EB-2023-0313

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, as amended (the "**OEB Act**");

AND IN THE MATTER OF a motion by Environmental Defence pursuant to rule 42 of the *Rules of Practice and Procedure* of the Ontario Energy Board (the "**OEB**") to review and vary OEB decisions in EB-2022-0156, EB-2022-0248, and EB-2022-0249

Book of Authorities*

Environmental Defence's Motion to Review Decisions

**This BOA only includes sources that are not hyperlinked in the submissions*

November 15, 2023

TORYS LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, Ontario M5K 1N2
Fax: 416.865.7380

Charles Keizer
Arlen Sternberg
Shalom Cumbo-Steinmetz
Tel: 416.865.0040
ckeizer@torys.com
asternberg@torys.com
scumbo-steinmetz@torys.com

Counsel to Enbridge Gas Inc.

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4	*Horizon Utilities Corp. (Re)*, 2015 LNONOEB 48, Ontario Energy Board Decisions
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5	Sarah Blake, *Administrative Law in Canada*, 7th ed (LexisNexis Canada, 2022)
6	Lorne Sossin, *Practice and procedure before administrative tribunals*, Release 11 (Thomson Reuters Canada: 2023), §16:40
7	Lorne Sossin, Practice and procedure before administrative tribunals, Release 11 (Thomson Reuters Canada: 2023), §13:1
8	Guy Régimbald, *Canadian Administrative Law*, 3rd ed (LexisNexis Canada: 2021), 2:3

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TAB 1

1977 CarswellOnt 328
Ontario Divisional Court

Dawn (Township) Restricted Area By-Laws 40 of 1973 & 52 of 1974, Re

1977 CarswellOnt 328, [1977] 1 A.C.W.S. 365, [1977] O.J. No. 2223, 15 O.R. (2d) 722, 2 M.P.L.R. 23, 76 D.L.R. (3d) 613, 7 O.M.B.R. 300 (note)

Union Gas Ltd. v. Corporation Of Township Of Dawn

Tecumseh Gas Storage Ltd. v. Township Of Dawn

Keith, Maloney and Donohue JJ.

Heard: January 24, 1977
Judgment: February 22, 1977

Proceedings: reversed *Dawn (Township) Restricted Area By-Laws 40 of 1973 & 52 of 1974, Re* (1975), 1975 CarswellOnt 1123, 4 O.M.B.R. 462 ((O.M.B.))

Counsel: *J.J. Robinette* , Q.C. and *L.G. O'Connor* , Q.C., for appellant Union Gas Ltd.
P.Y. Atkinson , for appellant Tecumseh Gas Storage Ltd.
W.B. Williston , Q.C., for respondent Township of Dawn.
T.H. Wickett , for Ontario Energy Board.

The judgment of the Court was delivered by *Keith J.* :

1 Pursuant to leave granted by this Court on 24th November 1975, upon application made in accordance with s. 95(1) of The Ontario Municipal Board Act, R.S.O. 1970, c. 323, the following questions are submitted to this Court for its opinion:

(a) Is s. 4.2.3. of By-law 40 of the Township of Dawn as amended, ultra vires of the respondent municipality?

(b) Is the Ontario Municipal Board therefore without jurisdiction to approve the respondent's By-law 40 as amended including s. 4.2.3. thereof?

2 The Township of Dawn in the County of Lambton, a rural agricultural township in south western Ontario, passed its first comprehensive zoning by-law on 18th June 1973 (By-law No. 40) and amending By-law (No. 52) on 3rd September 1974.

3 These two by-laws came before the Ontario Municipal Board on the 16th and 24th April 1975, for approval. In addition to the parties appearing in this Court, two other parties interested in the effect of these by-laws were represented at the Municipal Board hearings, but the Ontario Energy Board, one of the most vitally interested parties, inexplicably was not.

4 The relevant sections of the by-laws as amended read as follows:

1.1 Section 1 — Introduction

Whereas the Council has authority to regulate the use and nature of land, buildings and structures in the Township of Dawn by by-law subject to the approval of the Ontario Municipal Board and deems it advisable to do so.

1.2 Now therefore the Council of the Corporation of the Township of Dawn enacts as follows:

Title

2.1 This by-law shall be known as the 'Zoning By-law' of the Township of Dawn.

Penalty

3.3.1 Every person who contravenes by-law is guilty of an offence and liable upon conviction to fine of not more than three hundred (300) dollars for each offence, exclusive of costs. Every such fine is recoverable under the Summary Convictions Act, all the provisions of which apply except that the imprisonment may be for a term of not more than twenty-one (21) days.

3.3.2 Where a person, guilty of an offence under this by-law has been directed to remedy any violation and is in default of doing such matter or thing required, then such matter or thing may be done at his expense, by the Corporation of the Township of Dawn and the Corporation may recover the expense incurred in doing it by action or the same may be recovered in like manner as municipal taxes.

Section 4 — General Use and Zone Regulations

4.1 Uses Permitted.

4.1.1. No land, building or structure shall be used or occupied and no building or structure or part thereof shall be erected or altered except as permitted by the provisions of this by-law.

4.2.3. Except as limited herein nothing in this by-law shall prevent the use of any land as a right-of-way, easement or corridor for any oil, gas, brine or other liquid product pipeline and appurtenances thereto, but no appurtenances in the form of a metering, booster, dryer, stipper or pumping station, shall be constructed closer than 500 feet to any adjacent residential or commercial zone or rural residence, except as otherwise provided. All transmission pipelines to be installed from or to a production, treatment or storage site shall be constructed from or to such site to and along, in or upon a right-of-way, easement or corridor located as follows:

(a) running northerly or southerly within 100 feet perpendicular distance from the centre line dividing the east and west halves of a concession lot;

(b) running easterly and westerly within 100 feet perpendicular distance from a concession lot line not being a township, county or provincial road or highway;

(c) across, but not along a township, county or provincial road or highway.

Nothing herein shall prevent the location of a local distribution gas service line upon any street, road or highway.

5 On 20th May 1975, the Ontario Municipal Board released its decision approving of By-law 40 as amended. The reasons are devoted almost exclusively to s. 4.2.3 as amended and the objections of the appellants thereto. To fully understand the approach taken by the Municipal Board, the following extracts from these reasons are quoted:

> The township consists of flat agricultural land with soil rated in the Canada Land Survey as A2. The Board was advised by the representative of the Ministry of Agriculture and Food that the soil is of the Brookston clay type which requires particular attention to drainage because the land is so flat and that this was the reason it was rated A2 rather than A1. The soil is very productive if properly drained and worked. As drainage is installed the soil responds to cash crops such as corn and soya beans. Drainage is accomplished generally by a grid system of tile drainage lines approximately 40 feet apart throughout the whole of the township. These feed into municipal drains which generally follow lot and concession lines and eventually drain to the south-west into the Sydenham River. An example of this method of drainage in the township is shown on Exhibit 9, filed. This also indicates the position of the Union Gas Company pipeline which runs in a diagonal direction across the tile drains referred to above. Because the pipeline runs across the drains, a header line is required to direct the flow of the water into the municipal drain.

The evidence indicates that in respect of the pipeline installation on a right-of-way that may be 60 feet wide or more, and the header line parallel to it, the farmer in using his equipment must gear down each time before crossing these installations rather than continuing in the usual sweep of the farmland. This time-consuming and inconvenient operation is necessary every time the farmer crosses the pipeline easement area. In addition, the evidence clearly indicated that upon excavation for the pipeline, the soil composition is disturbed and impacted so that growth is hampered for several years until the soil is returned to its normal state. The Company indicated in evidence that a new method for laying lines and conserving the topsoil for future development had been devised. This may alleviate the problems, but only time will tell.

The Union Gas Limited (hereinafter to be referred to as 'the Company') operates in the south-west part of the province and has important connections with Consumers' Gas Company of Toronto and other systems for whom it stores gas in the summer months for delivery in the winter. The relationship of the Union Gas Limited operation to other systems in the province are well illustrated on Exhibit 33, filed. The hub of their system is in Dawn Township from which all the distribution and transmission lines radiate. The importance of the Company to the municipality is illustrated by Exhibit 26 filed, which shows that for the years 1970 to 1974 inclusive, the Company paid taxes which formed a significant portion of the total township levy varying from 24.3 per cent to 30.6 per cent in those years.

The by-law provides that transmission lines are to be laid in corridors 200 feet wide running along the half lot lines in a north-south direction and along concession lines in an east-west direction, 'across but not along a township, county or provincial road or highway', Section 4.2.3.

This corridor concept was the chief source of objection registered by the Company which in evidence indicated that the corridor method of laying their lines would be very costly. This was particularly so when some of the existing lines are now laid in a diagonal direction. When new looping lines are required they are now planned to run generally parallel to the existing lines. If they were to follow the corridors the length of line would be increased, in some cases the diameter of the pipe would have to be greater, and perhaps they might also require additional compression facilities. The additional costs were shown to be large and would result in increased costs to the public.

The Board must weight the possibility of incurring these increased costs against the need for protecting the farm industry against unnecessary and unplanned disturbance in future years. There was ample evidence to indicate that the need for pipeline installations would increase in the future. There was also evidence to indicate that about 50 per cent of the existing lines are already built in a north-south and east-west direction and that the corridor concept has therefore in fact found practical use in the past. (Exhibits 7 and 27). It was the argument of counsel for the applicant that once the corridors were established the extra cost for looping will not be as significant.

Argument of counsel for the Tecumseh Gas Storage Limited was that the use of land for pipelines was not in fact a use of land as envisaged under Section 35(1)1 of The Planning Act. To bolster this argument counsel referred the Board to the case of *Pickering Township v. Godfrey* reported in 1958 Ontario Reports, page 429. The Board finds that the instant case can be distinguished from the quoted case which dealt specifically with the making of a quarry or gravel pit as a 'land use'. In addition, the Board finds that the use of land for installation of a pipeline fits the definition arrived at in the case above quoted as meaning 'the employment of the property for enjoyment, revenue or profit without in any way otherwise diminishing or impairing the property itself'. (p. 427, second paragraph).

The second major argument of counsel was that the municipality has no jurisdiction to deal with pipeline installation because of the existence of The Ontario Energy Board Act which creates the Ontario Energy Board and gives it jurisdiction to determine the route for a transmission line, production line, distribution line or a station (Section 40(1)). The Board was also referred to Section 57 of The Ontario Energy Board Act which reads as follows:

> 57(1) In the event of conflict between this Act and any other general or special Act, this Act prevails.
>
> (2) This Act and the regulations prevail over any by-law passed by a municipality.

In the opinion of the Board the above section provides only for the event of a conflict between The Ontario Energy Board Act and any other Act. It does not, nor can it be interpreted to mean that no other Act can be effective. It does not in the opinion of the Board prohibit the municipality from dealing with those matters referred to in Section 35 of The Planning Act.

The major considerations of the Ontario Energy Board are not directed towards planning. It is the responsibility and duty of council to plan for the proper and orderly development of the municipality having regard to the health, safety, convenience and welfare of the present and future inhabitants of the municipality, all within the framework of The Planning Act.

The Board is of the opinion that zoning by-laws must provide for all ratepayers a degree of certainty for reasonable stability. This can be accomplished by passing restricted area by-laws for land use on a planning basis with proper and responsible study and public input. The evidence indicates that the municipality has indeed acted in a reasonable and responsible manner to achieve this end. The consideration for the farming community which forms a large proportion of the municipality is a proper and reasonable one. There is no certainty as to where the Ontario Energy Board may finally decide to place the pipelines required by the criteria they have and will develop. They will, however, have the legislative document before them giving the corporate expression of the municipality to indicate where, on the basis of planning considerations, the pipelines should go. The Ontario Energy Board will then, on the basis of its criteria and the evidence heard, be in a position to give its decision on the ultimate route chosen.

