority for the power to make a one-time credit order, it was necessary to find that s. 66 (power to "review, rescind, change, alter or vary" previous decisions) or s. 60(2) (power to make interim orders) of the *National Transportation Act* provide powers to make retroactive orders. Of course, the respondent argued that these provisions did not grant such a power and the majority of the Federal Court of Appeal composed of Marceau and Pratte JJ. agreed with this argument, Hugessen J. dissenting: [1988] 1 F.C. 296, 43 D.L.R. (4th) 30, 78 N.R. 58.

Marceau J. held that the appellant in this Court only had the power to fix telephone tolls and tariffs and that it has no statutory authority to deal with excess revenues or deficiencies in revenues arising as a result of a discrepancy between the rate of return yielded from the interim rates in force prior to the final decision and the permissible rate of return fixed by this final decision. Marceau J. was of the opinion that the wording of s. 66 of the *National Transportation Act* is neutral with

audiences et analyser tous les éléments de preuve. L'appelant a toutefois le pouvoir de rendre des ordonnances provisoires et ce pouvoir doit être interprété en fonction de l'intention du législateur de conférer à l'appelant des pouvoirs souples et variés en vue d'assurer que les taux de téléphone soient toujours justes et raisonnables.

La Cour doit donc déterminer si la loi habilite l'appelant à ordonner l'attribution d'un crédit forfaitaire pour redresser une situation si ce dernier décide, après une audition finale portant sur le caractère raisonnable des taux de téléphone imposés au cours des années qui font l'objet de l'examen, que les tarifs provisoires en vigueur au cours de cette période n'étaient pas justes et raisonnables. Puisque la *Loi sur les chemins de fer* et la *Loi sur les transports nationaux* ne comportent aucune disposition claire à cet égard, il faudra déterminer si l'existence de ce pouvoir découle implicitement des systèmes de réglementation établis dans ces lois.

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IV—La décision du tribunal d'instance inférieure

En Cour d'appel fédérale, Bell Canada a soutenu que pour être en mesure d'affirmer qu'il existe un pouvoir légal d'ordonner l'attribution d'un crédit forfaitaire, il fallait conclure que l'art. 66 (le pouvoir de «réviser, abroger ou modifier» les décisions antérieures) ou que le par. 60(2) (le pouvoir de rendre des ordonnances provisoires) de la *Loi sur les transports nationaux* comporte le pouvoir de rendre des ordonnances rétroactives. L'intimée a évidemment soutenu que ces dispositions ne conféraient pas un tel pouvoir et la Cour d'appel fédérale à la majorité (les juges Marceau et Pratte) a retenu cet argument, le juge Hugessen étant dissident: [1988] 1 C.F. 296, 43 D.L.R. (4th) 30, 78 N.R. 58.

Le juge Marceau a conclu que le CRTC avait seulement le pouvoir de fixer les taxes et tarifs de téléphone et que la loi ne l'habilitait pas à traiter d'un excédent ou d'une insuffisance de revenus résultant de l'écart entre le taux de rendement généré par les taux provisoires en vigueur avant la décision finale et le taux de rendement autorisé dans cette décision finale. Selon le juge Marceau, le texte de l'art. 66 de la *Loi sur les transports nationaux* est neutre en ce qui concerne le pouvoir

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

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

I am bolstered in my opinion by the fact that the regulatory scheme established by the *Railway Act* and the *National Transportation Act* gives the appellant very broad procedural powers for the purpose of ensuring that telephone rates and tariffs are, at all times, just and reasonable. Within this regulatory framework, the power to make appropriate orders for the purpose of

tarifaire provisoire a été accordée parce que la longueur des procédures pouvait entraîner une grave détérioration de la situation financière de l'intimée. Ce n'est que lorsque l'appelant a conclu qu'une telle situation d'urgence existait qu'il s'est demandé quelle majoration provisoire serait juste et raisonnable compte tenu des éléments de preuve disponibles et pour éviter cette détérioration financière. Les différences inhérentes entre une décision provisoire et une décision finale justifient clairement le pouvoir de réexaminer la période pendant laquelle les taux provisoires étaient en vigueur.

L'intimée soutient que le pouvoir de réexaminer la période pendant laquelle les taux provisoires étaient en vigueur ne saurait exister dans le régime juridique établi par la *Loi sur les chemins de fer* et la *Loi sur les transports nationaux* parce que ces lois ne confèrent pas explicitement ce pouvoir, contrairement à l'art. 64 de la *Loi sur l'Office national de l'énergie*, L.R.C. (1985), chap. N-7. Les pouvoirs d'un tribunal administratif doivent évidemment être énoncés dans sa loi habilitante, mais ils peuvent également découler implicitement du texte de la loi, de son économie et de son objet. Bien que les tribunaux doivent s'abstenir de trop élargir les pouvoirs de ces organismes de réglementation par législation judiciaire, ils doivent également éviter de les rendre stériles en interprétant les lois habilitantes de façon trop formaliste. J'ai conclu que dans le régime juridique établi par la *Loi sur les chemins de fer* et la *Loi sur les transports nationaux* le pouvoir de rendre des ordonnances provisoires comporte nécessairement le pouvoir de réexaminer la période pendant laquelle les taux provisoires étaient en vigueur. Le fait que ce pouvoir soit prévu explicitement dans d'autres lois ne saurait changer cette conclusion fondée sur l'interprétation de ces deux lois dans leur ensemble.

Je me vois renforcé dans mon opinion par le fait que le régime de réglementation établi par la *Loi sur les chemins de fer* et la *Loi sur les transports nationaux* confère à l'appelant des pouvoirs très larges en matière de procédure pour veiller à ce que les taux et tarifs de téléphone soient justes et raisonnables en tout temps. À l'intérieur de ce cadre de réglementation, le pouvoir de rendre des

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remedying interim rates which are not just and reasonable is a necessary adjunct to the power to make interim orders.

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

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

. . . .

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

ordonnances appropriées pour remédier aux taux provisoires qui ne sont pas justes et raisonnables est nécessairement accessoire au pouvoir de rendre des ordonnances provisoires.

Dans le cadre de régimes juridiques où le pouvoir d'établir des taux provisoires n'existait pas, il est intéressant de souligner que la Cour suprême des États-Unis a décidé que les organismes de réglementation ont à la fois le pouvoir d'imposer des taux provisoires et le pouvoir d'ordonner des remboursements lorsque l'on conclut que ces taux sont excessifs dans l'ordonnance définitive: voir l'arrêt *United States v. Fulton*, 475 U.S. 657 (1986), aux pp. 669 à 671, et l'arrêt *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978), où le juge Brennan fait les remarques suivantes, aux pp. 654 à 656:

> [TRADUCTION] Enfin, les requérants prétendent que la Commission ne peut les obliger à rendre compte des sommes perçues en vertu des taux provisoires en vigueur pendant la période de suspension et des taux imposés à l'origine qui entreraient en vigueur à la fin de cette période et à les rembourser ... En réponse à cet argument, soulignons d'abord que nous avons déjà reconnu dans l'arrêt *Chessie* que la Commission a des pouvoirs «accessoires» à son pouvoir de suspension et que ces derniers ne découlent pas d'une disposition législative les lui conférant expressément. Nous n'avons pas eu l'occasion de déterminer ce que pourrait comprendre toute l'étendue de ces pouvoirs dans l'arrêt *Chessie*, mais nous avons indiqué que la pierre de touche de ce pouvoir accessoire était un «rapport direct» entre le pouvoir invoqué et le «mandat [de la Commission] d'évaluer le caractère raisonnable des [...] taux et de les suspendre pendant l'enquête si leur légalité est mise en doute.» 426 U.S., à la p. 514.

. . . .

Ainsi, en l'espèce comme dans l'arrêt *Chessie* les conditions de remboursement imposées par la Commission sont «légitimes, raisonnables et directement accessoires au pouvoir légal exprès de la Commission de suspendre les taux pendant l'enquête» en ce qu'elles lui permettent, dans l'exercice de son pouvoir de suspension, de poursuivre une «ligne de conduite plus appropriée» et d'«offrir une solution de rechange beaucoup mieux adaptée aux circonstances particulières» de ces instances. Encore une fois comme dans l'arrêt *Chessie*, puisque la ligne de conduite appropriée adoptée en l'espèce est nécessaire pour établir un équilibre convenable entre les

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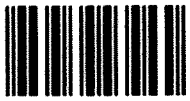

TAB6

2015 SCC 44, 2015 CSC 44
Supreme Court of Canada

Ontario (Energy Board) v. Ontario Power Generation Inc.

2015 CarswellOnt 14395, 2015 CarswellOnt 14396, 2015 SCC 44, 2015 CSC 44, [2015] 3 S.C.R. 147, 135 O.R. (3d) 160 (note), 257 A.C.W.S. (3d) 252, 338 O.A.C. 1, 388 D.L.R. (4th) 540, 475 N.R. 1, 95 Admin. L.R. (5th) 1, J.E. 2015-1505

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

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

Heard: December 3, 2014
Judgment: September 25, 2015
Docket: 35506

Proceedings: reversing *Hydro One Networks Inc., Re* (2013), (sub nom. *Power Workers' Union, Canadian Union of Public Employees, Local 1000 v. Ontario Energy Board)* 116 O.R. (3d) 793, 2013 CarswellOnt 9792, (sub nom. *Power Workers' Union v. Ontario Energy Board)* 307 O.A.C. 109, 365 D.L.R. (4th) 247, 2013 ONCA 359, M. Rosenberg J.A., R.A. Blair J.A., S.T. Goudge J.A. (Ont. C.A.); reversing *Hydro One Networks Inc., Re* (2012), 2012 CarswellOnt 2709, 2012 ONSC 1080, Aitken J., Hoy J., Swinton J. (Ont. Div. Ct.); affirming *Hydro One Networks Inc., Re* (2010), 2010 CarswellOnt 10806, Ken Quesnelle Member, Paul Sommerville Presiding Member, Paula Conboy Member (Ont. Energy Bd.)

Counsel: Glenn Zacher, Patrick Duffy, James Wilson, for Appellant
John B. Laskin, Crawford Smith, Myriam Seers, Carlton Mathias, for Respondent, Ontario Power Generation Inc.
Richard P. Stephenson, Emily Lawrence, for Respondent, Power Workers' Union, Canadian Union of Public Employees, Local 1000
Paul J.J. Cavalluzzo, Amanda Darrach, for Respondent, Society of Energy Professionals
Mark Rubenstein, for Intervener

Subject: Public; Labour
Related Abridgment Classifications
Administrative law
IV Standard of review
IV.4 Miscellaneous
Labour and employment law
I Labour law
I.6 Collective agreement
I.6.z Miscellaneous
Public law
IV Public utilities
IV.5 Regulatory boards
IV.5.b Regulation of rates
Public law
IV Public utilities
IV.5 Regulatory boards

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

> (5) The Board may fix such other payment amounts as it finds to be just and reasonable,
>
> (a) on an application for an order under this section, if the Board is not satisfied that the amount applied for is just and reasonable; ...

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

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

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

16 This means that the utility must, over the long run, be given the opportunity to recover, through the rates it is permitted to charge, its operating and capital costs ("capital costs" in this sense refers to all costs associated with the utility's invested capital). This case is concerned primarily with operating costs. If recovery of operating costs is not permitted, the utility will not earn its cost of capital, which represents the amount investors require by way of a return on their investment in order to justify an investment in the utility. The required return is one that is equivalent to what they could earn from an investment of comparable risk. Over the long run, unless a regulated utility is allowed to earn its cost of capital, further investment will be discouraged and it will be unable to expand its operations or even maintain existing ones. This will harm not only its shareholders, but also its customers: *TransCanada Pipelines Ltd. v. Canada (National Energy Board)*, 2004 FCA 149, 319 N.R. 171 (F.C.A.).