In the meantime, the municipality will by legislation inform all its ratepayers where the pipelines should be laid. The farmer will be able to proceed with the least amount of interference both during construction of pipelines on or near his lands and indeed in his everyday work. The pipeline companies will benefit from this as well. With less interference to the farmer there should be fewer difficulties experienced both in the installation of the pipelines and the servicing and maintenance of the pipelines and the tile drain systems.

6 By-law 40 as amended was enacted by the council of the respondent in accordance with the powers given to municipal councils by s. 35 of The Planning Act, R.S.O. 1970, c. 349. The relevant portions of that section read as follows:

35. — (1) By-laws may be passed by the councils of municipalities:

1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.

2. For prohibiting the erection or use of buildings or structures for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway.

7 Section 46 of The Planning Act is identical with s. 57(1) of The Ontario Energy Board Act, R.S.O. 1970, c. 312 quoted in the reasons of the Ontario Municipal Board. Fortunately, s. 46 of The Planning Act has no equivalent to s. 57(2) of The Ontario Energy Board Act or the Court might well have been forced to assert that its views prevailed over one or other or both of the statutes.

8 The appellant Union Gas operates an extensive network of natural gas transmission lines throughout south-western Ontario delivering this energy to customers, both wholesale and retail, extending from Windsor on the south-west, to Hamilton and Trafalgar on the east and Goderich and Owen Sound on the north.

9 It supplies scores of city, town and village municipalities in this extensive and heavily populated area and its lines traverse 16 counties which contain upwards of 140 township municipalities. The municipal councils of each of these has the same power under The Planning Act to pass zoning by-laws.

10 The principal source of the supply of natural gas to Union Gas is the Trans-Canada pipeline which enters the southern part of Ontario in Lambton County just south of Sarnia and connects with a major compressor station of Union Gas in the

Township of Dawn. There are four other major compressor stations operated by this appellant, one just west of London, another at Trafalgar between Hamilton and Toronto, one near Simcoe and the fourth south of Chatham. These stations are essential to maintain pressure throughout the pipeline network.

11 In addition, Union Gas lines serve as feeders for companies like the Consumers' Gas Company serving Metropolitan Toronto and another extensive area of Ontario.

12 In addition, a significant portion of the source of natural gas transmitted by Union Gas, comes from local wells found in south-western Ontario, a number of which are located in the Township of Dawn.

13 The company also maintains reserves of gas in natural underground storage fields, some but by no means all of which are also located in the Township of Dawn.

14 The local wells and the storage fields must all be connected to the distribution lines and the compressor stations.

15 The second appellant, Tecumseh Gas Storage Limited, is equally affected by the impugned by-law, but no detailed description of its operations was presented to the Court.

16 I have stressed these points to illustrate firstly how insignificant are the local problems of the Township of Dawn when viewed in the perspective of the need for energy to be supplied to those millions of residents of Ontario beyond the township borders, and to call to mind the potential not only for chaos but the total frustration of any plan to serve this need if by reason of powers vested in each and every municipality by The Planning Act, each municipality were able to enact by-laws controlling gas transmission lines to suit what might be conceived to be local wishes. We were informed that other township councils have only delayed enacting their own by-laws pending the outcome of this appeal.

17 At the conclusion of the argument of this appeal I informed counsel, on behalf of the Court, that the appeal book had been endorsed as follows:

> The appeal will be allowed with costs. In view of the importance of the issue, which is raised in this appeal insofar as it relates specifically to the Energy Board's jurisdiction as challenged by a municipal council, and in deference to the lengthy reasons delivered by the Ontario Municipal Board, the Court will in due course, deliver considered reasons which will be the basis of the formal order of the Court.

18 It is not necessary for my purpose to trace the history and origins of the present Ontario Energy Board Act, as amended. Reference to s. 58 of the present act will suffice to show that this industry has developed over many years under provincial legislation. Section 58 reads as follows:

> 58. Every order and decision made under,
>
> (*a*) *The Fuel Supply Act* , being chapter 152 of the Revised Statutes of Ontario, 1950;
>
> (*b*) *The Natural Gas Conservation Act* , being chapter 251 of the Revised Statutes of Ontario, 1950;
>
> (*c*) *The Well Drillers Act* , being chapter 423 of the Revised Statutes of Ontario, 1950;
>
> (*d*) *The Ontario Fuel Board Act, 1954;*
>
> (*e*) *The Ontario Energy Board Act, 1960;*
>
> (*f*) *The Ontario Energy Act* , being chapter 271 of the revised Statutes of Ontario, 1960; or
>
> (*g*) *The Ontario Energy Board Act, 1964* . that were in force on the day the Revised Statutes of Ontario, 1970 is proclaimed in force shall be deemed to have been made by the Board under this Act.

19 Pursuant to s. 2 [am. 1973, c. 55, s. 1] of the Act, the Ontario Energy Board is composed of not less than five members appointed by the Lieutenant Governor in Council. It has an official seal, and its orders which must be judicially noticed are not subject to The Regulations Act, R.S.O. 1970, c. 410.

20 By s. 14, many of the powers of the Supreme Court of Ontario are vested in this Board "for the due exercise of its jurisdiction".

21 Section 18 is important having regard to the penalty provisions of the township by-law quoted above. That sections reads as follows:

> 18. An order of the Board is a good and sufficient defence to any action or other proceeding brought or taken against any person in so far as the act or omission that is the subject of such action or other proceeding is in accordance with the order.

22 Section 19 [am. 1973, c. 55, s. 5(1), (2)] vests power in the Board to fix rates and other charges for the sale, transmission, distribution and storage of natural gas.

23 Under s. 23 [am. 1973, c. 55, s. 8] the Board is charged with responsibility to issue permits to drill gas wells.

24 Section 25 prohibits any company in the business of transmitting, distributing or storing gas from disposing of its plant by sale or otherwise without leave, and such leave cannot be granted without, inter alia, a public hearing.

25 Section 30 provides that any order of the Board may be filed with the Registrar of the Supreme Court and is enforceable in the same way as a judgment or order of the Court.

26 Part II of the Act deals specifically with pipe lines and I quote s. 38(1), s. 39, s. 40(1), (2), (3), (8), (9) and (10), s. 41(1), (3) and s. 43(1) and (3):

> 38. — (1) No person shall construct a transmission line without first obtaining from the Board an order granting leave to construct the transmission line.
>
> 39. Any person may, before he constructs a production line, distribution line or station, apply to the Board for an order granting leave to construct the production line, distribution line or station.
>
> 40. — (1) An applicant for an order granting leave to construct a transmission line, production line, distribution line or a station shall file with his application a map showing the general location of the proposed line or station and the municipalities, highways, railways, utility lines and navigable waters through, under, over, upon or across which the proposed line is to pass.
>
> (2) Notice of the application shall be given by the applicant in such manner as the Board directs and shall be given to the Department of Agriculture and Food, the Department of Municipal Affairs, the Department of Highways and such persons as the Board may direct.
>
> (3) Where an interested person desires to make objection to the application, such objection shall be given in writing to the applicant and filed with the Board within fourteen days after the giving of notice of the application and shall set forth the grounds upon which such objection is based.
>
> 40. — (8) Where after the hearing the Board is of the opinion that the construction of the proposed line or station is in the public interest, it may make an order granting leave to construct the line or station.
>
> (9) Leave to construct the line or station shall not be granted until the applicant satisfies the Board that it has offered or will offer to each landowner an agreement in a form approved by the Board.

(10) Any person to whom the Board has granted leave to construct a line or station, his officers, employees and agents, may enter into or upon any land at the intended location of any part of the line or station and may make such surveys and examinations as are necessary for fixing the site of the line or station, and, failing agreement, any damages resulting therefrom shall be determined in the manner provided in section 42.

41. — (1) Any person who has leave to construct a line or station under this Part or a predecessor of this Part may apply to the Board for authority to expropriate land for the purposes of the line or station, and the Board shall thereupon set a date for the hearing of such application, and such date shall be not fewer than fourteen days after the date of the application, and upon such application the applicant shall file with the Board a plan and description of the land required, together with the names of all persons having an apparent interest in the land.

41. — (3) Where after the hearing the Board is of the opinion that the expropriation of the land is in the public interest, it may make an order authorizing the applicant to expropriate the land.

43. — (1) Any person who has leave to construct a line may apply to the Board for authority to construct it upon, under or over a highway, utility line or ditch.

43. — (3) Without any other leave and notwithstanding any other Act, where after the hearing the Board is of the opinion that the construction of the line upon, under or over a highway, utility line or ditch, as the case may be, is in the public interest, it may make an order authorizing the applicant so to do upon such terms and conditions as it considers proper.

27 Finally, with respect to the statute itself, it may not be amiss to again quote s. 57:

57. — (1) In the event of conflict between this Act and any other general or special Act, this Act prevails.

(2) This Act and the regulations prevail over any by-law passed by a municipality.

28 In my view this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under The Planning Act.

29 These are all matters that are to be considered in the light of the general public interest and not local or parochial interests. The words "in the public interest" which appear, for example, in ss. 40(8), 41(3) and 43(3) which I have quoted, would seem to leave no room for doubt that it is the broad public interest that must be served. In this connection it will be recalled that s. 40(1) speaks of the requirement for filing a general location of proposed lines or stations showing "the municipalities, highways, railways, utility lines and navigable waters through, under, over, upon or across which the proposed line is to pass".

30 Persons affected must be given notice of any application for an order of the Energy Board and full provision is made for objections to be considered and public hearings held.

31 In the final analysis, however, it is the Energy Board that is charged with the responsibility of making a decision and issuing an order "in the public interest".

32 While the result in the case of *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207, [1954] 3 D.L.R. 481 , might perhaps be different today, having regard to the facts of that case and subsequent federal legislation, the principles enunciated are valid and applicable to the case before this Court.

33 In the *Campbell-Bennett* case, the defendant Trans Mountain Pipe Line was incorporated by a special act of the Parliament of Canada to construct inter-provincial pipe lines. During the course of construction of a pipe line from Acheson, Alberta to Burnaby, British Columbia, some work was done in British Columbia by the plaintiff for which it claimed to be entitled to a

mechanics' lien on the works in British Columbia, and to enforce that lien under the British Columbia Mechanics' Lien Act, R.S.B.C. 1960, c. 238 by seizing and selling a portion of the pipe line.

34 At p. 212 Kerwin J. (as he then was) on behalf of himself and Fauteux J. (as he then was) said "The result of an order for the sale of that part of Trans Mountain's oil pipe line in the County of Yale would be to break up and sell the pipe line piecemeal, and a provincial legislature may not legally authorize such a result."

35 Then at pp. 213 to 215, Rand J. on behalf of himself and the other three members of the Court said:

> The respondent, Trans Mountain Oil Pipe Line Company, was incorporated by Dominion statute, 15 Geo. VI, c. 93. It was invested with all the 'powers, privileges and immunities conferred by' and, except as to provisions contained in the statute which conflicted with them, was made subject to all the 'limitations, liabilities and provisions of any general legislation relating to pipe lines for the transportation of oil' enacted by Parliament. Within that framework, it was empowered to construct or otherwise acquire, operate and maintain interprovincial and international pipe lines with all their appurtenances and accessories for the transportation of oil.
>
> The *Pipe Lines Act* , R.S.C. 1952, c. 211, enacted originally in 1949, is general legislation regulating oil and gas pipe lines and is applicable to the company. By its provisions the company may take land or other property necessary for the construction, operation or maintenance of its pipe lines, may transport oil and may fix tolls therefor. The location of its lines must be approved by the Board of Transport Commissioners and its powers of expropriation are those provided by the *Railway Act* . By s. 38 the Board may declare a company to be a common carrier of oil and all matters relating to traffic, tolls or tariffs become subject to its regulation. S. 10 provides that a company shall not sell or otherwise dispose of any part of its company pipe line, that is, its line held subject to the authority of Parliament, nor purchase any pipe line for oil transportation purposes, nor enter into any agreement for amalgamation, nor abandon the operation of a company line, without leave of the Board; and generally the undertaking is placed under the Board's regulatory control.
>
> Is such a company pipe line so far amenable to provincial law as to subject it to statutory mechanics' liens? The line here extends from a point in Alberta to Burnaby in British Columbia. That it is a work and undertaking within the exclusive jurisdiction of Parliament is now past controversy: *Winner v. S.M.T. (Eastern) Limited* ([1951] S.C.R. 887), affirmed, with a modifi cation not material to this question, by the Judicial Committee but as yet unreported. The lien claimed is confined to that portion of the line within the County of Yale, British Columbia. What is proposed is that a lien attaches to that portion of the right of way on which the work is done, however small it may be, or wherever it may be situated, and that the land may be sold to realize the claim. In other words, an interprovincial or international work of this nature can be disposed of by piecemeal sale to different persons and its undertaking thus effectually dismembered.
>
> In the light of the statutory provisions creating and governing the company and its undertaking, it would seem to be sufficient to state such consequences to answer the proposition. The undertaking is one and entire and only with the approval of the Board can the whole or, I should say, a severable unit, be transferred or the operation abandoned. Apart from any question of Dominion or Provincial powers and in the absence of clear statutory authority, there could be no such destruction by means of any mode of execution or its equivalent. From the earliest appearance of such questions it has been pointed out that the creation of a public service corporation commits a public franchise only to those named and that a sale under execution of property to which the franchise is annexed, since it cannot carry with it the franchise, is incompatible with the purposes of the statute and incompetent under the general law. Statutory provisions, such as s. 152 of the *Railway Act* , R.S.C. (1952), c. 234, have modified the application of the rule, but the sale contemplated by s. 10 of the *Pipe Lines Act* is a sale by the company, not one arising under the provisions of law and in a proceeding *in invitum* . The general principle was stated by Sir Hugh M. Cairns, L.J. in *Gardner v. London, Chatham and Dover Railway* ((1867), L.R. 2 Ch. 201 at 212):
>
> > When Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and

> imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred.

In the same judgment and speaking of the effect of an authorized mortgage of the 'undertaking' he said:

> The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and sums of money ejusdem generis — that is to say, the earnings of the undertaking — must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot; under their mortgages, or as mortgagees — by seizing, or calling on this Court to seize, the capital, or the lands, or the proceeds of sales of land, or the stock of the undertakings — either prevent its completion, or reduce it into its original elements when it has been completed.

36 Several further and compelling submissions were made to the Court on behalf of the appellants, but having regard to the first submission which is irresistible and of fundamental importance, I do not think it necessary to deal with all of the arguments advanced.

37 Reference should be made, however, to two of them. First, attention should be directed to An Act to Regulate the Exploration and Drilling for, and the Production and Storage of Oil and Gas, commonly referred to as The Petroleum Resources Act, 1971 (Ont.), c. 94.

38 The objects of this legislation can be readily understood by reference to s. 17(1) of the statute which reads as follows:

> 17. — (1) The Lieutenant Governor in Council may make regulations,
>
> (*a*) for the conservation of oil or gas;
>
> (*b*) prescribing areas where drilling for oil or gas is prohibited;
>
> (*c*) prescribing the terms and conditions of oil and gas production leases and gas storage leases or any part thereof, excluding those relating to Crown lands, and providing for the making of statements or reports thereon;
>
> (*d*) regulating the location and spacing of wells;
>
> (*e*) providing for the establishment and designation of spacing units and regulating the location of wells in spacing units and requiring the joining of the various interests within a spacing unit or pool;
>
> (*f*) prescribing the methods, equipment and materials to be used in boring, drilling, completing, servicing, plugging or operating wells;
>
> (*g*) requiring operators to preserve and furnish to the Department drilling and production samples and cores;
>
> (*h*) requiring operators to furnish to the Department reports, returns and other information;
>
> (*i*) requiring dry or unplugged wells to be plugged or replugged, and prescribing the methods, equipment and materials to be used in plugging or replugging wells;
>
> (*j*) regulating the use of wells and the use of the subsurface for the disposal of brine produced in association with oil and gas drilling and production operations.

39 The importance of this Act is reflected in s. 18 which reads as follows:

> 18. — (1) In the event of conflict between this Act and any other general or special Act, this Act, subject only to *The Ontario Energy Board Act, 1964* , prevails.

(2) This Act and the regulations prevail over any municipal by-law.

40 Similarly, although it was not referred to in argument, The Energy Act, R.S.O. 1970, c. 148 [repealed by 1971, Vol. 2, c. 44, s. 32] deals with other aspects of the natural gas and oil industry. The objects of the legislation are set out in s. 12(1) which I need not quote, but again s. 13 of this Act is identical in its wording to s. 18 of The Petroleum Resources Act quoted above.

41 The second of the additional submissions to which reference should be made is based on a cardinal rule for the interpretation of statutes and expressed in the maxim "*generalia specialibus non derogant* ". For a discussion of the effect of this rule I will only refer to the case of *Ottawa v. Eastview*, [1941] S.C.R. 448, [1941] 4 D.L.R. 65 commencing at p. 461, and to the Dictionary of English Law (Earl Jowitt) at p. 862.

42 In the case before this Court, it is clear that the Legislature intended to vest in the Ontario Energy Board the widest powers to control the supply and distribution of natural gas to the people of Ontario "in the public interest" and hence must be classified as special legislation.

43 The Planning Act, on the other hand, is of a general nature and the powers granted to municipalities to legislate with respect to land use under s. 35 [am. 1972, c. 118, s. 6(1)] of that Act must always be read as being subject to special legislation such as is contained, for example, in The Ontario Energy Board Act, The Energy Act and The Petroleum Resources Act.

44 In the result therefore, and in response to the questions with respect to which leave to appeal was granted, this Court certifies to the Ontario Municipal Board:

(a) Section 4.2.3. of By-law 40 as amended, of the Township of Dawn is ultra vires the said municipality, and

(b) The Ontario Municipal Board therefore is without jurisdiction to approve the said by-law as amended in its present form by reason of s. 4.2.3. thereof.

45 This Court further certifies that should the Ontario Municipal Board see fit to exercise the powers vested in it by s. 87 of The Ontario Municipal Board Act, the said By-law 40 as amended may be approved after deleting from s. 4.2.3. the words "Except as limited herein" at the commencement of the said section and all the words after the word "thereto" in the fourth line of the said by-law as printed down to and including the words "road or highway" in sub-clause (c) of the said s. 4.2.3., so that s. 4.2.3. as so approved would read:

Nothing in this by-law shall prevent the use of any land as a right-of-way, easement or corridor for any oil, gas, brine or other liquid product pipeline and appurtenances thereto.

Nothing herein shall prevent the location of a local distribution gas service line upon any street, road or highway.

46 The appellants and the Ontario Energy Board are entitled to their costs of this appeal.

Appeal allowed.

TAB 2

Ontario Power Generation Inc. (Re)

Ontario Energy Board Decisions

Ontario Energy Board

Panel: Howard Wetston, Presiding Member and Chair; Pamela Nowina, Member and Vice Chair

Decision: May 11, 2009.

No. EB-2009-0038

2009 LNONOEB 44

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; AND IN THE MATTER OF an application by Ontario Power Generation Inc. pursuant to Rule 42 of the Rules of Practice and Procedure for an Order varying part of the Ontario Energy Board's Decision with Reasons made November 3, 2008.

(60 paras.)

DECISION AND ORDER ON MOTION TO REVIEW AND VARY

1 On January 28, 2009, Ontario Power Generation Inc. ("OPG") filed a Notice of Motion (the "Motion") for a review and variance of the Ontario Energy Board's (the "Board") Decision with Reasons dated November 3, 2008, file number EB-2007-0905, *2008 LNONOEB 36* ("Payments Decision"). The Motion has been assigned file number EB-2009-0038.

2 On March 2, 2009, the Board issued a Notice of Motion and Procedural Order No. 1 which advised the Board would hold an oral hearing at which the threshold question of whether OPG's Motion raised a substantial question as to the correctness of the Decision, and the merits of the Motion, would be considered concurrently. The Board adopted the intervenors and parties of record from the EB-2007-0905 proceeding. No other parties came forward requesting intervenor or observer status.

3 The School Energy Coalition ("SEC"), Canadian Manufacturers and Exporters ("CME"), the Power Workers' Union ("PWU"), the Electricity Distributors Association ("EDA"), Board staff and OPG filed submissions in advance of the oral hearing. The Board heard submissions from SEC, CME, PWU and OPG at the oral hearing held on April 3, 2009.

4 After considering the oral and written submissions, the Board has decided to grant OPG's motion to vary the Payments Decision. The following Decision and Order sets out the reasons of the Board.

Background

Motion Brought November 24, 2008

5 Prior to the Motion which is the subject of this decision, OPG filed a Notice of Motion dated November 24, 2008 ("Previous Motion") which also sought a review and variance of the Payments Decision. No additional materials were filed.

6 The Previous Motion requested a review and variance of that portion of the Payments Decision "which purport to de-link OPG's mitigation proposal from the prior period tax losses, require OPG to make an unqualified gift to consumers and expose OPG to liability to credit consumers twice for the same prior period tax losses".[1]

7 The Previous Motion listed four grounds:

1. the Board's analysis and disposition of the tax loss issue was never advanced before or during the hearing, depriving OPG of the opportunity to respond to the approach;
2. the Board erred in fact and law by failing to recognize regulatory tax loss carry forwards as the basis for the OPG's proposal to mitigate payment amounts in the test period;
3. the Board exceeded its jurisdiction by arbitrarily ordering OPG to make an unqualified gift to consumers, unlawfully depriving OPG of the opportunity to recover its approved costs and return on equity; and
4. the Board was unreasonable in its disposition of the tax loss issue as it appeared intended to result in double counting tax loss credits to consumers.

8 The Previous Motion described the relief sought as a variance of the portion of the Payments Decision dealing with the treatment of tax losses to provide for:

(i) a clear acknowledgement of the link between OPG's mitigation proposal and the tax losses;

(ii) a clear acknowledgement that OPG's mitigation proposal was not an unqualified gift but was unambiguously based on OPG's calculation of prior period regulatory tax losses notionally available to be carried forward into the test period;

(iii) a clear acknowledgement that OPG would, under no circumstances, be found liable to provide credits to customers on account of any regulatory tax losses; and

(iv) the establishment of a tax loss variance account to record any variance between the tax loss mitigation amount which underpins the draft rate order for the test period and the tax loss amount resulting from the re-analysis of the prior period tax returns based on the Board's directions in the Payments Decision as to the re-calculation of those tax losses.