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

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

19 Where applied-for operating costs are disallowed, the utility, if it is able to do so, may forego the expenditure of such costs. Where the expenditure cannot be foregone, the shareholders of the utility will have to absorb the reduction in the form of receiving less than their anticipated rate of return on their investment, i.e. the utility's cost of equity capital. In such circumstances it will be the management of the utility that will be responsible in the future for bringing its costs into line with what the Board considers just and reasonable.

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

II. Facts

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

22 It employs approximately 10,000 people in connection with its regulated facilities, 95 percent of whom work in its nuclear business. Approximately 90 percent of its employees in its regulated businesses are unionized, with approximately two thirds of unionized employees represented by the Power Workers' Union, Canadian Union of Public Employees, Local 1000 ("PWU"), and one third represented by the Society of Energy Professionals ("Society").

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

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

24 As part of OPG's first-ever rate application with the Board in 2007, for a test period covering the years 2008 and 2009, OPG sought approval for a $6.4 billion "revenue requirement"; this term refers to "the total revenue that is required by the company to pay all of its allowable expenses and also to recover all costs associated with its invested capital": L. Reid and J. Todd, "New Developments in Rate Design for Electricity Distributors", in G. Kaiser and B. Heggie, eds., *Energy Law and Policy* (2011), 519, at p. 521. This constituted an increase of $1 billion over the revenue requirement that it had sought and was granted under the regulatory scheme in place prior to the Board's assumption of regulatory authority over OPG: EB-2007-0905, Decision with Reasons, November 3, 2008 (the "Board 2008-2009 Decision") (online), at pp. 5-6).

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

26 In explaining the importance of benchmarking, the Board stated: "The reason why the MOA emphasized benchmarking was because such studies can and do shine a light on inefficiencies and lack of productivity improvement" (Board 2008-2009 Decision, at p. 30).

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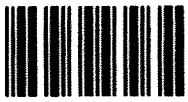

TAB7

DRIVERS OF DEFICIENCY

1.0 PURPOSE

This evidence presents the major drivers of revenue deficiency for the nuclear facilities over the 2017-2021 period as determined in Ex. I1-1-1 Table 3 and updated in Ex. N1-1-1 Attachment 2 and EX. N2-1-1.

2.0 OVERVIEW

The revenue deficiency for the nuclear facilities over the 2017-2021 period is driven in largely equal parts by (i) lower nuclear production, which reflects the commencement of Darlington refurbishment outages and outage days related to Pickering Extended Operations[1], and (ii) increases in revenue requirement relative to the annual average of the 2014 and 2015 revenue requirement approved in EB-2013-0321.

The largest drivers of changes in revenue requirement are described below, the largest of which is the Darlington Refurbishment Program ("DRP"). The annual revenue deficiency impact of the production and revenue requirement drivers are detailed in Chart 1 and explained in section 3.0 below.

3.0 DRIVERS OF DEFICIENCY FOR THE NUCLEAR FACILITIES

3.1 Lower Production (53 per cent of revenue deficiency)

Relative to the annual average of the OEB-approved nuclear production for 2014 and 2015, forecast nuclear production declines by 9.7TWh for 2017, 9.3TWh for 2018, 8.8TWh for 2019, 10.4TWh for 2020, and 12.4TWh for 2021. The comparison of production forecasts in Ex. E2-1-2 identifies the drivers of production forecast changes. The primary drivers of lower production are the units taken out of service for DRP,[2] and the incremental outage requirements resulting from Pickering Extended Operations between 2017 and 2020.

---

[1] The overall impact of Pickering Extended Operations is to increase production in the 2017-2021 test period relative to the original planned end of commercial operations in 2020. Pickering Extended Operations is a driver of deficiency relative to 2014/15 payment amounts due to decreased production and increased costs in 2017-2020 in order to execute outages to enable extension.

[2] Unit 2 in 2016, Unit 3 in 2020 and Unit 1 in 2021.

3.2 Darlington Refurbishment (17 per cent of revenue deficiency)

The DRP impacts primarily reflect an increase in the cost of capital and depreciation expense, and related income taxes resulting from rate base in-service additions for refurbishment capital projects. OPG forecasts approximately $370M in such rate base additions over the 2016-2019 period, and approximately $4.8B in 2020 when Unit 2 returns to service.[3] The DRP impacts also include DRP-related nuclear OM&A expenses, which are related to the removal activities associated with existing structures or facilities including re-tube and feeder replacement and waste management costs.[4]

3.3 Pickering Extended Operations Enabling Costs (5 per cent of revenue deficiency)

The positive economic evaluations of Pickering Extended Operations from OPG and the IESO are provided at Ex. F2-2-3. Forecast OM&A expenses to 2020 to enable Pickering Extended Operations are another driver of the higher revenue requirement relative to EB-2013-0321 approved levels. These costs total $292M over the 2017 to 2020 period as presented in Ex. F2-2-3 Chart 2.

3.4 Impact of Changes in Nuclear Station End-of-Life Dates on Nuclear Liabilities (7 per cent of revenue deficiency)

Accounting changes in nuclear station end-of-life dates[5] impact OPG's nuclear decommissioning and nuclear used fuel and waste management liability ("nuclear liabilities") costs. As further discussed in Ex. C2-1-1 and detailed in Ex. C2-1-1 Table 5, the net impact (for both prescribed and Bruce facilities and including associated income taxes) relates to the increase in the nuclear asset retirement obligation ("ARO") and corresponding increase in nuclear asset retirement costs ("ARC") of approximately $2.3B recorded by OPG at the end of 2015. This increase was primarily driven by the extension of the accounting service life for

[3] Ex. D2-2-10 Table as updated in N2-1-1Table 3.
[4] Ex F2-7-1 Table 1, footnote 1.
[5] Effective December 31, 2015. Discussed in Ex. F4-1-1.

the Bruce B nuclear units to recognize the Province's December 2015 announcement of an updated refurbishment agreement between the IESO and Bruce Power L.P. The net increase in the revenue requirement consists of an increase related to the Bruce facilities (through a reduction in Bruce Lease net revenues) and a decrease related to the prescribed nuclear facilities.

3.5 Impact of Changes in Nuclear Liabilities Reflecting 2017 ONFA Reference Plan (-5 per cent of revenue deficiency)

On December 20, 2016, OPG filed Ex. N1-1-1 Impact Statement updating its pre-filed evidence. This update included changes to forecast costs associated with OPG's nuclear liabilities since the pre-filed evidence, reflecting the projected accounting impact of the 2017-2021 ONFA Reference Plan approved by the Province in December 2016 with an effective date of January 1, 2017. The projected accounting impact is a year-end 2016 decrease in the nuclear ARO of approximately $1.5B and a corresponding decrease in nuclear ARC. The resulting revenue requirement decrease is mainly driven by the decrease in the nuclear liabilities costs for the Bruce facilities, primarily due to the impact of the lower Used Fuel Disposal program cost estimates. The updated nuclear liabilities costs are discussed in Ex. N1-1-1 and detailed in Ex. N1-1-1 Table 6.

3.6 Remaining Depreciation and Amortization Expense (7 per cent of revenue deficiency)

Remaining nuclear depreciation and amortization expense is the change in depreciation and amortization expense excluding that related to DRP and nuclear liability costs, which are discussed above. Remaining nuclear depreciation and amortization expense for prescribed facilities (including the associated tax gross-up) is forecast to be higher over the 2017-2020 period, reflecting nuclear operations capital in-service additions to rate base. Depreciation and amortization expense declines significantly in 2021, as Pickering reaches the facility's assumed end of life date of December 31, 2020. Depreciation and amortization expense is presented in Ex. F4-1-1.

3.7 Outage OM&A Expenses (3 per cent of revenue deficiency)

Forecast nuclear outage OM&A expenses[6] are higher in the test period, primarily due to a number of planned outages in accordance with OPG's aging and life cycle management programs, in addition to and separate from the refurbishment of the Darlington units. The outage work in 2017-2019 effectively replaces two scheduled planned outages for Unit 2 in 2016 and 2019 which would otherwise have been undertaken absent Unit 2 refurbishment. In addition, Pickering's outage OM&A forecast in 2021 includes expenditures associated with a six-unit Vacuum Building Outage (planned every 12 years). Additional detail on outage activities and costs is provided in Ex. F2-4-1 and Ex. F2-4-2.

3.8 Remaining/Other OM&A Expenses (13 per cent of revenue deficiency)

Remaining/Other OM&A expenses changes in OM&A expenses that do not include DRP-related increases in OM&A, Pickering Extended Operations enabling costs or nuclear outage costs. Drivers of the increase in remaining/other OM&A include an increase in nuclear base OM&A costs due to labour costs, including escalation reflecting collective agreement provisions, as well as purchased services and new CNSC requirements. Purchased services increase to fund work programs to maintain asset reliability, address equipment aging issues and for fire hazard assessment and emergency management. New CNSC requirements related to Fitness for Duty are discussed in Ex. N1-1-1, pp. 20-21. Nuclear base OM&A costs are presented in Ex. F2-2-1 and Ex. F2-2-2. Compensation and benefits are discussed in Ex. F4-3-1.

3.9 Fuel Costs (-4 per cent of revenue deficiency)

Fuel costs discussed here exclude those related to the nuclear liabilities adjustment discussed above. The forecast decrease in fuel costs for the prescribed nuclear facilities over the 2017-2021 period reflects lower generation, as discussed above, and lower fuel bundle costs. The lower forecast fuel bundle costs are primarily due to lower cost of uranium concentrate partially offset by higher prices for conversion services and fuel bundle manufacturing. Nuclear fuel costs are discussed in Ex. F2-5-1 and Ex. F2-5-2.

[6] Other than enabling costs for Pickering Extended Operations discussed in section 3.6 above.

3.10 Other (4 per cent of revenue deficiency)

The "Other" revenue requirement driver category includes a number of factors. The two main causes of the increase in this cost driver are a decline in non-energy revenue and lower Bruce Lease net revenues (other than the impact of the 2015 nuclear liabilities adjustment and station end-of-life changes discussed in section 3.4 and the impact of the 2016 nuclear liabilities adjustment discussed in section 3.5). The decline in non-energy revenue is primarily the result of lower heavy water sales due to the depletion of inventory. Lower Bruce Lease net revenues are due to a combination of factors including lower forecast lease revenues and higher used fuel expenses. Non-energy revenue is discussed in Ex. G2-1-1 and Ex. G2-1-2. Bruce Lease net revenues are discussed in Ex. G2-2-1, as updated in Ex. N1-1-1.

The remaining costs in this category consist of a residual decrease in the cost of capital and associated tax gross-up, lower property taxes, and a residual decrease in income taxes not included in the drivers discussed above. The residual decrease in the cost of capital is mainly due to a lower allowable return on equity value published by OEB in October 2016 compared to that reflected in the EB-2013-0321 payment amounts as discussed in Ex. N1-1-1. The residual decrease in income taxes primarily reflects the impact of higher forecast cash expenditures on nuclear waste management and decommissioning, net of forecast disbursements from the nuclear segregated funds, for the prescribed nuclear facilities. Taxes are discussed in Ex. F4-2-1, as updated in Ex. N1-1-1. The cost of capital is discussed in Ex. C1-1-1, as updated in Ex. N1-1-1, as well as Ex. C1-1-2 and Ex. C1-1-3.

Chart 1: Nuclear Deficiency for 2017 - 2021 Period

Line No		($M) 2017	($M) 2018	($M) 2019	($M) 2020	($M) 2021	Reference
1	**EB-2013-0321 Average Approved 2014 & 2015 Revenue Requirement**	**2,834.0**	**2,834.0**	**2,834.0**	**2,834.0**	**2,834.0**	Note 1a
2	Revenue at EB-2013-0321 Payment Amount ($59.29/MWh)	**2,258.9**	**2,280.9**	**2,313.9**	**2,214.8**	**2,097.9**	Note 2a
3	Lower Production (line 1 - line 2)	**575.2**	**553.1**	**520.2**	**619.2**	**736.1**	
	Changes in Revenue Requirement:						
4	Darlington Refurbishment	46.7	(15.9)	(51.0)	487.9	519.3	Note 3a
5	Pickering Extended Operations Enabling Costs	25.6	55.3	107.1	104.3	0.0	Ex. F2-2-3 Chart 2
6	Impact of Changes in Nuclear Station End-of-Life Dates on Nuclear Liabilities	31.8	36.2	42.2	129.7	132.2	Ex. C2-1-1 Table 5, line 18
7	Impact of Changes in Nuclear Liabilities Reflecting 2017 ONFA Reference Plan	(22.9)	(32.8)	(3.7)	(84.8)	(127.0)	Ex. N1-1-1 Chart 3.2.1 line 8
8	Remaining Depreciation and Amortization Expense *(other than lines 4, 6 & 7)*	99.9	136.9	143.7	132.4	(141.7)	Note 4a
9	Outage OM&A Expenses *(other than line 5)*	75.8	59.8	29.9	12.2	11.8	Note 5a
10	Remaining/Other OM&A Expenses *(other than lines 4, 5, 6, & 7)*	81.8	103.5	164.4	182.2	194.6	Note 6a
11	Fuel Costs *(other than lines 6 & 7)*	(49.8)	(47.8)	(37.5)	(41.4)	(56.7)	Note 7a
12	Other	38.6	61.5	54.2	42.3	51.9	Note 8a
13	**Total Change in Revenue Requirement** (lines 4 through 12)	**327.4**	**356.6**	**449.4**	**964.8**	**584.4**	
14	**Total Revenue Deficiency** (line 3 + line 13)	**902.5**	**909.7**	**969.5**	**1,584.0**	**1,320.5**	

Notes

1a Ex. I1-1-1 Table 2, Line 11

OEB APPROVED		
2014	2015	AVERAGE
2,790.4	2,877.6	2,834.0

2a

REDUCED PRODUCTION	2017	2018	2019	2020	2021
Test Period Production (Ex E2-1-1 Table 1, line 3, cols. (e) to (i)) **(TWh)**	38.1	38.5	39.0	37.4	35.4
Nuclear Base Payment Amount (EB-2013-0321 Payment Amount Order, App D, line 3) **($/MWh)**	$59.29	$59.29	$59.29	$59.29	$59.29
Forecast Revenue ($M)	2,258.9	2,280.9	2,313.9	2,214.8	2,097.9

Note	Driver of Revenue Requirement Change	EB-2016-0152 *(references shown are to EB-2016-0152 exhibits)*		EB-2013-0321 *(references shown are to EB-2016-0152 exhibits unless otherwise noted)*	
3a	**Impact of Darlington Refurbishment Program (DRP)**	**DRP revenue requirement impact comprises:**		**DRP revenue requirement impact comprises:**	
		OM&A Expenses	Ex. F2-1-1 Table 1, line 5, cols. (e) to (i)	OM&A Expenses	Ex. H1-1-1 Table 11a, Table to Note 1, col. (a), line 4a
		Cost of Capital	Ex. N2-1-1, Chart 3, line 4 x Ex. N2-1-1 Chart 1, line 2	Cost of Capital	Ex. H1-1-1 Table 11a, Table to Note 6, col. (c), line 3b
		Depreciation	Ex. F4-1-1 Table 2, line 2, cols. (e) to (i) less Ex. N2-1-1, Chart 2, line 5	Depreciation	Ex. H1-1-1 Table 11a, Table to Note 6, col. (c), line 5b
		Income Tax	((Ex. N2-1-1 Chart 3, line 4 x Ex. C1-1-1 Tables 1-5, col. (b), line 5 x Ex. N1-1-1 Chart 3.4, line 6) + (Ex. F4-1-1 Table 2, line 2, cols. (e) to (i) less Ex. N2-1-1, Chart 2, line 5, less Ex. F4-2-1 Table 3b, Note 3)) x 25% / (1-25%)	Income Tax	(Ex. H1-1-1 Table 11a, Table to Note 6, col. (c), lines 4b+ 5b-6b) x 25% / (1-25%)
4a	**Impact of Other Depreciation and Amortization Expense**	**Impact of Other Depreciation and Amortization Expense is calculated as:**		**Impact of Other Depreciation and Amortization Expense is calculated as:**	
		Total Depreciation and Amortization	Ex. N2-1-1 Table 1, line 17, cols. (a) to (e)	Total Depreciation and Amortization	Ex. I1-1-1 Table 2, line 4, (cols. (a)+(b))/2
		Less: Darlington Refurbishment Depreciation	Ex. F4-1-1 Table 2, line 2, cols. (e) to (i) less Ex. N2-1-1, Chart 2, line 5	Less: Darlington Refurbishment Depreciation	Ex. H1-1-1 Table 11a, Table to Note 6, col. (c), line 5b
		Less: Nuclear Liabilities Impact Reflecting 2017 ONFA Reference Plan	Ex. N1-1-1 Table 6, line 1, cols. (a) to (e) less cols. (f) to (j)		
		Less: Nuclear Liabilities Impact of 2015 Station Life Changes	Ex. C2-1-1 Table 5, line 1, cols. (a) to (e) less cols. (f) to (j)		
5a	**Increase in Outage OM&A Expenses**	**Outage OM&A expenses are calculated as:**		**Outage OM&A expenses are calculated as:**	
		Total Outage OM&A	Ex. F2-4-1 Table 1, line 7, cols. (e) to (i)	Total Outage OM&A	EB-2013-0321: Ex. F2-4-1 Table 1, line 6 (cols. (e)+(f))/2
		Less: Pickering Extended Operations Enabling Costs (Outage OM&A)	Ex. F2-2-3 Chart 2, line 5		
6a	**Other OM&A Expenses**	**Other OM&A Expenses are calculated as:**		**Other OM&A Expenses are calculated as:**	
		Total OM&A Expenses	Ex. N2-1-1 Table 1, line 15, cols. (a) to (e)	Total OM&A Expenses	Ex. I1-1-1 Table 2, line 2 (cols. (a)+(b))/2
		Less: Outage OM&A Expenses	As calculated in Note 5a	Less: Outage OM&A Expenses	EB-2013-0321: Ex. F2-4-1 Table 1, line 6 (cols. (e)+(f))/2
		Less: Pickering Extended Operations Enabling Costs	Line 5		
		Less: Nuclear Liabilities Impact Reflecting 2017 ONFA Reference Plan	Ex. N1-1-1 Table 6, line 3, cols. (a) to (e) less cols. (f) to (j)		
		Less: Darlington Refurbishment OM&A Expenses	Ex. F2-1-1 Table 1, line 5, cols. (e) to (i)	OM&A Expenses	Ex. H1-1-1 Table 11a, Table to Note 1, col. (a), line 4a
		Less: Nuclear Liabilities Impact of 2015 Station Life Changes	Ex. C2-1-1 Table 5, line 3, cols. (a) to (e) less cols. (f) to (j)		
7a	**Decrease in Fuel Costs**	**Fuel Costs are calculated as:**		**Fuel Costs are calculated as:**	
		Total Fuel Expense	Ex. N2-1-1 Table 1, line 16, cols. (a) to (e)	Total Fuel Expense	Ex. I1-1-1 Table 2, line 3 (cols. (a)+(b))/2
		Less: Nuclear Liabilities Impact of 2015 Station Life Changes	Ex. C2-1-1 Table 5, line 2, cols. (a) to (e) less cols. (f) to (j)		
		Less: Nuclear Liabilities Impact Reflecting 2017 ONFA Reference Plan	Ex. N1-1-1 Table 6, line 2, cols. (a) to (e) less cols. (f) to (j)		
8a	**Other**	**Impact of Other is calculated as:**		**Impact of Other is calculated as:**	
		Total Revenue Requirement	Ex. N2-1-1 Table 1, line 24, cols. (a) to (e)	Total Revenue Requirement	Ex. I1-1-1 Table 2, line 11 (cols. (a)+(b))/2
		Less: Revenue requirement change factors identified	Notes 3a to 7a + Line 5 + Line 6 + Line 7	Less: Revenue requirement change factors identified	Notes 3a to 7a

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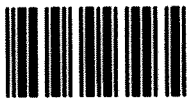

TAB8

CITATION: Rogers Communications Partnership v. Ontario Energy Board, 2016 ONSC 7810
DIVISIONAL COURT FILE NO.: 141/16
DATE: 20161214

2016 ONSC 7810 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MOLLOY, DAMBROT and VARPIO JJ.

BETWEEN:	
ROGERS COMMUNICATION PARTNERSHIP, TELUS COMMUNICATIONS COMPANY, QUEBECOR MEDIA INC. and ALLSTREAM INC.	*Jennifer McAleer and Leslie Minton*, for the Appellants
Appellants	*M. Philip Tunley and Pam Hrick*, for the Respondent Ontario Energy Board
– and –	
THE ONTARIO ENERGY BOARD and HYDRO OTTAWA LIMITED	*Fred D. Cass*, for the Respondent Hydro Ottawa Limited
Respondents	
	HEARD: September 29, 2016 in Toronto

REASONS FOR DECISION

MOLLOY J.

A. INTRODUCTION

[1] The Ontario Energy Board ("OEB" or "the Board") issued an Order on February 25, 2016 approving an increase in the rate Hydro Ottawa Limited ("Ottawa Hydro") was permitted to charge to various carriers in order to attach their wireline communications equipment to Hydro Ottawa poles (known as a "pole attachment rate"). The appellants are all carriers affected by the 2016 Order. They participated in the hearing before the OEB and opposed the increased pole

> fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation.

[13] In other cases, courts have held that the standard of review for issues of procedural fairness is correctness. For example, the Supreme Court of Canada stated in *Mission Institution v. Khela*[2] that the "standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be 'correctness'."

[14] In my view, how this is characterized does not impact the analysis. The first step for the reviewing court is to decide whether the tribunal is required to observe principles of procedural fairness for the decision at issue and to then determine the scope of the duty owed. The tribunal is required to have complied with the scope of the duty identified by the court, which is essentially the same thing as saying the tribunal must be correct in its application of procedural fairness.

[15] In determining the scope of the duty, the relevant factors to be taken into account were described by the Supreme Court's 1999 decision in *Baker*[3] and have been consistently applied ever since. Although these are acknowledged not to be exclusive factors, the following should be taken into account:

(i) the nature of the decision being made and the process followed to make it;

(ii) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;

(iii) the importance of the decision to the individual or individuals affected;

(iv) the legitimate expectations of the person challenging the decision; and

(v) the choices of procedure made by the agency itself.

[16] The first four of these factors point to a requirement that the OEB provide the highest degree of procedural fairness. The fifth factor demonstrates that the OEB itself has adopted procedures for hearings that reflect a high standard of procedural fairness. Further, this factor has particular significance in the circumstances of this case.

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[2] *Mission Institution v. Khela*, [2014] 1 S.C.R. 502, 2014 SCC 24 at para. 79; see also *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, 2009 SCC 12 at para. 43

[3] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

2016 ONSC 7810 (CanLII)

TAB9

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2011-0286

Filing Guidelines for Ontario Power Generation Inc.