9 The Previous Motion made no reference to the Board's *Rules of Practice and Procedure* (the "Rules"), and specifically, no reference to the Rules under which OPG was proceeding; no reference to the powers that OPG sought the Board to exercise on its behalf (for example, no order was sought); no reference to the type of hearing sought; and no reference to the Board's power to determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

10 On December 19, 2008, the Board issued a Decision and Order which stated:

> Rule 45 of the *Rules of Practice and Procedure* states the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.
>
> The review panel has determined that there are no grounds for review. In the review panel's view, the objective of the relief sought is to protect OPG from findings that *might* be made as a result of a future panel's interpretation of the Decision in the next OPG Payment Amounts application. The Motion anticipates an interpretation which is detrimental to OPG, and seeks to safeguard against such an interpretation by obtaining acknowledgements from the review panel which effectively remove the possibility of such an interpretation being made. It is the review panel's opinion that what is being sought is not the proper subject of a review motion as it is based upon how the Decision might be interpreted rather than the Decision proper.
>
> The right of a future panel to interpret and apply the Decision as it sees fit cannot be pre-empted. OPG will have the opportunity to present its interpretation of the Decision as it relates to tax losses and mitigation to the future panel; OPG will also be able to present its concerns with respect to other potential interpretations. The future panel will undoubtedly inform itself as to all the relevant circumstances in determining the appropriate balance between customers and OPG. If after the next Payment Amounts proceeding and Board decision OPG is of the view that the interpretation and application of the Decision

has led to customers receiving credit twice for the same amounts, OPG may bring a motion to vary at that time.

Motion Brought January 28, 2009

Procedural matters related to the Motion

11 The Motion was filed January 28, 2009, along with a written submission.

12 Rule 42.03 requires a notice of motion to be filed and served within 20 calendar days of the date of the order or decision for which a review is requested. In a letter accompanying the Motion, OPG acknowledged its late filing and requested the Board give consideration to it nonetheless; the Motion and the written submission sought no specific relief with regard to the late filing.

13 SEC and CME took issue with the filing of the Motion by OPG given the dismissal of the Previous Motion. In its written and oral argument, SEC expressed concerns that if the Board permitted the Motion to proceed, it would encourage parties to bring repeated review motions until they obtained a sympathetic Board panel, thus undermining the principle of the finality of decisions. SEC argued OPG could only be before the Board on the Motion "if, in principle, a party can keep moving to review or vary a decision of the Board as many times as it likes." SEC urged the Board to exercise control over its own review process by refusing to permit the Motion to proceed.[2]

14 In its reply and oral submission, OPG responded that the Rules provided ample flexibility to the Board to hear and determine the Motion, without undermining the integrity of the Board's processes. OPG argued that the Rules permitted the Board to receive the Motion if the Board was satisfied the circumstances of the case and the public interest in securing the most just, expeditious and efficient determination on the merits required it to do so.[3]

15 The Board agrees that finality in decision making is important, as is discouraging motions for review as a means of seeking a sympathetic Board panel; however, the Board views this matter as one which engages broader issues. The Board is the economic regulator charged with ongoing oversight of certain aspects of the regulated business of OPG and its prescribed facilities. The Payments Decision was the first opportunity for the Board to examine and consider the many issues associated with the setting of just and reasonable payment amounts for the prescribed facilities. The issues to be determined by the Board were complex, and the ambit of the decision was framed both by statute and by a regulation drafted in contemplation of the first payment amounts hearing. In this first payments case, it is self evident that the accurate assessment of the evidence would not only support the determination of the payment amounts for the test period but would also establish the framework for consistent results in future payment amounts proceedings.

16 Given the significance of this first decision, and having considered the Motion and the written submission which accompanied it, the Board determined that an oral hearing on the threshold issue and the merits of the Motion was warranted in all of the circumstances; and that the breadth of its powers under the Rules, and its statutory mandate, permitted it to order such a hearing.

17 In making such a decision, the Board was exercising its authority, not relinquishing it. As it has done in the past and as it did in this instance, the Board will assess the circumstances of each matter in its determination of whether and how to proceed.

The Motion

18 The Motion sought a review and variance of the Payments Decision; an order for an oral hearing of the motion on the merits, or alternatively an oral hearing on the threshold question of whether the Motion raised a substantial question as to the correctness of the Decision[4]; and if successful, an order varying the Payments Decision, and establishing a variance account.

19 The Motion made specific reference to the Rules on which it relied in seeking such relief, and the written submission outlined the evidence, law and argument on which OPG based its request for a review on the merits and an order varying the Payments Decision.

20 The grounds for the Motion as set out in the Notice of Motion were:

1. the Board exceeded its jurisdiction by ordering a revenue requirement reduction of $342 million without evidentiary or legal foundation, unlawfully depriving OPG of the opportunity to recover its approved costs and return on equity;
2. the Board erred in fact and in law in finding that there was no connection between regulatory tax losses and OPG's proposal to reduce its test period revenue requirement; and
3. the Board's analysis and disposition of the regulatory tax loss and mitigation issue was never advanced at the hearing, depriving OPG of the opportunity to respond to the Board's approach to the regulatory tax loss and mitigation issue.

21 In the Notice of Motion the principal remedies sought were an order:

(i) varying the approximately $342 million reduction in OPG's revenue requirement in the absence of any legal basis for the reduction;

(ii) varying the finding that there was no connection between OPG's proposed revenue requirement reduction and regulatory tax losses carried forward from the 2005-2007 period in the absence of any evidence to support the finding;

(iii) an order establishing a tax loss variance account to record the revenue requirement reduction of $342 million incorporated in the test period payment amounts and directing that the disposition of that account be conducted in conjunction with consideration of the analysis of prior period tax returns in OPG's next case.[5]

22 In addition to the written submission, OPG filed a reply submission. At the hearing, it was noted by CME and SEC that the reply submission was the clearest expression of what was being sought by OPG, its arguments and the relief it was seeking. In particular, CME expressed frustration that its written submissions were superseded by the reply submission, and that due to its filing shortly before the oral hearing, limited time was available to consider and respond to certain aspects of the reply submission.

23 This Motion Record has been difficult to follow. The materials filed by OPG have evolved as between the Previous Motion and this Motion, from the filing of the written submission and the reply submission, and the oral argument. For example, the jurisdictional argument, which was one of three grounds in the Previous Motion and the first ground cited in the Motion, and to which a significant amount of the written submission and the Brief of Authorities was devoted, was referred to as an alternative argument in the reply submission, and was characterized as OPG's 'fifth' argument at the oral hearing.[6]

24 A similar evolution occurred in the relief sought. In the Previous Motion OPG request the establishment of a tax loss variance account that would record any variance between the tax loss mitigation amount which underpins the draft rate order for the te period and the tax loss amount resulting from the re-analysis of the prior period tax returns based on the re-calculation of the tax losses required by the Board in the Payments Decision.[7]

25 In the Motion, OPG requested the establishment of a variance account to record the revenue requirement reduction of $342 million incorporated in the test period paymen amounts with the disposition of the account to be conducted in conjunction with the consideration of the analysis of prior period tax returns in OPG's next case.[8] In the reply submission, OPG explained the establishment of the variance account was to record the difference between the revenue requirement reduction of $342 million embedded in the test period payment amounts and the amount of regulatory tax losse recalculated in accordance with the Board's directions.[9]

26 While the Board appreciates that arguments and positions evolve in response to arguments posed by others, it reminds all parties that those who seek relief from the Board must ensure the clarity and consistency of the materials they file. This is fundamental to effective adjudication and informed decision making. It also encourages meaningful participation by all parties in the regulatory process.

FINDINGS

The Threshold Question

The Procedural and Substantive Issues related to the Threshold Question

27 Rule 45.01 states that in respect of a motion to review brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

28 In determining the threshold question the Board considers the grounds for the motion, described in Rule 44.01 (a):

> Every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:
>
> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> (i) error in fact;
>
> (ii) change in circumstances;
>
> (iii) new facts that have arisen;
>
> (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

29 The list of grounds set out in Rule 44.01(a) is not exhaustive but rather illustrative.[10]

30 In the *Natural Gas Electricity Interface Review Decision* ("NGEIR Review Decision")[11] the Board determined that the threshold question requires the motion to review to meet the following tests:

* the grounds must raise a question as to the correctness of the order or decision;
* the issues raised that challenge the correctness of the order or decision must be such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended;
* there must be an identifiable error in the decision as 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; and
* the alleged error must be 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.[12]

The Board's Finding on the Threshold Question

31 The Board is satisfied that the grounds put forward by OPG meet the tests as set out in the NGEIR Review Decision.

32 OPG has raised questions regarding the correctness of the finding that there was no connection between the mitigation offered by OPG and its regulatory tax losses, and the ordering of certain revenue requirement reductions after making that finding.

33 The Board is persuaded that those findings are inconsistent with the evidence; that those inconsistent findings are material and relevant to the outcome of the decision; and that if varied or changed, those findings would change the outcome of the decision.

34 The threshold having been met, the Board will proceed to consider the merits of the Motion.

The Merits of the Revenue Requirement Reduction

35 The Board must decide if the panel in the Payments Decision erred in

a) finding that OPG's proposal to eliminate an income tax provision in the test period was 'simply mitigation', and unrelated to regulatory tax losses;

b) finding that there was no connection between the tax loss benefits and OPG's proposed carry forward or acceleration of a revenue reduction of $228 million;

while also

c) ordering that OPG should not include any tax provision for 2008 and 2009 in respect of the prescribed assets; and

d) ordering that the amount of mitigation for the test period will be equal to 22% of the revenue deficiency calculated based on the Board's findings in the decision.

36 The reductions ordered were:

1. The elimination of any tax provision for the test year period in respect of the prescribed assets. In its findings, the Board did not provide an exact figure for this amount; in its materials, OPG calculated this amount to be $173 million.
2. Mitigation unrelated to regulatory tax losses in an amount equal to 22% of the revenue deficiency calculated based on the Board's findings in the Payment Decision; OPG calculated this amount to be $169 million.

37 If the Board now decides that the findings and the reductions are in error, then the Board must determine if the treatment of tax losses necessitates the establishment of a variance account.

OPG's Use of Tax Losses

38 In its application to determine payments for OPG's prescribed assets, OPG attributed the benefit of prior period tax losses to ratepayers. This was done in two parts. The first amount was to offset the 2008/2009 taxes calculated on regulatory assets. The second amount represented the remainder of the estimated prior period tax loss benefit which would normally be used to offset taxes in a future period. In its application and evidence, OPG recommended that this amount be moved forward to the 2008/2009 payment period to mitigate rateshock.

39 In its submissions in this hearing OPG indicated that it had always been its position that both amounts should be to the benefit of the ratepayers, since the calculated taxes were based on assets which OPG believed should receive regulatory treatment and would therefore impose costs on ratepayers. According to OPG, the only question of true mitigation was the availability of a portion of the benefit at an earlier period than would normally be the case.

Related Payment Decision Determinations

40 In the Payments Decision, the Board made several determinations which impact the calculation of taxes.

41 In its application OPG treated Bruce Nuclear revenues and costs as though they were related to a regulated business. The Board did not agree with this treatment. The Board required OPG to make these calculations on the basis of Generally Accepted Accounting Principles ("GAAP") and not regulatory accounting. The Board indicated that the treatment of taxes on Bruce revenues and costs should be treated in a normal GAAP manner and a tax provision should be included in the calculation of Bruce costs, contrary to OPG's proposal to carry forward tax loss benefits for the Bruce revenues and costs.