Setting Payment Amounts for Prescribed Generation Facilities

Issued: July 27, 2007 (EB-2006-0064)
Revised: November 27, 2009 (EB-2009-0331)
Revised: November 11, 2011

1. PART 1: INTRODUCTION

This document provides the filing guidelines for Ontario Power Generation Inc. ("OPG") regarding the setting of payment amounts for OPG's prescribed generation facilities. The Board expects that OPG will comply with these filing guidelines. This document is not a statutory regulation, rule or code issued under the Board's authority and does not preempt the Board's discretion to make any order or give any direction as it determines necessary concerning any matters raised in relation to the setting of payment amounts for the prescribed generation facilities, including in relation to the production by OPG of additional information which the Board on its own motion or at the request of a party considers appropriate.

This document sets out specific filing guidelines for purposes of the setting of payment amounts for certain of Ontario Power Generation Inc.'s ("OPG") generation facilities under section 78.1 of the *Ontario Energy Board Act, 1998* (the "Act").[1] The generation facilities in question are identified in the *Payments Under Section 78.1 of the Act Regulation*, O. Reg. 53/05 ("O. Reg. 53/05") and are: Sir Adam Beck I, Sir Adam Beck II, Sir Adam Beck Pump Generation Station, De Cew Falls I, De Cew Falls II (all of the foregoing being hydroelectric generating stations located in the Regional Municipality of Niagara), the R.H. Saunders hydroelectric generating station on the St. Lawrence River, Pickering A nuclear generating station, Pickering B nuclear generating station and Darlington nuclear generating station (collectively the "prescribed generation facilities").

1.1 OVERVIEW OF LEGISLATIVE CONTEXT AND REGULATORY METHODOLOGY

Section 78.1 of the Act authorizes the Ontario Energy Board (the "Board") to set payments to be made to OPG with respect to the output of the prescribed generation facilities. Under O. Reg. 53/05, the Board's authority in that regard commenced on April 1, 2008.

In addition to identifying the prescribed generation facilities, O. Reg. 53/05 empowers the Board to establish the form, methodology, assumptions and calculations to be used in making an order that determines payment amounts for the purpose of section 78.1 of

[1] The working assumption reflected in this version of the guidelines is that OPG will be filing a payment amounts application in 2012 for test years 2013 and 2014. The prior test years for which the Board set OPG's payment amounts were 2011 and 2012. It is assumed that actuals will be available for 2009, 2010 and 2011 as well as the most recent forecast for the 2012 (current) bridge year. Accordingly, the term "historical" refers to 2009, 2010 and 2011 actuals and "Board-approved" refers to the numbers which support the payment amounts approved by the Board for 2011 and 2012.

Directives and Undertakings Include	EB-2010-0008 Decision with Reasons Page Number
Nuclear Fuel Procurement – In the next proceeding, the Board will examine the program to determine whether OPG is optimizing its contracting. The Board will therefore direct OPG to file an external review as part of its next application.	55
Nuclear Rate Base – In the next proceeding, the Board will re-examine the issue of rate base additions and the accuracy of OPG's forecasts. The separate presentation of data related to ARC will assist in this regard.	59
Darlington Refurbishment – The Board expects OPG to file updated information on its progress for examination in the next proceeding.	71
Darlington Refurbishment – As DRP is a multi-year project, the Board expects that in future payments cases, the business case will be updated.	72
Compensation – The Board will therefore direct OPG to file on a FTE basis in its next application and to restate historical years on that basis.	84
Compensation – The Board expects to examine the issue of overtime more closely in the next proceeding. The Board expects OPG to demonstrate that it has optimized the mix of potential staffing resources.	84
Compensation – The Board directs OPG to conduct an independent compensation study to be filed with the next application.	88
Pension and OPEB – OPG is directed to provide a fuller range and discussion of alternatives to the use of AA bond yields to forecast discount rate in its next application.	91
The Board will direct OPG to file an independent depreciation study at the next proceeding.	97
The Board directs OPG to re-address the hydroelectric incentive mechanism ("HIM") structure in its next application.	148
IRM – Following a preliminary Board review, the Board expects OPG to provide a proposed work plan and status report for an independent productivity study as part of its 2013 and 2014 cost of service application.	156

2. PART 2: FILING GUIDELINES

2.1 INTRODUCTION

OPG's application to the Board should provide sufficient detail to enable the Board to make a determination as to whether the proposed payment amounts are just and reasonable. The material presented is OPG's evidence and the onus is on OPG to prove the need for and the basis for the proposed new payment amounts. A clearly written application that advocates the need for the proposed payment amounts, complete with sufficient evidence and justification for the proposed payment amounts, is essential to facilitate an efficient regulatory process and a timely decision.

In the previous proceeding, the Board observed that at times the analysis was complicated by the fact that data was presented in ways which were not always comparable. The Board expects OPG to present data on a consistent basis so that comparisons are accurate.

The 2013-2014 payment amounts application will be OPG's third cost of service application. To the extent that materials are the same or substantially the same as those filed in previous applications, OPG shall indicate this to improve the efficiency of the review.

The Board remains cognizant of the large number of interrogatories that a rate (or in this case payment) setting process can generate. The requirement for a large number of interrogatories in the previous cases suggests that OPG and the interested parties do not have a common understanding of the information required to support the application. OPG should strategically consider the clarity and materiality of the evidence, with the goal of providing a clear and concise narrative of its filing. The evidence should be designed to increase the understanding of the parties with the overall objective of reducing the number and scope of interrogatories required. The Board also advises parties to carefully consider the relevance of their interrogatories when assessing an application and whether the issue being explored is material.

In determining what evidence to file, OPG should consider what information the Board and the intervenors are likely to request, and provide that information in the filed evidence rather than waiting for the request to be made at the hearing. This will ensure a better use of hearing time, and a more focused and informed cross examination.

directed to electricity and gas distributors, the Board will consider OPG's transition to IFRS in the context of the policies established in the Board Report.

OPG is required to identify in its application the financial differences and resulting revenue requirement impacts arising from the adoption of modified IFRS accounting. This is consistent with requirements set out in the Board Report.

As OPG is expected to adopt modified IFRS for financial reporting in 2012, OPG is required to present all historical years up to 2010 on a CGAAP basis, historical year 2011 on both CGAAP and modified IFRS basis, bridge year 2012 and test years 2013 and 2014 on a modified IFRS basis. Where there are differences in information between CGAAP and modified IFRS for the historical year 2011, the presentation of the information must clearly show the differences.

In addition, OPG shall meet the following guidelines in preparing its filing:

- Six years of data shall be submitted, as a minimum. The years are defined as:
  - Test Years = prospective payment years (typically 2 years)
  - Bridge Year = current year
  - Historic Years = last 3 complete years of actuals (as a minimum)
- Multi-year data showing data for all of the Historic Years, Bridge Year and Test Years shall be presented on the same sheet for the summary/main schedules
- Where applicable, for the each of the Historic Years, a detailed variance analysis shall also be provided **comparing Board-approved to actual costs and production**. The use of the phrase "Board approved" in these filing guidelines refers to the set of data used by the Board as the basis for approving the most recent payment amounts. It does not mean that the Board, in fact, "approved" any of the data, but only that the final approved payment amounts were based on that data.
- A detailed variance analysis for costs and production shall be provided for each historic and bridge year compared to the prior year. This analysis shall explain the reasons for the variance, the drivers of the variance and the contribution of each towards the total year-over-year variance.
- Written direct evidence shall be presented before the data schedules
- With respect to the claimed revenue sufficiency/deficiency, OPG shall provide a summary of the drivers of the sufficiency/deficiency for each of the Test Years, along with how much each driver contributes
- OPG shall file twelve paper copies and a copy in electronic form. The electronic form, including appendices and attachments, shall be in searchable/unrestricted

- Contact information
- Draft issues list – including preliminary prioritization of primary and secondary issues
- Procedural Orders/motions/correspondence
- Identification of areas where there has been deviation from IFRS
- Relevant maps (or provide link to webpage where maps can be found)
- Organization charts
- Planned changes in corporate or operational structure
- Relevant company policies and regulations
- List of witnesses and their curriculum vitae

2.2.2 Overview/Summary

- Summary of filing (purpose, need and timing of the filing)
- Budget directives and guidelines (capital and operating budgets), including economic assumptions used
- Changes in methodology (accounting including IFRS, etc.) that would affect any of the Historic, Bridge or Test Years
- Schedule of overall revenue sufficiency/deficiency
    - Numerical schedules detailing the causes of the sufficiency/deficiency
    - Complete and detailed references to the data contained in the detailed schedules and tables shall be provided so that parties can map the summary cost driver information to the evidence supporting it
    - A detailed narrative of the causes of the sufficiency/deficiency highlighting the significant issues.
- An overview of the allocation methodology for assets, costs and revenues to the prescribed and non-prescribed assets, and to the nuclear- and hydroelectric-specific businesses
- Summary and status of Board directives from the EB-2010-0008 and EB-2011-0090 Decisions. OPG should clearly indicate how these have been or are being addressed in the current application.
- Summary or copy of relevant orders from any federal or provincial agency, Ministerial Directives and Shareholder Directives.

2.2.3 Background Financial Information

- Audited OPG financial statements approved by OPG's Board of Directors for each of the Historic Years (or provide the webpage address of the location on SEDAR or EDGAR where these audited financial statements can be found)
- Audited OPG financial statements should be provided as soon as they are available. If the statements are not available at the time of filing, OPG should provide these as an update
- Most recent quarterly OPG financial reports
- Rating agency reports for each of the Historic Years and Bridge Year
- Audited prescribed generation facilities financial statements for the Historic Years
- An overview of how the provisions of O. Reg. 53/05 are reflected in the filing compared to data in the financial statements

- Year over year analysis for the six year period

2.3.1 Gross Assets – Property, Plant and Equipment and Intangible Assets

Continuity statements should be provided as indicated above.

- Required statements and analysis should be broken down by function
- A detailed breakdown should be provided by major plant account for each functionalized plant item for each of the Historic Years, Bridge Year and Test Years. For the Test Years, each plant item should be accompanied by a written description
- Mid-year averages should be provided

2.3.2 Accumulated Depreciation and Amortization

Continuity statements and a summary variance explanation shall be provided as indicated above for each of the Historic, Bridge and Test Years by asset account. Continuity statements shall be reconcilable to calculated depreciation costs.

2.3.3 Working Capital Calculation

Working capital shall be provided for the each of the Historic, Bridge and Test Years. The results shall be provided on a single schedule for comparison. The basis for the calculation of cash working capital must be detailed.

2.4 EXHIBIT C COST OF CAPITAL AND RATE OF RETURN

OPG shall ensure that the total capitalization in the filing (debt and equity) equates to the total rate base.

2.4.1 Capital Structure – Amounts & Ratios

The following elements of the proposed capital structure shall be detailed, with the necessary schedules, for each of the Historic, Bridge and Test Years:

- Long-term debt
- Short-term/unfunded debt (to equate total capitalization with rate base)
- Preference shares
- Common equity

Justification for proposed capital structure is required, including an explanation of the following:

- Non-scheduled retirement of debt or preference shares and buy back of common shares
- Long-term debt, preference shares and common share offerings

is summarized elsewhere in the application, the reference shall be provided in this section.

The information shall be disaggregated to present Darlington and Pickering separate from Bruce.

The information presented shall cover:
- the revenue requirement treatment of OPG's liabilities for decommissioning its nuclear stations and nuclear used fuel and low and intermediate level waste management
- the revenue requirement treatment of OPG's liabilities for decommissioning Bruce

Further, the exhibit shall include:
- A summary of net book values of OPG's nuclear stations including Bruce, noting amounts of unamortized asset retirement cost, for Historic, Bridge and Test years.
- A summary of the forecast pre-tax charge in OPG's income statement due to the nuclear liabilities and the segregated funds

2.5 EXHIBIT D CAPITAL PROJECTS

Capital Budget - Historic Years, Bridge Year and Test Years

- Policies
  - OPG's capitalization policy and any changes to that policy should be presented as part of the capital budget evidence
  - Proposed accounting treatment, including the treatment of costs of funds for capital projects that have a project life cycle greater than one year, should be provided
- Capital Expenditures – Provide a summary of capital expenditures for the Historic, Bridge and Test years, including the Board-approved amounts for the Historic and Bridge years.

the following comparisons:

- Board-approved vs. actual for each of the Historic Years
- Board-approved vs. Bridge Year forecast

OPG shall provide a summary table for projects $5M and greater that were projected to go into service in 2011 and 2012 in the EB-2010-0008 application. The table should include the project stage as provided in the EB-2010-0008 application and the current status of the project.

2.6 EXHIBIT E PRODUCTION FORECAST

The production forecast and any normalization methodology shall be provided. A description of outage planning processes and production reliability initiatives shall also be provided.

- Explanation of causes and assumptions for the production forecast
- Production for all Historic, Bridge and Test Years
- Weather forecasting and hydrological forecasting methodologies
- All data used to determine the forecast should be presented in **MS Excel spreadsheet format**
- Comparison of historical data with the forecast data in regard to forecasting assumptions
- A variance analysis of energy output shall be provided for the following:
  - Board-approved vs. actual for each of the Historic Years
  - Board-approved vs. Bridge Year forecast
  - Year over year analysis for the six year period
- All economic assumptions and their sources used in the preparation of the production forecast shall be included in this section
- Where available, actual and forecast generation losses due to spill shall be filed.

HYDROELECTRIC INCENTIVE MECHANISM ("HIM")

An analysis of the HIM shall be provided. The analysis shall include an assessment of the benefits of HIM for ratepayers, the interaction between the mechanism and surplus baseload generation, and an assessment of potential alternative approaches.

- Total compensation by employee group and average level per group
- Details of any pay-for-performance or other employee incentive program
- The status of pension funding and all assumptions used in the analysis

Information shall be presented in terms of FTEs. In some cases, OPG may choose to provide the information in terms of head count as well as FTEs. The basis for each breakout of compensation data will be specified:

- Head count or FTE
- Yearly average, mid year or year end

These data shall be provided in Excel spreadsheet table format.

- Employee benefit programs, including pensions, and costs charged to O&M shall include the following details:

  - historic actuarial reports
  - actuarial evidence to support pension and OPEB expense for the bridge year and test years including any educational notes or articles issued by the Canadian Institute of Actuaries on methods for determining discount rates used for reporting under CICA standards
  - CICA guidance, practice notes, etc. that provide information on approaches to selecting discount rates shall be filed
  - discussion and analysis on discount rates used for calculating pensions and OPEB benefit obligations, cost for the year and liabilities
  - a table that summarizes actual accounting expense compared to Board-approved expense and with amounts actually paid for pensions and OPEBs for the period April 1, 2008 to the end of the historical period
  - the most recent report filed with Financial Services Commission of Ontario
  - discussion on the impacts of the adoption of IFRS

- A variance analysis for OM&A, and components of OM&A (including Regulatory Affairs costs), shall be provided for the following:

  - Board-approved vs. actual for each of the Historic Years
  - Board-approved vs. Bridge Year forecast
  - Year over year analysis for the six year period

  A written explanation is required for any variance greater than or equal to 10% of category expenses.

b) Depreciation/Amortization/Depletion

- An independent depreciation study and summary of changes for depreciation, amortization and depletion by asset group shall be provided

2.8.1 Energy Revenue

This section shall include:

- Production and energy revenues for all Historic, Bridge and Test Years
- Schedule of production showing volumes, total revenues and unit revenues for each of the Historic, Bridge and Test Years

2.8.2 Other Revenues

Details of other revenue, broken down by revenue source, shall be provided. This shall include OPG's revenues and costs associated with the Bruce nuclear generating stations

- A variance analysis of other revenues shall be provided for the following:
    - Board-approved vs. actual for each of the Historic Years
    - Board-approved vs. Bridge Year forecast
    - Year over year analysis for the six year period
- A detailed explanation of how other revenues are attributed to the prescribed generation facilities shall be provided.

2.9 EXHIBIT H DEFERRAL AND VARIANCE ACCOUNTS

As described in Part 1, O. Reg. 53/05 contains a number of provisions regarding the establishment of deferral and variance accounts and the recovery of balances in those accounts. In this section, OPG shall include information necessary to enable the Board to deal with these accounts in the manner contemplated by O. Reg. 53/05, including OPG's proposals regarding the following:

- The end date for entries into the deferral and variance accounts
- Addressing timing differences between the end date for entries into the deferral and variance accounts and the effective date of the Board's order
- The number of years over which balances in the deferral and variance accounts should be recovered (subject to the maximum set out for each in O. Reg. 53/05)
- The interest rate for the nuclear liability deferral account referred to in section 5.2(1) of O. Reg. 53/05

OPG shall also identify any deferral or variance accounts that it may wish to have authorization to establish on and after the date of the Board's order.

In general, this exhibit should include:

revenue requirement.
- Analysis of % change vs. current payment amounts
- Bill impact analysis

- Payment Design

  OPG shall, in addition to providing the existing design of payment amounts, include:

  - Analysis of the existing design of payment amounts and whether the design maximized efficient use of the generation facilities
  - Proposed payment design and rationale
  - Explanation of non-cost factors and their application to payment design.

- Payment Implementation

  OPG shall provide a description of the settlement process with the IESO, including a description of the timelines associated with the requested effective date.

TAB10

Ontario Energy Board
P.O. Box 2319
27th. Floor
2300 Yonge Street
Toronto ON M4P 1E4
Telephone: 416- 481-1967
Facsimile: 416- 440-7656
Toll free: 1-888-632-6273

Commission de l'énergie de l'Ontario
C.P. 2319
27e étage
2300, rue Yonge
Toronto ON M4P 1E4
Téléphone: 416- 481-1967
Télécopieur: 416- 440-7656
Numéro sans frais: 1-888-632-6273

Ontario

BY E-MAIL

October 25, 2013

Colin Anderson
Director, Ontario Regulatory Affairs
Ontario Power Generation Inc.
700 University Avenue, H18G2
Toronto ON M5G 1X6

Dear Mr. Anderson:

Re: Ontario Power Generation Inc.
2014-2015 Payment Amounts Application
Board File Number EB-2013-0321

The Board has completed a preliminary review of Ontario Power Generation Inc.'s ("OPG") application for payment amounts for the prescribed generation facilities filed on September 27, 2013. The "Filing Guidelines for Ontario Power Generation Inc. in Setting Payment Amounts for Prescribed Generation Facilities" issued on November 11, 2011 served as the reference document for the review.

The preliminary review has identified that certain sections of the evidence supporting the application do not comply with the filing guidelines. Those sections include:

Filing Guideline (EB-2011-0286)	Application (EB-2013-0321)
Page 6 - "*Excel spreadsheets shall be provided as appropriate to the data in question. Generally, formulae indicating on-sheet calculations shall be provided. As a minimum, OPG shall file an Excel spreadsheet summarizing production forecast (as noted in section 2.6), compensation and benefits (as noted in section 2.7.1) and a Revenue Requirement Work Form ("RRWF") in Excel format.*"	Only the RRWF has been filed in Excel format.

Filing Guideline (EB-2011-0286)	Application (EB-2013-0321)
Page 8 – "*Unless otherwise directed by the Board, any request for confidential treatment of information by OPG must be made at the time of the filing and in accordance with the Board's Practice Direction on Confidential Filings.*"	OPG requests confidential treatment for two volumes of information. The information has not been filed in accordance with section 5.1.4(b) of the Practice Direction which states that a request for confidentiality must include, "*a confidential, un-redacted version of the document containing all of the information for which confidentiality is requested. This version of the document should be marked "confidential" and should identify all portions of document for which confidentiality is claimed by using shading, square brackets or other appropriate markings. If confidential treatment is requested in relation to the entire document, the document should be printed on coloured paper*"
Page 9 – "*Audited prescribed generation facilities financial statements for the Historic Years*"	Exh A2-1-1, page 3 – "*OPG is preparing a set of stand-alone annual consolidated financial statements for the prescribed facilities in accordance with USGAAP for the year ended December 31, 2012, with comparative information for the year ended December 31, 2011. At the time of filing, the audit of these financial statements has not been completed. After the audit has been completed, these financial statements will be filed as Attachment 2 to this exhibit.*"
Page 17 – "*A variance analysis for OM&A, and components of OM&A (including Regulatory Affairs costs), shall be provided*"	No Regulatory Affairs costs or analysis have been provided.
Page 21 – "*OPG shall provide a description of the settlement process with the IESO, including a description of the timelines associated with the requested effective date.*"	No description has been provided.

The Board expects that OPG will file the above listed information as soon as possible. In addition, the Board notes:

- At Exh A2-1-1 page 1, OPG has provided links to financial information on its webpage. To facilitate reference during this proceeding to financial documents listed in the filing guidelines that were not filed with the application but are available on

OPG's webpage, please file one hard copy with the Board and file electronic copies with the Board of each document. Please assign an exhibit number to each of the documents.

- At Exh F4-1-1 page 1, OPG notes that it has filed a 2011 Depreciation Study. OPG also states that it is in the process of updating the study based on changes made to end of life dates for Pickering and to include the Niagara Tunnel. OPG states that the updated study will be filed as it becomes available.
- There is no index provided with the two volumes of information for which confidential treatment is sought. In addition, there are no tabs provided in Attachment A. Please provide an index and tabs with the confidential information that is filed in accordance with section 5.1.4(b) of the Practice Direction.
- At Exh A1-4-3 page 1, OPG states that the operations of Pickering A and Pickering B were amalgamated into a single station in 2010. At page 5 of the filing guidelines, the Board commented that analysis in the previous proceeding was complicated when data was presented in ways that were not comparable. The Board encourages OPG to file any additional information, when it files information that is the subject of this correspondence, that could assist parties with their review of Pickering operations as it is presented in the current application and the previous application. In the absence of information presented as Pickering A and Pickering B, subject areas that could receive many interrogatories are nuclear production forecast and nuclear benchmarking.

Today, the Board has issued a letter of direction and notice of application. The timing of any further procedural steps will be dependent on OPG's response to the items noted in this correspondence. Specifically, the Board does not intend to proceed with further procedural steps beyond notice until such time as the updated Depreciation Study (Exh F4-1-1, Exh F5-3-1) and audited financial statements for the prescribed generation facilities for the historic years (Exh A2-1-1) are filed with the Board.

Please direct any questions relating to this application to Violet Binette, Project Advisor at 416-440-7674 or violet.binette@ontarioenergyboard.ca.

Yours truly,

Original signed by

Kirsten Walli
Board Secretary

CC: Charles Keizer, Torys LLP
Carlton Mathias, OPG

TAB11

Mavis Baker *Appellant*

v.

Minister of Citizenship and Immigration *Respondent*

and

The Canadian Council of Churches, the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees, and the Charter Committee on Poverty Issues *Interveners*

INDEXED AS: BAKER *v.* CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)

File No.: 25823.

1998: November 4; 1999: July 9.