42 In its decision, the Board also made other findings questioning OPG's regulatory tax loss calculations. It observed that it did not have the information necessary to determine the tax benefits which should be carried forward to offset payment amounts in 2008 and later periods, and ordered OPG to file better information and analysis on its forecast test period income tax provision in its next payment application. The Board stated that the analysis should be based on the principle that if electricity consumers should bear a cost (or should benefit from revenues) they should receive the related tax benefit (or will be charged the related income taxes).

43 Although these decisions on tax calculations are relevant to OPG's Motion, the findings have not been challenged by OPG or any other party. What the OPG Motion does challenge are the Board's findings which separate the rationale for the proposed revenue reduction from any tax loss benefit.

44 The Board found that OPG should reduce its revenue requirement by eliminating any tax provision for 2008 and 2009. The Board stated that because there was no evidence about the amount of the pre-2008 tax benefits that appropriately should be carried forward to offset 2008 and 2009 taxes, it viewed OPG's proposal to eliminate the test period's income tax provision as "simply mitigation."[13]

45 In addition, the Board ordered OPG to reduce its revenue requirement by 22% of its revenue deficiency. This latter amount was calculated to be approximately the same percentage of revenue deficiency that OPG had proposed as an additional reduction. OPG had based its calculation on the amount of tax benefit that it expected to be available to future periods and which it proposed bringing forward to the test period; however, the Board also separated this reduction from tax loss benefits stating: "As for OPG's proposed $228 million mitigation amount, the Board does not accept that there is any connection between that amount and any regulatory tax losses."[14]

Positions taken on the Motion

46 OPG argued that the Board disposed of the regulatory tax loss and mitigation issue on a basis that was never raised or argued during the hearing, denying all parties the opportunity to make submissions on a material issue, and depriving the Board of the benefit of hearing parties on the issue. OPG submitted that by so doing, the Board was not fair and breached the rules of natural justice. PWU supported this argument in its written and oral submissions.

47 OPG also argued that the Board made findings that were unsupported by the evidence, thereby falling into error.

48 OPG argued:

> In OPG's submission, once the OEB decided that it was not satisfied there were any regulatory tax losses, or that they had not been correctly calculated, or that there was not sufficient evidence to determine the amount of those regulatory tax losses, the proper response was not to require OPG to proceed to reduce its revenue requirement by approximately $342 million in any event. Rather, the only proper and lawful course open to the OEB in the face of those findings involved one of two choices:
>
> 1. remove the mitigation proposal from any calculation of the revenue requirement for the test period and remit the matter for further consideration to a future panel; or

2. establish a variance account to record the revenue requirement reduction of $342 million embedded in the test period payment and consider the disposition of that amount in the context of any regulatory tax loss calculations resulting from an analysis of prior period tax returns in OPG's next case.[15]

49 CME argued that any finding that was not based on evidence should be corrected. Assuming that the linkage between mitigation and the tax losses was restored, and a variance account was created as requested by OPG, the amount of the regulatory losses to be brought into the variance account should be corrected also; this correction could occur at the next payment amounts hearing when the tax loss analysis was placed into evidence, and tested by the intervenors and the Board.

50 SEC argued that as OPG's proposed revenue reduction was entirely voluntary, it should be required to live with the consequences of its own proposal. In support of its characterization of the proposed reduction as voluntary, SEC cited a portion of the transcript of the original hearing where Mr. Barrett of OPG describes returning the tax loss benefit to the ratepayers in the following way, "Yes, we do not believe this treatment is required, but we do believe that it is appropriate".[16] Therefore, SEC argued, the Board gave OPG what it asked for and the company should not be able to overturn the decision now because the tax calculations modified by the Board's decision result in a significantly lower regulatory tax benefit than OPG anticipated.

51 OPG and SEC both stated that the issue of the tax calculations was not raised in the hearing. SEC pointed out that while intervenors may have questioned the Board's decision in regard to those calculations, they could not move for review since the Board maintained the approximate revenue reduction as proposed originally by OPG.

Board Findings and Disposition of the Motion to Review

52 OPG and PWU argued that the Board disposed of the regulatory tax loss and mitigation issue on a basis that was never raised or argued during the hearing, depriving parties of the opportunity to make submissions; by doing so, it was alleged that the Board denied OPG procedural fairness and breached the rules of natural justice.

53 While being provided the opportunity to make submissions is desirable, there is no general rule precluding the Board, a specialized economic energy regulator, from reaching decisions based on its own analysis of the record or on its own expertise or on the basis of some combination of the two. Ultimately the determination of whether fairness is breached in particular circumstances turns on the circumstances. In this case, the Board finds it unnecessary to make a specific finding on this issue.

54 The Board finds that the evidentiary record established and supported a link between the regulatory tax losses and the revenue requirement reduction. The oral and written evidence provided by OPG consistently linked the tax losses with the revenue requirement reduction. That evidence was not challenged by any party.

55 If a reviewing panel is satisfied that an identifiable error that is material and relevant to the outcome of the reviewed decision has been made, the Board may vary, suspend or cancel the order or decision, or if they find it appropriate, remit the matter back to the original panel.[17] As noted above, the Board has determined that identifiable errors that are material and relevant to the outcome of the reviewed decision have been made.

56 The Board varies the Payments Decision in a manner that links the revenue requirement reduction and regulatory tax losses, and orders the establishment of a tax loss variance account to record any variance between the tax loss mitigation amount which underpins the rate order for the test period and the tax loss amount resulting from the re-analysis of the prior period tax returns based on the Board's directions in the Payments Decision as to the re-calculation of those tax losses.

57 The clearance of this account will be reviewed in OPG's next payment application hearing when a future panel of the Board reviews the tax analysis ordered in the Payments Decision.[18] The Board anticipates that any issues related to tax calculations will be dealt with at the next payment amounts hearing.

Costs

58 A decision regarding cost awards will be issued at a later date. Eligible intervenors claiming costs should do so as ordered below. OPG shall pay any Board costs of and incidental to this proceeding upon receipt of the Board's invoice.

59 THE BOARD THEREFORE ORDERS THAT

1. The Payments Decision shall be varied in a manner that links the revenue requirement reduction and the regulatory tax losses;
2. OPG shall establish a variance account to be called the Tax Loss Variance Account to be effective as of April 1, 2008;
3. Intervenors eligible for cost awards shall file with the Board and forward to OPG their respective cost claims within 14 days from the date of this Decision;
4. OPG may file with the Board and forward these intervenors any objections to the claimed costs within 28 days from the date of this Decision;
5. Intervenors, whose cost claims have been objected to, may file with the Board and forward to OPG any responses to any objections for cost claims within 35 days of the date of this Decision; and

60 Filings are to be in the form of two hardcopies and one electronic copy in searchable PDF format at boardsec@oeb.gov.on.ca and copy Ontario Power Generation Inc.

ISSUED at Toronto, May 11, 2009

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

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1 OPG Compendium of Evidence, Tab 1, Previous Motion, p.3.

2 Submissions of SEC, paras. 3.1.1 - 3.2.2.

3 Reply Submission, paras. 41 - 47. In support of its position, OPG cited Rules 1.03, 2.01, 2.02 and 5.01(a).

4 The Motion also stated that "OPG had a reasonable expectation that it would be heard on the threshold issue and basic fairness requires that it should have been heard before any decision to dismiss the Previous Motion was made". As an oral hearing was ordered on both the merits of the motion and the threshold issues concurrently, this point was not argued; however, the Board points out that Rule 45 clearly states that it may dismiss a motion to review with or without a hearing. It is within the Board's discretion to determine that the threshold has not been met, and to dismiss a motion to review without a hearing, based solely upon its review of the materials filed. No party seeking relief should expect the Board to grant its request; rather, the onus is on the moving party to persuade the Board to exercise its powers.

5 OPG Compendium of Evidence, Tab 1, Notice of Motion, p. 1, para.2. Although expressed otherwise in the Notice of Motion, at the oral hearing OPG's counsel advised that the remedies were sought in the alternative: Hearing Transcript, pp. 9-11.

6 Reply submission, para. 79; Oral Hearing Transcript, pp. 25-28.

7 OPG Compendium of Evidence, Tab 1, Previous Notice of Motion, p. 12.

8 OPG Compendium of Evidence, Tab 1, Notice of Motion, p. 2.

9 Reply submission, para. 34.

10 *Natural Gas Electricity Interface Review Decision*, May 22, 2007, EB-2006-0322/0338/0340, *2007 LNONOEB 51*, p.15.

11 *Ibid.*

12 *Supra.*, pp. 17-18.

13 Payments Decision, p. 171

14 Ibid.

15 OPG Written Submission, para. 53.

16 OPG Compendium of Evidence, Tab 4, Hearing Day 15, June 20, 2008, p. 75, ls. 20-21.

17 *A Review of Certain Parts of the Natural Gas Electricity Interface Review Decision of November 7, 2006 and Conducted Pursuant to the Board's Review Decision of May 22, 2007*, EB-2006-0322/-340, *2007 LNONOEB 51*, Decision with Reasons, July 30, 2007, p. 1.

18 Payments Decision, p. 171: "The Board also expects OPG to file an analysis of its prior period tax returns that identifies all items (income inclusions, deductions, losses) in those returns that should be taken into account in the tax provision for the prescribed facilities. That analysis should be based on the principle that if OPG is proposing that electricity consumers should bear a cost (or should benefit from revenues) they will receive the related tax benefit (or will be charged the related income taxes).

End of Document

TAB 3

2021 CarswellNat 6057
Canada Energy Regulator

NOVA Gas Transmission Ltd., Re

2021 CarswellNat 6057, 2021 CarswellNat 6058

NOVA Gas Transmission Ltd. (NGTL)

Applications regarding Pioneer South Pipeline Acquisition

Decision and Orders

Ramona Sladic Member

Judgment: December 22, 2021
Docket: None given

Counsel: Elizabeth von Engelbrechten for NOVA Gas Transmission Ltd.

***Ramona Sladic Member*:**

1 Dear Elaine Liddiard, Elizabeth von Engelbrechten and Rosa Twyman:

Background

2 On 15 January 2021, NGTL filed two concurrent applications with the Canada Energy Regulator (*CER*) for the Pioneer South Pipeline Acquisition:

- an application was filed under paragraph 181(1)(b) and section 226 of the Canadian Energy Regulator Act (CER Act) to acquire the approximately 30 km Pioneer South Pipeline, Zeta Lake Receipt Meter Station and in-line inspection launcher facility (*the Assets*) from ATCO Gas and Pipelines Ltd. (*ATCO*) subject to a positive Alberta Utilities Commission (*AUC*) decision, and to roll the purchase price of the Assets plus adjustments and project costs into the NGTL System rate base, as of the closing date of the acquisition (the *Section 181/226 Application*) (*C10966*).

- an application was filed under section 214 of the CER Act for an order authorizing the continued operation of the Assets under CER jurisdiction, effective on the closing date. NGTL requested leave to open the Assets pursuant to section 213 of the CER Act, effective on the closing date. NGTL also requested an exemption from the provisions of paragraph 180(1)(a) of the CER Act in respect of the Assets, as the Assets are currently in operation (the *Section 214 Application*) (*C10955*).

(collectively, the *Applications*)

3 The Assets are the westernmost part of the Pioneer Pipeline, an approximately 131 km provincially regulated pipeline. On 15 June 2021, the AUC approved ATCO's acquisition of the approximately 131 km Pioneer Pipeline from Pioneer Pipeline Inc. operating for Pioneer Pipeline Limited Partnership (*Pioneer*) (AUC Decision 25937-D01-2021) and the disposition of the approximately 30 km Pioneer South Pipeline to NGTL (AUC Decision 26189-D01-2021).

4 In its letter dated 5 August 2021, the Commission of the CER (*Commission*) stated that although NGTL filed the Applications separately, the relief sought in both Applications is interdependent. To facilitate its review of the Applications and related submissions, the Commission determined that, in order to support regulatory efficiency, the Applications would be assessed together under one file (*C14357-1*).

5 After two rounds of Information Requests (*IRs*) and a number of letters from Western Export Group (*WEG*) and NGTL, the Commission set out a structured comment process in its 5 August 2021 letter whereby interested parties were invited to provide their views regarding eight specific issues. Responses were received from Tidewater Midstream and Infrastructure Ltd. (*Tidewater*), Industrial Gas Consumers Association of Alberta, The Office of the Utilities Consumer Advocate (*UCA*), ATCO, TransAlta Corporation (*TransAlta*), NGTL and WEG.

6 Following the conclusion of the comment process, on 15 October 2021, the Commission issued its decision on an efficient regulatory approach, process, completeness and time limits with respect to the Applications (*C15452*). The Commission also issued IR No. 3 to NGTL and included an opportunity for interested parties to comment on NGTL's response and for NGTL to reply.

7 NGTL filed its response to IR No. 3 on 22 October 2021 (*C15628-1*). WEG filed a letter on 29 October 2021 commenting on NGTL's response to IR No. 3 (*C15796-1*). No other comments from interested parties were received. On 5 November 2021, NGTL filed its reply to WEG's comment letter (*C15997-1*).

Commission Decisions on the Applications

8 The Commission has considered the Applications and all the subsequent filings on the record. For the reasons stated below, the Commission approves the Pioneer South Pipeline Acquisition as set out in the Applications. The Pioneer South Pipeline Acquisition is limited to existing Assets that are fully constructed and operational; no new physical works are required. The Commission recognizes that this acquisition will align the ownership and operation of the Pioneer Pipeline with the footprints in the Integration Agreement, [1] which is consistent with previous asset swaps between NGTL and ATCO. [2] Upon completion of the sales transaction for NGTL to purchase the Assets, the Assets will be subject to federal jurisdiction.

9 The Commission has decided that it is in the public interest to grant NGTL leave to purchase the Assets from ATCO pursuant to paragraph 181(1)(b) of the CER Act and issues Order MO-041-2021. The Assets will continue to form part of the integrated NGTL System and there is no change expected to the use or service of the Assets.

10 As indicated in Order MO-041-2021, the Commission also approves NGTL's request to roll the purchase price of the Assets plus adjustments and project costs into the NGTL System rate base, pursuant to section 226 of the CER Act. Under section 67 of the CER Act, this will come into effect on the date of receipt by the CER of written confirmation from NGTL that the transaction is completed, so that the effective date is clear from the record.

11 Furthermore, the Commission issues Order XG-015-2021, pursuant to section 214 of the CER Act, exempting the Assets from the provision of paragraph 180(1)(a) of the CER Act and approving the operation of the Assets by NGTL.

12 As indicated in Order XG-015-2021, the Commission grants NGTL leave to open the Assets, pursuant to section 213 of the CER Act. The Commission is satisfied that *Canadian Energy Regulator Onshore Pipeline Regulations* requirements are met and the Assets are fit for their designed service.

13 Pursuant to section 67 of the CER Act, Order XG-015-2021 will come into effect on the date of receipt by the CER of written confirmation from NGTL that the transaction is completed as required by Order MO-041-2021.

14 In reaching its determination under section 214, the Commission has taken into account considerations that appear to it to be relevant and directly related to the Assets, including matters under section 56 of the CER Act. The Commission acknowledges NGTL's engagement with Indigenous [3] peoples in relation to the Pioneer South Pipeline Acquisition. The CER did not receive any submissions of concerns regarding the Pioneer South Pipeline Acquisition from Indigenous peoples.

15 The Commission is satisfied with NGTL's engagement activities with commercial third parties, and public stakeholders. The Commission finds that the protection of the environment and public safety have been appropriately addressed by NGTL. In

addition, the Commission evaluated the financial viability, economic justification, and continued operation of the Assets. The Commission finds that it is in the public interest to grant the requested relief.

16 Orders MO-041-2021 and XG-015-2021, and their respective Schedule As, which together, outline the specifics of the Applications as approved, are attached.

17 Parties raised additional issues regarding procedural fairness, need, alternatives, purchase price, engagement with commercial third parties and compliance with climate change policies. The Commission provides additional reasons to address these issues below.

Scope of the Applications

18 The Applications before the Commission are for the acquisition of the Assets, which include the Pioneer South Pipeline (??30 km segment), not for the Pioneer Pipeline in its entirety. Concerns regarding the acquisition of the Pioneer Pipeline as a whole (??131 km) were considered by the AUC in AUC Decisions 25937-D01-2021 and 26189-D01-2021, as well as the Alberta Court of Appeal in Western Export Group v Alberta (Utilities Commission) [4] The Commission will only examine issues such as need, alternatives and purchase price to the extent that they are relevant to the determination the Commission must make in relation to NGTL's purchase of the Assets.

19 NGTL stated that WEG's 29 October 2021 letter of comment expresses views that go beyond the scope of submissions on NGTL's response and includes positions previously stated by WEG; NGTL responded to these comments for completeness of the record. NGTL submitted that WEG's reiteration of arguments it has already made should be once again rejected by the Commission.

20 The Commission acknowledges that WEG's 29 October 2021 letter includes comments that are not directly related to NGTL's IR No. 3 response, including submissions on procedural fairness, need, interconnect-only option and greenhouse gas emissions compliance. WEG raised a number of issues repeatedly in its submissions. As stated in its 15 October 2021 letter, the Commission will not consider submissions that are beyond the scope of the Applications (i.e., relating to the acquisition of the Pioneer Pipeline as a whole).

Procedural Fairness

Views of the Parties

21 NGTL argued that the CER process has been procedurally fair. NGTL submitted that it has met its onus as applicant and that WEG had ample opportunities to share its views with the Commission.

22 In its 29 October 2021 letter, WEG took the position that it does not consider the CER's process to comply with the principles of natural justice and procedural fairness. WEG stated that no intervenor had an opportunity to ask information requests or cross-examine NGTL. WEG also argued that the process places the onus on WEG and other intervenors to prove that the acquisition and the premium price is not justified and prevents any review of the Western Alberta System (*WAS*) interconnect-only alternative.

Commission Analysis and Findings

23 Interested parties had the opportunity to comment on the issue of "further process steps and reasons why they are needed" in the Commission's structured comment process for the Applications. WEG's request for further process failed to provide adequate supporting reasons and focused on enabling the review of the acquisition of the Pioneer Pipeline as a whole, rather than the Applications before the Commission. The Commission made its decision on process in its 15 October 2021 letter and WEG has not raised any changed circumstances or new facts which would support a review of that decision.

24 The Commission is of the view that parties had a meaningful opportunity to raise and reply to concerns regarding the Applications through their submissions, their response to the Commission's 5 August 2021 comment process and the

further comment process related to IR No. 3. The Commission's determination of what procedural fairness requires in these circumstances considered the fact that there is no statutorily prescribed process associated with the Applications, nor is there any basis, given the nature of the interests at stake in this proceeding, for a legitimate expectation that a certain procedure including some form of cross-examination must be followed. As an administrative tribunal, the Commission has discretion to tailor its process to the nature and scope of an application before it. The Commission considers the process it used to hear and decide this matter to be appropriate. The Applications involve the transfer and operation of existing Assets to align the ownership of the Pioneer Pipeline with the geographic footprints established in the Integration Agreement. The AUC approved ATCO's acquisition of the Pioneer Pipeline in AUC Decision 25937-D01-2021 [5] and ATCO closed the acquisition on June 30, 2021. Therefore, the Pioneer Pipeline is already part of the Integrated System regardless of the outcome of the Applications. In light of these factors, particularly the limited scope of the Applications, the Commission concludes that it was not and is not necessary for WEG to ask information requests or cross-examine NGTL. WEG filed five letters of comment on the record and the Commission finds that WEG had ample opportunity to present its case fully and fairly.

25 The Commission confirms that the onus is on NGTL, as the applicant, to make the case for its requested relief. Consideration of the premium price and interconnect-only alternative is addressed in more detail below.

Need and Alternatives

Views of the Parties

26 NGTL submitted there is growing demand for natural gas in the Wabamun area largely driven by conversions of existing power generation facilities from coal to natural gas. NGTL determined that the acquisition of the Pioneer Pipeline was the optimal solution to meet its service requirements. The acquisition and integration of the Pioneer Pipeline into the Integrated System attracted contracts for three distinct transportation services: Firm Transportation Delivery (*FT-D*), Firm Transportation Receipt (*FT-R*) and Other Services Extraction (*OS-EXT*). These included contracts from TransAlta for executed 15-year FT-D service contracts for 400,000 GJ/d at its Keephills and Sundance power plants (the Keephills Sales 4 and Sundance Sales meter stations). Tidewater also entered into an incremental FT-R contract with an eight-year term for 47 MMcf/d and an OS-EXT contract for 3,500 GJ/d.

27 As for the material changes to the power plant facilities raised by WEG, NGTL argued WEG effectively ignores that the acquisition of the Pioneer pipeline is underpinned by long term 15 year contracts. NGTL is of the view that the Wabamun area will likely require a long-term supply of natural gas to continue to provide Alberta with a stable and reliable electricity source.

28 NGTL stated that in assessing the optimal solution to meet the requests for incremental service in the Wabamun area, it evaluated three options: (1) building an expansion of the existing ATCO System; (2) buying the Pioneer Pipeline; or (3) leasing capacity on the Pioneer Pipeline (transportation by others). NGTL's analysis concluded buying the Pioneer Pipeline represented the greatest level of incremental contracting and the lowest ratio when comparing cost of service to new contracts.

29 NGTL submitted that the installation of an interconnect between the Pioneer Pipeline and the NGTL System without a change in ownership of the Pioneer Pipeline was not a commercially viable option. The request for delivery service was made to the Keephills Sales 4 and Sundance Sales meter stations. No contracts for incremental service would have been reached if NGTL had proposed to only construct the WAS interconnect.

30 WEG submitted that it takes issue with NGTL's application to acquire the ??30 km portion of the Pioneer Pipeline from ATCO because, among other things, there is no present or future unmet need. The Pioneer Pipeline was constructed by the owner of a gas processing complex and the owner of electrical power plants to transport gas from the processing complex to provide service to the owner of the power plants. If additional gas supply is required by the current users of the Pioneer Pipeline, there is no reason to conclude that the required quantities cannot be delivered through existing infrastructure, such as the Pioneer Pipeline and the Pembina-Keephills Pipeline, or with the addition of a simple interconnection between the Pioneer Pipeline and the NGTL System.

31 WEG argued that the need for the Pioneer Pipeline beyond year 15 is highly uncertain. WEG also stated that a number of the TransAlta power plants are no longer in operation or scheduled to be retired imminently; and the need for gas at the Sundance and Keephills power plant units has changed materially. WEG stated that NGTL has never provided evidence on why an interconnect-only facility investment without a change in the ownership of the Pioneer Pipeline, including Pioneer South, would not be a better alternative.

32 Industrial Gas Consumers Association of Alberta does not support or oppose NGTL's Application but, stated that NGTL has not provided evidence or sufficient information to justify that the existing Alberta System cannot meet the customer's requests for service without the Pioneer Pipeline acquisition.