Present: L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache and Binnie JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Immigration — Humanitarian and compassionate considerations — Children's interests — Woman with Canadian-born dependent children ordered deported — Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad — Application denied without hearing or formal reasons — Whether procedural fairness violated — Immigration Act, R.S.C., 1985, c. I-2, ss. 82.1(1), 114(2) — Immigration Regulations, 1978, SOR/93-44, s. 2.1 — Convention on the Rights of the Child, Can. T.S. 1992 No. 3, Arts. 3, 9, 12.

Administrative law — Procedural fairness — Woman with Canadian-born dependent children ordered deported — Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad — Whether participatory rights accorded consistent with duty of procedural fairness — Whether failure to provide reasons violated principles of procedural fairness — Whether reasonable apprehension of bias.

Mavis Baker *Appelante*

c.

Le ministre de la Citoyenneté et de l'Immigration *Intimé*

et

Le Conseil canadien des églises, la Canadian Foundation for Children, Youth and the Law, la Défense des enfants-International-Canada, le Conseil canadien pour les réfugiés et le Comité de la Charte et des questions de pauvreté *Intervenants*

RÉPERTORIÉ: BAKER *c.* CANADA (MINISTRE DE LA CITOYENNETÉ ET DE L'IMMIGRATION)

N° du greffe: 25823.

1998: 4 novembre; 1999: 9 juillet.

Présents: Les juges L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache et Binnie.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Immigration — Raisons d'ordre humanitaire — Intérêts des enfants — Mesure d'expulsion contre une mère d'enfants nés au Canada — Demande écrite fondée sur des raisons d'ordre humanitaire sollicitant une dispense de l'exigence de présenter à l'extérieur du Canada une demande d'immigration — Demande rejetée sans audience ni motifs écrits — Y a-t-il eu violation de l'équité procédurale? — Loi sur l'immigration, L.R.C. (1985), ch. I-2, art. 82.1(1), 114(2) — Règlement sur l'immigration de 1978, DORS/93-44, art. 2.1 — Convention relative aux droits de l'enfant, R.T. Can. 1992 n° 3, art. 3, 9, 12.

Droit administratif – Équité procédurale — Mesure d'expulsion contre une mère d'enfants nés au Canada — Demande écrite fondée sur des raisons d'ordre humanitaire sollicitant une dispense de l'exigence de présenter à l'extérieur du Canada une demande d'immigration — Les droits de participation accordés étaient-ils compatibles avec l'obligation d'équité procédurale? — Le défaut d'exposer les motifs de décision a-t-il enfreint les principes d'équité procédurale? — Y a-t-il une crainte raisonnable de partialité?

1999 CanLII 699 (SCC)

impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113:

> A high standard of justice is required when the right to continue in one's profession or employment is at stake. . . . A disciplinary suspension can have grave and permanent consequences upon a professional career.

As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), at p. 667:

> In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin* [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface*, *supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty

grandes pour ces personnes, plus les protections procédurales requises seront rigoureuses. C'est ce que dit par exemple le juge Dickson (plus tard Juge en chef) dans l'arrêt *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 R.C.S. 1105, à la p. 1113:

> Une justice de haute qualité est exigée lorsque le droit d'une personne d'exercer sa profession ou de garder son emploi est en jeu. [. . .] Une suspension de nature disciplinaire peut avoir des conséquences graves et permanentes sur une carrière.

Comme le juge Sedley (maintenant Lord juge Sedley) le dit dans *R. c. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), à la p. 667:

> [TRADUCTION] Dans le monde moderne, les décisions rendues par des organismes administratifs peuvent avoir un effet plus immédiat et plus important sur la vie des gens que les décisions des tribunaux et le droit public a depuis l'arrêt *Ridge c. Baldwin* [1963] 2 All E.R. 66, [1964] A.C. 40, reconnu ce fait. Bien que le caractère judiciaire d'une fonction puisse élever les exigences pratiques en matière d'équité au-delà de ce qu'elles seraient autrement, par exemple en exigeant que soit présenté et vérifié oralement un élément de preuve contesté, ce qui le rend «judiciaire» dans ce sens est principalement la nature de la question à trancher, et non le statut formel de l'organisme décisionnel.

L'importance d'une décision pour les personnes visées a donc une incidence significative sur la nature de l'obligation d'équité procédurale.

26 Quatrièmement, les attentes légitimes de la personne qui conteste la décision peuvent également servir à déterminer quelles procédures l'obligation d'équité exige dans des circonstances données. Notre Cour a dit que, au Canada, l'attente légitime fait partie de la doctrine de l'équité ou de la justice naturelle, et qu'elle ne crée pas de droits matériels: *Vieux St-Boniface*, précité, à la p. 1204; *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525, à la p. 557. Au Canada, la reconnaissance qu'une attente légitime existe aura une incidence sur la nature de l'obligation d'équité envers les personnes visées par la décision. Si le demandeur s'attend légitimement à ce qu'une certaine procédure soit suivie, l'obliga-

1999 CanLII 699 (SCC)

of fairness: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, [1989] 3 F.C. 16 (C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D. J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Social Pol'y* 282, at p. 297; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 76 F.T.R. 1. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

tion d'équité exigera cette procédure: *Qi c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1995), 33 Imm. L.R. (2d) 57 (C.F. 1re inst.); *Mercier-Néron c. Canada (Ministre de la Santé nationale et du Bien-être social)* (1995), 98 F.T.R. 36; *Bendahmane c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1989] 3 C.F. 16 (C.A.). De même, si un demandeur s'attend légitimement à un certain résultat, l'équité peut exiger des droits procéduraux plus étendus que ceux qui seraient autrement accordés: D. J. Mullan, *Administrative Law* (3e éd. 1996), aux pp. 214 et 215; D. Shapiro, «Legitimate Expectation and its Application to Canadian Immigration Law» (1992), 8 *J.L. & Social Pol'y* 282, à la p. 297; *Canada (Procureur général) c. Comité du tribunal des droits de la personne (Canada)* (1994), 76 F.T.R. 1. Néanmoins, la doctrine de l'attente légitime ne peut pas donner naissance à des droits matériels en dehors du domaine de la procédure. Cette doctrine, appliquée au Canada, est fondée sur le principe que les «circonstances» touchant l'équité procédurale comprennent les promesses ou pratiques habituelles des décideurs administratifs, et qu'il serait généralement injuste de leur part d'agir en contravention d'assurances données en matière de procédures, ou de revenir sur des promesses matérielles sans accorder de droits procéduraux importants.

27 Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, *supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, *per* Gonthier J.

Cinquièmement, l'analyse des procédures requises par l'obligation d'équité devrait également prendre en considération et respecter les choix de procédure que l'organisme fait lui-même, particulièrement quand la loi laisse au décideur la possibilité de choisir ses propres procédures, ou quand l'organisme a une expertise dans le choix des procédures appropriées dans les circonstances: Brown et Evans, *op. cit.*, aux pp. 7-66 à 7-70. Bien que, de toute évidence, cela ne soit pas déterminant, il faut accorder une grande importance au choix de procédures par l'organisme lui-même et à ses contraintes institutionnelles: *IWA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282, le juge Gonthier.

28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed

Je dois mentionner que cette liste de facteurs n'est pas exhaustive. Tous ces principes aident le tribunal à déterminer si les procédures suivies res-

1999 CanLII 699 (SCC)

TAB12

CanLII

Apotex Inc. v. Canada (Attorney General), [2000] 4 FC 264, 2000 CanLII 17135 (FCA)

Date: 2000-05-12
File number: A-922-96
Other citations: 188 DLR (4th) 145; 255 NR 319; 6 CPR (4th) 165; 24 Admin LR (3d) 279; [2000] CarswellNat 889; [2000] FCJ No 634 (QL); 97 ACWS (3d) 140; 180 FTR 278
Citation: Apotex Inc. v. Canada (Attorney General), [2000] 4 FC 264, 2000 CanLII 17135 (FCA), <http://canlii.ca/t/4l3q>, retrieved on 2018-03-02

A-922-96

Apotex Inc. (*Appellant*) (*Applicant*)

v.

The Attorney General of Canada, The Minister of National Health and Welfare, Merck & Co., Inc. and **Merck Frosst Canada Inc.** (*Respondents*) (*Respondents*)

and

Eli Lilly Canada Inc., Pharmaceutical Manufacturers Association of Canada and **Canadian Drug Manufacturers Association** (*Interveners*) (*Interveners*)

Indexed as: Apotex Inc.v. Canada (Attorney General) (C.A.)

Court of Appeal, Décary, Sexton and Evans JJ.A.-- Toronto, February 28, 29; Ottawa, May 12, 2000.

Patents -- Validity of Patented Medicines (NOC) Regulations upheld as not ultra vires Patent Act, s. 55.2(4) -- Latter provision to be construed broadly, not limited to those who have availed themselves of benefits conferred by Act, s. 55.2(1) or (2) in connection with particular medicine in dispute -- Within Governor in Council's authority conferred by Act, s. 55.2(4) to provide expressly Regulations apply to submissions made before they came into effect, but not yet decided by Minister.

Practice -- Pleadings -- Mootness, abuse of process -- As Notice of Compliance (NOC) issued to Apotex for norfloxacin, request for order to issue NOC for same drug moot -- Furthermore, as appellant had opportunity to challenge validity of Patented Medicines (NOC) Regulations in earlier prohibition proceedings with respect to same drug, Court could have applied res judicata and issue estoppel to refuse to permit

[121]However, in my view the interests protected by the doctrine of legitimate expectations are not the same as those protected by a general duty to afford an opportunity to those affected to participate in the rule-making exercise. The bases of this latter duty are the democratic values of accountability, the claim of the governed to attempt to influence the content of the law to which they will be subject, and the belief that a better considered measure is likely to emerge from a consultative process. In contrast, holding government to a procedural undertaking that was solemnly given on its behalf to an individual is more a matter of individual justice.

[122]When a legitimate expectation arises from an agency's past practice, or non-statutory procedural guidelines, it serves to preclude procedural arbitrariness, not the actual expectation of the individual who may have been unaware of its existence. However, where the legitimate expectation arises from a promise or undertaking, categorically and specifically given to an individual or a defined group, the rationale for holding the government to it derives from the individual's reliance interest or, in the absence of a detrimental reliance, from the individual's right to expect that, in the absence of a compelling reason for not so doing, the government will act with basic decency by keeping promises that it makes to individuals.

[123]The interests underlying the legitimate expectations doctrine are the non-discriminatory application in public administration of the procedural norms established by past practice or published guidelines, and the protection of the individual from an abuse of power through the breach of an undertaking. These are among the traditional core concerns of public law. They are also essential elements of good public administration. In these circumstances, consultation ceases to be a matter only of political process, and hence beyond the purview of the law, but enters the domain of judicial review.

[124]Accordingly, in my view the legitimate expectations doctrine is not simply a branch of the duty of fairness, in the sense that it serves the same purposes as the participatory rights conferred by the duty of fairness. Hence, there is no reason to limit its reach to the exercise of statutory powers to which the duty applies.

[125]On the other hand, as with the duty of fairness, a breach will lead to the imposition of procedural duties, generally of a participatory nature, on the person or body empowered to take some administrative action, rather than requiring a particular substantive outcome to the exercise of power. Indeed, when in *Baker v. Canada (Minister of Citizenship and Immigration), supra*, at page 839, paragraph 26, the Supreme Court of Canada recently located the legitimate expectations doctrine within the duty of fairness it was in response to an argument that a person may have a legitimate expectation of receiving a substantive, and not merely a procedural benefit. And, in the *Canada Assistance Plan* case, *supra*, the Court's concern was to preserve the sovereignty of Parliament from the imposition of novel manner and form requirements on the enactment of legislation. However, in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, *supra*, where no contrast was made with substantive rights, it was said only that, as developed in the English cases, the legitimate expectations doctrine was an extension of the duty of fairness.