33 The UCA argued that NGTL has not established a need or provided justification for the acquisition of the Assets. This is simply a case where assets that reside within the NGTL footprint have been acquired by ATCO.

34 Tidewater confirmed that it had contracted for FT-R and OS-T service on the Pioneer Pipeline. Tidewater submitted that the incremental FT-R, FT-D and OS-EXT contracts were contingent upon the acquisition of the Pioneer Pipeline and would not have occurred otherwise. Tidewater would not have contracted for an interconnect-only option, as it would make any additional contracting uneconomic for the contracting counterparties.

35 TransAlta confirmed that it contracted for FT-D service on the Pioneer Pipeline. TransAlta requires these volumes to further its environmental, social and governance commitments by completing coal-to-gas conversions at Keephills and Sundance plants. TransAlta submitted that the AUC's rejection of the interconnect-only option was a finding of fact by the AUC that "the incremental receipt and delivery contracts are contingent upon the Pioneer pipeline acquisition and would not materialize otherwise". TransAlta had interest in and contracted for FT-D service for delivery to the power generating facilities specifically and would not have executed FT-D service on the NGTL System otherwise.

Commission Analysis and Findings

36 The Commission examines the economic feasibility of a pipeline by considering evidence on all relevant factors, including need and alternatives, which impact the likelihood that the applied-for pipeline will be used at a reasonable level over its economic life and that the associated tolls will be paid.

37 The Commission finds that NGTL demonstrated the need for the acquisition of the Assets by illustrating the growing demand for natural gas in the region and how the Assets are required to meet it. The addition of the Assets into the Integrated System provides an increase in capability in 2021 to serve increased demand in the Wabamun area. The increases in capability between 2022 and 2024 are enabled by approved expansions on the NGTL System upstream of the Pioneer Pipeline and the ATCO System, to meet aggregate system requirements. The volumes and terms of TransAlta and Tidewater's incremental contracts further underpin the acquisition's justification. The evidence on the record demonstrates that there is adequate supply and markets to substantiate the continued use of the Assets.

38 The Commission is satisfied with NGTL's explanation and analysis of the alternatives considered. The Commission finds that the interconnect-only option is not a viable alternative, since Tidewater and TransAlta indicated they would not have contracted for an interconnect-only option. The Commission is persuaded that the incremental contracts would not be achieved without NGTL's purchase of the Assets. The Commission finds that the purchase of the Assets is the best solution as it is the least cost option to meet the incremental contract demand.

Purchase Price

Views of the Parties

39 NGTL submitted that it was not purchasing the Assets at a premium. The purchase price for the approximately 130 km Pioneer Pipeline was $255 million which represented the fair market value of the Pioneer Pipeline as negotiated between arm's length entities. NGTL submitted the purchase price resulted from negotiations between two arm's length entities and

represented the fair market value without reference to the Net Book Value (*NBV*) of the Pioneer Pipeline. NGTL confirmed that the difference between the purchase price and the estimated NBV of the Pioneer Pipeline was $35 million. NGTL and ATCO agreed on a purchase price of $64.975 million for the Assets, subject to purchase price adjustments. The purchase price for the Assets includes the length weighted average of the pipeline value (approximately $57.5 million) and the full cost of the Zeta Lake receipt meter station (approximately $5 million) for a total of $62.5 million for the portion of the Assets previously held by Pioneer. NGTL also agreed to pay the NBV of capital upgrades to the Assets during the period of ATCO ownership (estimated at $2.475 million). NGTL estimated NGTL's prorated share of the NBV for the Assets prior to ATCO's ownership to be approximately $53.9 million. The difference between $62.5 million and $53.9 million is approximately $8.6 million. NGTL stated the book value proposed to be recorded for the Assets will be equal to ATCO's NBV for the assets, as approved by the AUC.

40 NGTL stated that WEG makes unfounded claims that the acquisition of the Assets does not meet the factors from the GHW-001-2016 report [6] :

- An interconnect-only option was not a viable alternative. The acquisition of the Pioneer Pipeline was the only alternative that would result in the level of incremental firm service contracting described in the Applications.

- Each unaffiliated party negotiated the purchase price in a manner that aligned with its own interests. Despite there being both negotiations for the divestiture of the Assets and discussions regarding requests for incremental service, this does not change the fact that NGTL and Pioneer are arm's length parties

- NGTL pointed to ATCO's assessment to the AUC that over a 20-year period, the revenue generated from the requested service will fully offset the costs to own and operate the Pioneer Pipeline and related facilities. NGTL noted this was a conservative assumption for the revenues generated by the acquisition and that the integration of the Pioneer Pipeline into the Integrated System is expected to lower aggregate full-path system tolls, resulting in a positive toll impact for system customers.

41 NGTL submitted that the costs associated with the acquisition are being prudently incurred by NGTL to meet aggregate and incremental demand for service and the acquisition is consistent with cost causation, economic efficiency, and the public interest. As a result, the full cost of the Pioneer South Pipeline acquisition should be included in the NGTL System rate base.

42 WEG submitted that the prudency of the acquisition is not demonstrated. The proposed acquisition cost of the entire Pioneer Pipeline by ATCO is estimated to be more than $30 million higher than the book value at the time of its acquisition. The Pioneer South Pipeline which NGTL proposes to acquire from ATCO is priced as a percentage of the whole, and thus includes a portion of that premium.

43 WEG stated that no acquisition premium was justified and distinguished the current acquisition from GHW-001-2016 where an acquisition premium for inclusion into rate base was allowed:

- NGTL did not demonstrate that the acquisition represents a lower cost to any other alternative to TransAlta's gas demands. NGTL has not compared the acquisition to the alternative impacts for ATCO/NGTL system shippers based on approving the WAS interconnection only.

- The proposed purchase of Pioneer South is not an arm's length transaction. TransAlta FT-D contracting underpinned the need and TransAlta's power plant facilities is the demand market.

- NGTL has not shown how existing ATCO/NGTL system ratepayers will benefit. Further, intervenors did raise objections to the proposed acquisition in this case.

44 The UCA referenced its evidence from the AUC acquisition proceeding which took issue with the approximately $35 million gain (or 15.9 per cent premium) that Pioneer (and its owners, Tidewater and TransAlta) would see from the sale of the pipeline put into service less than two years earlier.

Commission Analysis and Findings

45 Although both NGTL and WEG reference the GHW-001-2016 report, the Commission's main emphasis is on the consideration of relevant circumstances and specific facts of the proposal. While those criteria *may* include "the purchase price of the facility in relation to its depreciated original cost, whether the negotiations for the purchase price were conducted at arm's length, the availability of lower-cost transportation alternatives, and the impacts on shippers' tolls and transportation service" [7] these are not intended to be mandatory or exhaustive criteria. The Commission confirms that there are circumstances in which the Commission may not allow the inclusion of all or a portion of a facility's acquisition costs in rate base.

46 In these specific circumstances, the Commission finds that the full purchase price of the Assets should be rolled into the NGTL System rate base as proposed by NGTL. The Commission is of the view that while NGTL is paying a purchase price that effectively includes a premium over the NBV as it stood prior to ATCO's acquisition ($8.6 million for their portion of the Assets), it is proper for NGTL to proportionally allocate 30km of the overall Pioneer Pipeline purchase price in a manner consistent with the Integration Agreement's geographic footprints. NGTL should be allowed to add these costs into rate base in this case for the following reasons:

- The Applications currently before the Commission do not require the Commission to approve the original purchase of the entire 131 km Pioneer Pipeline. In AUC Decision 25937-D01-2021 the AUC determined the original purchase price that ATCO paid of $255 million to be prudently incurred.

- The Commission accepts NGTL's evidence that they did engage with the Tolls, Tariffs, Facilities & Procedures Committee (*TTFP*) about the Applications and, apart from the concerns raised by WEG and consumer advocate UCA [8] in this proceeding, there were no outstanding concerns regarding the commercial aspects of the transaction.

- The AUC was satisfied that NGTL and the Pioneer Pipeline owners [9] negotiated an arm's length transaction [10] and the purchase price of the Assets was NGTL's proportional share of the purchase price of the Pioneer Pipeline.

- The Commission considered the alternatives to the purchase of the Assets in the Needs and Alternatives section and found that the purchase of the Assets was the best solution as it is the least cost option to meet the incremental contracts.

- The Commission is satisfied that the integration of the Pioneer Pipeline, including the Assets, is expected to have a positive toll and service impact for NGTL system customers. The 30 km portion of the Pioneer Pipeline being acquired by NGTL allows shippers access to the entire 131 km Pioneer Pipeline.

Engagement with Commercial Third Parties

Views of the Parties

47 NGTL provided an overview of its engagement with commercial third parties commencing with a facility notification presentation to the TTFP on 14 July 2020. Engagement activities also included a notification on the TTFP site, verbal update at a TTFP meeting, meeting with WEG on 6 November 2020, filing of a project notification in accordance with the CER Early Engagement Guide, and presentation of NGTL's 2020 annual plan to the TTFP.

48 WEG disagreed with NGTL's representation to the CER that there are no outstanding concerns regarding NGTL's proposed acquisition. WEG listed a number of issues that were not apparent during the earlier TTFP. However, in WEG's 2 September 2021 submission, WEG subsequently stated that it has no comments with regard to NGTL's engagement with commercial third parties.

49 Tidewater and TransAlta stated they are members of the Tolls, Tariff, Facilities and Procedures Committee. Tidewater stated that NGTL's engagement with the committee was detailed and adequate. TransAlta also stated that NGTL's engagement with commercial parties was detailed, fulsome and adequate.

Commission Analysis and Findings

50 The Commission is satisfied that NGTL's notification and engagement with commercial third parties was adequate. The engagement was conducted well in advance of the Applications being filed. In particular, the Commission acknowledges the numerous engagement activities involving the TTFP, as well as NGTL's meeting with WEG. The Commission is of the view that commercial third parties that could be affected by the decision are aware of the Applications and have had the opportunity to comment should they wish to do so.

Greenhouse Gas Emissions and Climate Change

Views of the Parties

51 NGTL stated that the Applications are to acquire and operate existing operating assets, not to construct and operate new facilities. On this basis, NGTL did not include information in its Applications with respect to the net zero filing requirements because it does not consider that those filing requirements are applicable to the Applications.

52 WEG provided comments on NGTL's IR No. 3 response regarding greenhouse gases and climate change. Specifically, WEG referenced the CER Filing Manual guidance for a net-zero emissions plan. WEG submitted that NGTL has not provided this information with respect to the Pioneer South Acquisition and as a result the record is incomplete.

Commission Analysis and Findings

53 The Pioneer South Pipeline and Zeta Lake Receipt Meter Station were previously constructed and have been in operation since 2019. This is an existing and currently operating pipeline and meter station with no new physical works planned. The Commission finds that a net-zero plan is not required as there will be no new or incremental emissions from the continued operation of the Pioneer South Pipeline and the Zeta Lake Receipt Meter Station. The Commission reminds NGTL that it must adhere to and implement Environment and Climate Change Canada's Regulations Respecting Reduction in the Release of Methane and Certain Volatile Organic Compounds (Upstream Oil and Gas Sector), as applicable, to the operation of the Assets.

54 The Commission directs NGTL to serve a copy of this letter, the attached Orders and their respective Schedule As on all interested parties, including the Alberta Utilities Commission.

Footnotes

1 The Integration Agreement contemplated the integration of the NGTL System and ATCO Pipelines System (*Integrated System*) to provide service under a single set of rates and services under the NGTL Gas Transportation Tariff, and the exchange of certain assets. The Integration Agreement is dated 7 April 2009 (Filing ID *A3Q7T7*) and has since been amended several times.