[126]Therefore, in the absence of binding authority to the contrary, I conclude that the doctrine of legitimate expectations applies in principle to delegated legislative powers

TAB13

2003 SCC 29 (CanLII)

Minister of Labour for Ontario *Appellant*

v.

Canadian Union of Public Employees and Service Employees International Union *Respondents*

and

Canadian Bar Association and National Academy of Arbitrators (Canadian Region) *Interveners*

INDEXED AS: C.U.P.E. *v.* ONTARIO (MINISTER OF LABOUR)

Neutral citation: 2003 SCC 29.

File No.: 28396.

2002: October 8; 2003: May 16.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour relations — Hospital labour disputes — Appointment of board of arbitration — Legislation requiring disputes over collective agreements in hospitals and nursing homes to be resolved by compulsory arbitration — Minister of Labour appointing retired judges to chair arbitration boards — Whether Minister required to select arbitrators qualified by expertise and acceptance in labour relations community — Whether retired judges, as a class, biased against labour — Hospital Labour Disputes Arbitration Act, R.S.O. 1990, c. H.14, s. 6(5).

Administrative law — Judicial review — Appointment of board of arbitration — Legislation requiring disputes over collective agreements in hospitals and nursing homes to be resolved by compulsory arbitration — Minister of Labour appointing retired judges to chair arbitration boards — Whether appointment process for selecting chairs of arbitration boards violates natural justice or infringes institutional independence

Ministre du Travail de l'Ontario *Appelant*

c.

Syndicat canadien de la fonction publique et Union internationale des employés des services *Intimés*

et

Association du Barreau canadien et National Academy of Arbitrators (Canadian Region) *Intervenantes*

RÉPERTORIÉ : S.C.F.P. *c.* ONTARIO (MINISTRE DU TRAVAIL)

Référence neutre : 2003 CSC 29.

N° du greffe : 28396.

2002 : 8 octobre; 2003 : 16 mai.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Relations de travail — Conflits de travail dans des hôpitaux — Constitution d'un conseil d'arbitrage — Loi exigeant que le règlement des différends en matière de convention collective qui surviennent dans les hôpitaux et les maisons de soins infirmiers soit assujetti à l'arbitrage obligatoire — Désignation par le ministre du Travail de juges retraités à la présidence des conseils d'arbitrage — Le ministre était-il tenu de choisir des arbitres ayant une expertise et étant acceptés dans le milieu des relations du travail? — En tant que catégorie, les juges retraités ont-ils un parti pris contre les travailleurs et les travailleuses? — Loi sur l'arbitrage des conflits de travail dans les hôpitaux, L.R.O. 1990, ch. H.14, art. 6(5).

Droit administratif — Contrôle judiciaire — Constitution d'un conseil d'arbitrage — Loi exigeant que le règlement des différends en matière de convention collective qui surviennent dans les hôpitaux et les maisons de soins infirmiers soit assujetti à l'arbitrage obligatoire — Désignation par le ministre du Travail de juges retraités à la présidence des conseils d'arbitrage — Le processus de désignation des présidents des conseils d'arbitrage

2003 SCC 29 (CanLII)

to the "changed process", no refusal of consultation.

(c) *The Alleged Violation of the Doctrine of Legitimate Expectation in Refusing to Nominate Only Arbitrators Who Had Been Mutually Agreed Upon*

The doctrine of legitimate expectation is "an extension of the rules of natural justice and procedural fairness": *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. It looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants (here the unions) a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken. To be "legitimate", such expectations must not conflict with a statutory duty. See: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Baker*, *supra*; *Mount Sinai*, *supra*, at para. 29; Brown and Evans, *supra*, at para. 7:2431. Where the conditions for its application are satisfied, the Court may grant appropriate procedural remedies to respond to the "legitimate" expectation.

The Court of Appeal concluded, at para. 105, that "the Minister interfered with the legitimate expectations of the appellants and other affected unions, contrary to the principles and requirements of fairness and natural justice" and ordered the Minister to restrict his appointments to the s. 49(10) roster.

In my view, with respect, the conditions precedent to the application of the doctrine are not established in this case. The evidence of past practice is equivocal, and as a result the evidence of a promise to "return to" past practice is also equivocal. What Minister Elizabeth Witmer meant by "a return to the sector-based system of appointing arbitrators" (Standing Committee on Resources Development, *supra*, at p. R-2577), and what she was understood by the unions to mean, depends on what they now

a eu, au sujet du « processus modifié », aucun refus de procéder à des consultations.

c) *L'allégation de violation de la règle de l'expectative légitime en raison du refus de désigner uniquement des arbitres sur lesquels les parties s'étaient entendues*

131 La règle de l'expectative légitime est « le prolongement des règles de justice naturelle et de l'équité procédurale » : *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525, p. 557. Elle s'attache à la conduite d'un ministre ou d'une autre autorité publique dans l'exercice d'un pouvoir discrétionnaire — y compris les pratiques établies, la conduite ou les affirmations qui peuvent être qualifiées de claires, nettes et explicites — qui a fait naître chez les plaignants (en l'espèce, les syndicats) l'expectative raisonnable qu'ils conserveront un avantage ou qu'ils seront consultés avant que soit rendue une décision contraire. Pour être « légitime », une telle expectative ne doit pas être incompatible avec une obligation imposée par la loi. Voir : *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170; *Baker*, précité; *Mont-Sinaï*, précité, par. 29; Brown et Evans, *op. cit.*, par. 7:2431. Lorsque les conditions d'application de la règle sont remplies, la cour peut accorder une réparation procédurale convenable pour répondre à l'expectative « légitime ».

132 La Cour d'appel a conclu, au par. 105, que [TRADUCTION] « le ministre a contrecarré les attentes légitimes des appelants et des autres syndicats touchés, contrairement aux principes et aux exigences de l'équité et de la justice naturelle », et lui a ordonné de ne désigner que des personnes inscrites sur la liste dressée en vertu du par. 49(10).

133 J'estime, en toute déférence, que l'existence des conditions préalables à l'application de cette règle n'est pas établie en l'espèce. La preuve de la pratique suivie antérieurement est équivoque et, partant, la preuve d'une promesse de « retour » à l'ancien système est, elle aussi, équivoque. Ce que la ministre Elizabeth Witmer entendait par [TRADUCTION] « retour au système sectoriel de désignation des arbitres » (Comité permanent du développement des ressources, *op. cit.*, p. R-2577), et ce que les

TAB14

Performance standards for processing applications

For applications filed on or after April 1, 2009

The Board's processes ensure that parties are given the opportunity to fully and fairly present their case. At the same time, subject to the overriding concern for fairness, the Board is committed to processing applications in an efficient and timely manner. A listing of timelines for processing various applications has been provided below. This listing describes typical application types filed with the Board and whether they result in oral or written hearings.

The Board is committed to follow these timelines but it should be noted that they are based upon the full scope of procedural events associated with each application type taking place in a predictable manner. This includes the evidentiary requirements of the applicant and the intervenors. The timely filings of the applicant and intervenors are important requirements if the Board is to achieve greater efficiency in processing applications.

Total period elapsed to board decision (calendar days) for application types

Municipal franchise or certificate	
Oral hearing	205

Municipal franchise or certificate	
Written hearing	90
Leave to construct or gas storage designation	
Oral hearing	210
Written hearing	130
Well drilling	
Oral hearing	210
Written hearing	130
Licence	
Individual application - oral hearing	210
Individual application - written hearing	130
Individual application - written hearing - one step notice	90 (60 days for feed-in tariff applications)

Licence

Total period elapsed to board decision (calendar days) for mergers, acquisitions, amalgamations and divestitures

A review of a SECTION 80 or 81 notice of proposal under SECTION 82 (generation, transmission, distribution ownership prohibition)	
Oral hearing	220
Written hearing	170
Sections 86 (change of ownership or control of systems)	
Oral hearing	180
Written hearing	130
Distribution rates	
Oral hearing	235

Distribution rates	
Standard written hearing	185
Streamlined written hearing	140
Quarterly rate adjustment filings - gas	
Written review	21
General application	
Motion to review - oral hearing	170
Motion to review - written hearing	120

Related information

April 1, 2009 - **Read the letter to Stakeholders**

TAB15

2014 ABCA 28
Alberta Court of Appeal

ATCO Pipelines, Re

2014 CarswellAlta 67, 2014 ABCA 28, [2014] A.W.L.D. 1183, 236 A.C.W.S. (3d) 1036, 566 A.R. 323, 597 W.A.C. 323, 89 Alta. L.R. (5th) 217

Atco Gas and Pipelines Ltd. Appellant and Alberta Utilities Commission and Office of the Utilities Consumer Advocate Respondents

Carole Conrad, Ronald Berger, Peter Martin JJ.A.

Heard: June 11, 2013
Judgment: January 20, 2014
Docket: Calgary Appeal 1201-0090-AC

Proceedings: allowing leave to appeal *ATCO Pipelines, Re* (2012), 2012 ABCA 273, 2012 CarswellAlta 1569 (Alta. C.A.); affirming *ATCO Pipelines, Re* (2012), 2012 CarswellAlta 462 (Alta. U.C.)

Counsel: H.M. Kay, Q.C., N.M. Gretener for Appellant
B.C. McNulty for Respondent, Alberta Utilities Commission
T.D. Marriott for Respondent, Utilities Consumer Advocate

Subject: Public; Civil Practice and Procedure
Related Abridgment Classifications
Public law
IV Public utilities
IV.4 Termination, valuation and privatization
IV.4.e Disposal of assets
Headnote
Public law --- Public utilities — Termination, valuation and privatization — Disposal of assets
Appellant ATCO Gas and Pipelines Ltd. (ATCO) were involved in lengthy proceedings before Alberta Utilities Commission (commission) in relation to identified surplus assets, possibility of disposing of them and/or of excluding them from its rate base — Judicial ruling held that utilities could dispose of assets whose price had been included in rate base calculations where they were no longer necessary for utility business without obtaining leave from commission — ATCO requested confirmation from commission that restrictions imposed regarding assets could be removed, but requirements remained unresolved and assets remained in rate base — Commission determined scope of assets to be removed from rate base, that effective date of removal would be July 1, 2009 and directed that any costs of subdivision or other process were to be borne by ATCO's shareholders — ATCO's application for leave to appeal was granted — ATCO appealed commission's decision — Appeal dismissed — Commission did not err in law by making its decision to remove assets from rate base effective July 1, 2009 and its decision was not unreasonable — Assets not being used or required to be used for utility service were not to be included in rate base — Utility service had responsibility to withdraw assets from rate base once assets were no longer used or required and no commission approval was required but such removal was subject to prudency review by commission — Decision fell squarely within commission's mandate, was not unreasonable and was owed deference — Commission did not err in law or act unreasonably in exercising its discretionary power — Depending on specific facts and circumstances, decision to remove portion of asset from rate base and method of doing so might raise many considerations including whether asset could be physically, practically or legally divided; ease of division; associated costs involved and who should pay them; length of time asset had been in rate base; whether divided portion had other potential uses; and generally whether exclusion of portion of asset from rate

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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 *ATCO Gas, Re*, 2010 ABCA 132, 477 A.R. 1 (Alta. C.A.) 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 S.C.R. 684at 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 S.C.R. 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:

> 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. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682 (S.C.C.) [*Bell Canada 1989*].

58 According to the Supreme Court of Canada in *Bell Canada* 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.

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TAB16

Most Negative Treatment: Distinguished
Most Recent Distinguished: ENMAX Power Corp., Re | 2014 CarswellAlta 618, [2014] A.W.L.D. 2413, [2014] A.W.L.D. 2414 | (Alta. U.C., Apr 15, 2014)

2010 ABCA 132
Alberta Court of Appeal

ATCO Gas, Re

2010 CarswellAlta 764, 2010 ABCA 132, [2010] A.W.L.D. 2377, [2010] A.W.L.D. 2380, [2010] A.J. No. 449, 188 A.C.W.S. (3d) 567, 26 Alta. L.R. (5th) 275, 318 D.L.R. (4th) 615, 477 A.R. 1, 483 W.A.C. 1

City of Calgary (Appellant / Applicant) and Alberta Energy and Utilities Board (Respondent / Respondent) and ATCO Gas and Pipelines Ltd. (Respondent / Respondent)

Jean Côté, Constance Hunt, Marina Paperny JJ.A.

Heard: January 13, 2010
Judgment: April 23, 2010
Docket: Calgary Appeal 0801-0030-AC

Proceedings: reversing *ATCO Gas, Re* (2008), 2008 CarswellAlta 2238 (Alta. E.U.B.); and reversing *ATCO Gas, Re* (2005), 2005 CarswellAlta 2255 (Alta. E.U.B.)

Counsel: B.J. Meronek, Q.C. for Appellant / Applicant, City of Calgary
J.P. Mousseau, P. Khan for Respondent / Respondent, A.E.U.B.
H.M. Kay, Q.C., L.E. Smith, Q.C., L.A. Goldbach for Respondent / Respondent, ATCO Gas and Pipelines Ltd.

Subject: Public; Civil Practice and Procedure
Related Abridgment Classifications
Public law
IV Public utilities
IV.2 Operation of utility
IV.2.d Rates
IV.2.d.iii Approval
Public law
IV Public utilities
IV.5 Regulatory boards
IV.5.c Practice and procedure
IV.5.c.iii Statutory appeals
IV.5.c.iii.B Grounds for appeal
IV.5.c.iii.B.1 Lack of jurisdiction

Headnote
Public law --- Public utilities — Operation of utility — Rates — Approval
In 2004, gas company sought approval of Alberta Energy and Utilities Board to correct balances in its deferred gas account ("DGA") because actual gas costs company incurred from January 1999 to February 2004 had been understated — Adjustment was sought because there had been inaccurate reporting of gas being transported for other entities through company's pipeline network — Company proposed that its present consumers would pay shortfalls for prior period —

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> order... the words "further directions" do not have any magical, retrospective content. ... It is the interim nature of the order which makes it subject to further retrospective directions.
>
> [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 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 ...

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

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TAB17

Most Negative Treatment: Check subsequent history and related treatments.

2009 SCC 40
Supreme Court of Canada

Bell Canada v. Canadian Radio-Television & Telecommunications Commission

2009 CarswellNat 2717, 2009 CarswellNat 2718, 2009 SCC 40, [2009] 2 S.C.R. 764, [2009] A.C.S. No. 40, [2009] S.C.J. No. 40, 180 A.C.W.S. (2d) 843, 310 D.L.R. (4th) 608, 392 N.R. 323, 92 Admin. L.R. (4th) 157, J.E. 2009-1708

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

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

Consumers' Association of Canada and National Anti-Poverty Organization, Appellants v. Canadian Radio-television and Telecommunications Commission, Bell Aliant Regional Communications, Limited Partnership, Bell Canada, Arch Disability Law Centre, MTS Allstream Inc., TELUS Communications Inc. and TELUS Communications (Québec) Inc., Respondents

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

Heard: March 26, 2009
Judgment: September 18, 2009
Docket: 32607, 32611

Proceedings: affirming *Bell Canada v. Canadian Radio-Television & Telecommunications Commission* (2008), 80 Admin. L.R. (4th) 159, 2008 CarswellNat 544, (sub nom. *Consumers Association of Canada v. Canadian Radio-Television & Telecommunications Commission)* 375 N.R. 124, 2008 FCA 91, 2008 CarswellNat 2390, 2008 CAF 91 (F.C.A.)

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Michael Koch, Dina F. Graser, for Respondent, MTS Allstream Inc.
John B. Laskin, Afshan Ali, for Respondent / Intervener, Canadian Radio Television & Telecommunications Commission
No one for Respondents, Société en commandite Télébec, Arch Disability Law Centre, Bell Aliant Regional Communications, Limited Partnership, Saskatchewan Telecommunications

Subject: Public
Related Abridgment Classifications
Communications law

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

54 The fact that deferral accounts are at issue does nothing to change this framework. No party objected to the CRTC's authority to establish the deferral accounts themselves. These accounts are accepted regulatory tools, available as a part of the Commission's rate-setting powers. As the CRTC has noted, deferral accounts "enabl[e] a regulator to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test year" [9]. They have traditionally protected against future eventualities, particularly the difference between forecasted and actual costs and revenues, allowing a regulator to shift costs and expenses from one regulatory period to another. While the CRTC's creation and use of the deferral accounts for broadband expansion and consumer credits may have been innovative, it was fully supported by the provisions of the *Telecommunications Act*.

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

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

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

> The Price Caps Decision required Bell Canada to credit a portion of its final rates to a deferral account, which the CRTC had clearly indicated would be disposed of in due course as the CRTC would direct. There is no dispute that the CRTC is entitled to use the device of a mandatory deferral account to impose a contingent obligation on a telecommunication service provider to make expenditures that the CRTC may direct in the future. It necessarily follows that the CRTC is entitled to make an order crystallizing that obligation and directing a particular expenditure, provided the expenditure can reasonably be justified by one or more of the policy objectives listed in section 7 of the Telecommunications Act.
>
> [Emphasis added; para. 52.]

58 This general analytical framework brings us to the more specific questions in these appeals. In the first appeal, Bell Canada relied on Gonthier J.'s decision *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722 (S.C.C.) ("*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

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only allowed for prospective, not retroactive or retrospective rate-setting, the one-time credit at issue was nevertheless permissible because the original rates were interim and therefore inherently subject to change.

60 In the current case, Bell Canada argued that the rates had been made final, and that the disposition of the deferral accounts for one-time credits was therefore impermissible. More specifically, it argued that the CRTC's order of one-time credits from the deferral accounts amounted to retrospective rate-setting as the term was used in *Bell Canada (1989)*, at p. 1749, namely, that their "purpose is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive" (at p. 1749).

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

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

63 In my view, the credits ordered out of the deferral accounts in the case before us are neither retroactive nor retrospective. They do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures, since these credits or reductions were contemplated as a possible disposition of the deferral account balances from the beginning. These funds can properly be characterized as encumbered revenues, because the rates *always* remained subject to the deferral accounts mechanism established in the Price Caps Decision. The use of deferral accounts therefore precludes a finding of retroactivity or retrospectivity. Furthermore, using deferral accounts to account for the difference between forecast and actual costs and revenues has traditionally been held not to constitute retroactive rate-setting (*Epcor Generation Inc. v. Alberta (Energy & Utilities Board)*, 2003 ABCA 374, 346 A.R. 281 (Alta. C.A.), at para. 12, and *Newfoundland (Board of Commissioners of Public Utilities), Re* (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. C.A.), at paras. 97-98 and 175).

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

65 The allocation of deferral account funds to consumers was not, strictly speaking, a "rebate" in any event. Instead, as in *Bell Canada (1989)*, these allocations were one-time disbursements or rate reductions the carriers were required to make out of the deferral accounts to their *current* subscribers. The possibility of one-time credits was present from the inception of the rate-setting exercise. From the Price Caps Decision onwards, it was understood that the disposition of the deferral account funds might include an eventual credit to subscribers once the CRTC determined the appropriate allocation. It was precisely because the rate-setting mechanism approved by the CRTC included accumulation in and disposition from the deferral accounts pursuant to further CRTC orders, that the rates were and continued to be just and reasonable.

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TAB18

submissions in opposition of their proposed off-ramp. OPG submits that the OEB should find OPG's off-ramp proposal to be appropriate on the basis of its written evidence.

13.0 IMPLEMENTATION

13.1 Issue 12.1

Primary: Are the effective dates for new payment amounts and riders appropriate?

OPG has asked for an effective date of January 1, 2017, in respect of the payment amounts associated with the prescribed hydroelectric and nuclear facilities (Ex. A1-2-1, pp.1-2). Moreover, OPG has asked for recovery, by way of rate riders, of the difference between existing payment amounts and the payment amounts approved in this Application from the effective date to the implementation date.

OEB staff, QMA, and SEP support OPG's request.[174] As OEB staff says, "a January 1, 2017 effective date for payment amounts is reasonable. The application was filed shortly after audited results for 2015 were available," and "OPG has met the deadlines established by the OEB in Procedural Order No.1." Where OPG did file updates to its Application, these updates were limited in scope as stated in Ex. N1-1-1, p. 4, to minimize the impact on the processing schedule and to keep the impact statements to a manageable size.

The remaining parties that take a position on this issue oppose OPG's request. SEC, for example, goes so far as to say that staff's position amounts to giving OPG a "free pass" (SEC argument, para. 11.1.8). It argues that the effective date should be the 1st of the month following the final payment amounts order. SEC estimates this date to be 461 days after the Application was filed. SEC and others that adopt its position justify their argument by reference to the OEB's decision in EB-2013-0321 and the time between the filing and effective dates in that case (447 days). Their argument should be rejected.

Filing the Application 461 days in advance of January 1, 2017 would have meant a filing date of approximately mid-October 2015. Realistically, OPG would have had to prepare and compile the Application through the spring and summer of that year. At that time:

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[174] See OEB staff argument, p. 180; QMA argument p. 11; SEP argument p. 25.

- financial results for 2015 (audited or otherwise) were not available or known;
- the 2016-2018 Business Plan which underpins the Application had not been prepared or approved;
- the RQE for the Darlington Refurbishment Program and the Business Case for PEO had not been completed by OPG or endorsed by the Province;
- the amended Bruce Lease agreement between OPG and Bruce Power and the amended refurbishment agreement between Bruce Power and the IESO had not been executed; and
- O. Reg. 53/05 had not been amended.

This information, which forms the backbone of the Application and is necessary for the OEB to make a decision as to just and reasonable payment amounts, would not have been included in the initial filing. As a result, OPG would have to have undertaken at least one, if not several, large-scale updates to fundamental elements of the Application. For parties that have expressed that the Application is too complex, this would have made the situation significantly worse, and OPG submits, would have been unhelpful to the OEB and OEB staff.

Parties' reference to the EB-2013-0321 proceeding is also misplaced. There, unfortunately, the case began with an incomplete filing which was only rectified a month before OPG's proposed effective date. As the OEB made clear in its decision, this was a failing on OPG's part and it had opportunities to file a complete application much earlier. This is not that case in this Application. OPG filed a complete, compliant application at the end of May 2016, its first opportunity to do so after all essential information was available.

13.1.1 Effective Date, the RSDA, and Other Deferral and Variance Accounts

Some parties have commented that "if the OEB selects an effective date other than January 1, it should be clear that any revenues that are foregone on account of the effective date should not be recorded in the RSDA" (OEB staff argument, p. 181). SEC in particular has unfairly generalized OPG's response to Undertaking J23.1 on this issue as "OPG claim[ing] that it would use the Rate Smoothing Variance Account ("RSVA") to claw back the entire amount of the deficiency for the period from January 1, 2017 to the effective date ordered by the Board" (SEC argument, para. 11.1.11).