2 For example, NEB, NGTL Integration Asset Transfer Project GH-002-2014 Report, Filing ID *A63558-1* (October 2014)

3 The use of the term "Indigenous" has the meaning assigned by the definition of "aboriginal peoples of Canada" in subsection 35(2) of the Constitution Act, 1982, which states:
In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

4 2021 ABCA 349.

5 WEG's application for permission to appeal AUC Decision 25937-D01-2021 was denied in Western Export Group v Alberta (Utilities Commission), 2021 ABCA 349. One of the grounds considered by the Alberta Court of Appeal was: "Did the AUC err in determining need and prudency without adequate evidence and without providing the applicants an opportunity to test NGTL's proposed need?" The Court found that none of WEG's grounds of proposed appeal were prima facie meritorious and that WEG failed to establish a question of jurisdiction or law that raises a serious, arguable point.

6 National Energy Board, NOVA Gas Transmission Ltd. - Albersun Pipeline Asset Purchase Project GHW- 001-2016 Report, Filing ID *A88632-1* (December 2017) at 14.

7 GHW-001-2016 Report at 14.

8 UCA identified that it was not a commercial shipper and not part of the TTFP

9 Pioneer Pipeline Limited Partnership, a partnership between TransAlta and Tidewater.

10 AUC, ATCO Pipeline Acquisition from Pioneer Pipeline Inc. Decision 25937-D01-2021 (15 June 2021) at para 37.

TAB 4

Horizon Utilities Corp. (Re)

Ontario Energy Board Decisions

Ontario Energy Board

Panel: Christine Long, Presiding Member

Decision: December 10, 2015.

No. EB-2015-0075

2015 LNONOEB 48

Horizon Utilities Corporation Application for electricity distribution rates and other charges beginning January 1, 2016

(73 paras.)

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DECISION AND ORDER

1 INTRODUCTION AND SUMMARY

1 Horizon Utilities Corporation (Horizon) is the electricity distributor that serves approximately 245,000 customers in the City of Hamilton and the City of St. Catharines. Horizon filed an Application with the Ontario Energy Board (OEB) to change the rates it charges to its customers for electricity distribution, to be effective January 1, 2016 (the Application). Under the OEB Act, (electricity) distributors must apply to the OEB to change the rates that they charge customers.

2 Horizon filed a Custom Incentive Regulation (Custom IR) Application in 2014 for electricity distribution rates for the period 2015-2019. The OEB accepted a partial settlement reached between Horizon and the intervenors in that proceeding and held an oral hearing on the issues of cost allocation and rate design. The OEB issued its decision on the outstanding issues on December 11, 2014.

3 The partial settlement proposal and decision (the Settlement Proposal and related decision[1]) included the provision for Horizon to update its rates to reflect certain changes on an annual basis. It also provided for a number of reasons that would justify reopening the Application. This Application is Horizon's first annual update to its Custom IR Application and includes a number of adjustments and changes due to reopeners.

4 The OEB has accepted all of Horizon's proposed changes for 2016 except for two changes related to the cost allocation model. Horizon had proposed an update to the street lighting load profile, which the OEB has not approved. Horizon has also proposed to move the revenue-to-cost ratio for the street lighting rate class to 100%. The OEB has approved phasing in the implementation of the change in the ratio for this class, starting with a move to 120% for 2016.

2 THE PROCESS

5 Horizon published a Notice of Application (the Notice) on its website, and served the Notice on individuals the OEB determined to be appropriate. The Notice indicated that anyone interested in participating in the Application process should apply for intervenor status.

6 Seven parties, who each represented different groups of customers affected by the Application, participated in the proceeding. These parties were:

* Association of Major Power Consumers in Ontario (AMPCO)
* Building Owners and Managers Association (BOMA)
* City of Hamilton (the City)
* Consumers Council of Canada (CCC)
* Energy Probe Research Foundation (Energy Probe)
* School Energy Coalition (SEC)
* Vulnerable Energy Consumers Coalition (VECC)

7 The OEB provided parties and OEB staff the opportunity to ask Horizon questions about its evidence in person at a technical conference, which was not transcribed. Horizon responded in writing to a number of undertakings from the technical conference.

8 On November 5, 2015, Horizon withdrew its request for approval of a new variance account for the implementation of monthly billing. The parties and OEB staff made written submissions on November 16, 2015 and Horizon filed a reply submission on November 23, 2015.

3 STRUCTURE OF THE DECISION

9 The OEB has organized this Decision into sections, reflecting the issues as presented in Horizon's Application. Each section covers the OEB's reasons for approving or denying the proposals included in the Application and affecting 2016 rates. The last section addresses the steps to implement the final rates that flow from this Decision.

10 As a preliminary matter the OEB wishes to address an argument raised by SEC and CCC with respect to their claim that the OEB's failure to allow for interrogatories and/or a transcribed technical conference was inappropriate. SEC and CCC submitted that the OEB did not allow for a proper evidentiary record on which to decide the matter. The OEB disagrees. The parties were allowed to ask questions at the technical conference and to ask for undertakings to ensure that there is a proper evidentiary record.

11 Procedural fairness issues must be considered in the specific context of each case[2]. Horizon's Application is for an annual rate adjustment that is expected to be mechanistic. This mechanistic adjustment resulted from the decision in Horizon's Custom IR Application, which involved a very detailed and through examination of the Application that proceeded by way of an oral hearing. In the context of this annual adjustment Application, proceeding by way of a non-transcribed technical conference and not providing for a separate interrogatory phase was in no way inappropriate. Parties were given the opportunity to ask questions of Horizon at a technical conference. Parties who sought to have evidence added to the record had the opportunity to do so through undertaking responses.

4 REOPENERS

12 The parties to the Settlement Proposal and related decision in Horizon's Custom IR Application agreed to the following reopeners:

* changes to income tax rates and laws
* changes to the Ontario Market Rules or OEB codes
* changes to environmental laws
    * changes to technical requirements beyond the control of the utility
* items that qualified for a Z-factor
* accounting framework changes
    * changes to the permitted market rates to be charged for wireless pole attachments

13 Horizon's evidence indicated that none of these reopeners is applicable to this annual filing and no party disagreed.

14 Horizon did submit that there were three applicable reopeners related to OEB policy changes and Ministerial Directives. These are addressed individually below:

4.1 Cost Allocation for Street Lights

15 On June 5, 2015, the OEB issued a new cost allocation policy for street lighting, which required the implementation of a street lighting adjustment factor (SLAF) and the narrowing of the range for the revenue to cost ratio (RCR) for the street lighting class to 80%-120%[3]. The policy stated that adjustments consistent with the decision should be made as part of a Custom IR annual update. Horizon updated its 2016 cost allocation model

with the SLAF. Horizon also updated the load profile for the street lighting class because the City of Hamilton had converted its street lights to light emitting diodes (LEDs) which reduced the load. Because of these two changes, the RCR for the street light class increased to 160.09% from 81.35%. Horizon proposed to reduce the RCR to 100%.

16 Horizon provided evidence, in its response to Undertaking JTC 9(a) to indicate changes to the revenues allocated to the street lighting class as follows:

Scenario	Allocated Revenues
Cost allocation model updated for OEB's new cost allocation policy for street lighting, updated load profile and adoption of a RCR of 100%	($1,128,091)
Cost allocation model updated for OEB's new cost allocation policy for street lighting and a RCR of 100%	($952,160)
Cost allocation model updated for OEB's new cost allocation policy for street lighting and a RCR of 120%	($592,405)

17 SEC submitted that all of the proposed changes, i.e. implementation of the new cost allocation policy for street lighting, the update to the street light load profile and the changes to the RCRs, increased the bill impact from 4% in the Settlement Proposal and related decision to almost 7% for the GS [less than] 50 kW and GS [greater than] 50 kW classes.

18 Horizon also requested that its proposed revisions to the cost allocation model be approved for 2017-2019. Each of these proposed changes will be addressed individually below.

i) Implementation of OEB policy re SLAF

19 All parties submitted that Horizon had correctly implemented the SLAF in the cost allocation model.

Findings

20 The OEB accepts Horizon's update for the SLAF. The policy provided that adjustments be made as part of a Custom IR update. The OEB is satisfied that Horizon has implemented the policy correctly.

ii) Adjustment of RCR for Street Lighting Class

21 The City of Hamilton supported Horizon's proposal to adjust the RCR for the street lighting class from 160.09% to 100%. OEB staff and all other parties did not support the move to 100% and recommended that initially the RCR for street lighting should move to the upper boundary of the OEB's approved range, i.e. 120%.

22 Horizon submitted that the street lighting class had experienced substantial rate volatility over the years, from a RCR of 15.6% in 2008 to 160.09% in this annual filing. Horizon acknowledges that in its decision on Horizon's 2008 cost of service Application, the OEB recommended phasing in the adjustment of the RCR for street lighting into the OEB's range by moving to the bottom end of the OEB range (70% at that time) and that normal practice would be to

move the street lighting class to the edge of the OEB's range, however given the unique history of the cost allocation for the street lighting class, it was just and reasonable to move to 100% at this time.[4]

23 OEB staff did submit that the adjustment of the RCR for the street lighting class from 120% to 100% could be phased in and Horizon agreed that should the OEB decide that the RCR for street lighting should be set at 120% for 2016, then the applicant could move to 110% in 2017 and 100% in 2018.

Findings

24 The OEB accepts OEB staff's recommendation that the implementation of a RCR of 100% for the street light class should be phased in, as has been past practice, starting with a move to 120% for 2016. Moving the RCR to 100% should be done over subsequent years at a reduction of 6.6% per year for three years. This progression will assist in gradually phasing in the change.

iii) Update to Street Lighting Profile

25 Horizon has proposed to update the load profile used for the street lighting class in the cost allocation model. The City of Hamilton has converted its street lights to LEDs, resulting in reduced demand. With this update to the class load profile, costs would be reallocated from the street lighting class to other classes. The City of Hamilton supported this update while all other parties opposed the change, indicating that it was not fair to other classes that may also have implemented conservation measures that would affect their load profiles.

Findings

26 As the OEB stated in the Decision and Order issued for Horizon's Custom IR Application[5], while the use of up to date data is preferable, there is no advantage to selective updating. Until data that is more accurate is available for all classes, Horizon must continue to use the existing load profiles for the purpose of its cost allocation model.

iv) Cost Allocation Model for 2017-2019

27 Horizon has requested approval of its cost allocation model, as presented in this Application, for 2017 to 2019. OEB staff, Energy Probe and VECC supported the use of the updated models, with the exception of the update to the street lighting load profile as described above. OEB staff noted that this approval should be subject to any further revisions to the cost allocation policy or models that the OEB directs utilities implement during a Custom IR rate plan term.

Findings

28 Subject to the findings in this Decision and any changes in policy or cost allocation models that the OEB directs utilities to implement during a Custom IR rate plan term, the OEB approves Horizon's cost allocation models for 2017-2019.

4.2 Residential Distribution Rate Design

29 On April 2, 2015, the OEB issued the Report of the Board: A New Distribution Rate Design for Residential Electricity Customers, which stated that distribution charges for the Residential class would transition to a fully fixed service charge over a four-year period. In a July 16, 2015 letter, the OEB stated that it "expects that all distributors will file an application for 2016 rates to begin the implementation of fixed residential distribution rates"[6]. Distributors are expected to transition to a fully fixed residential charge in equal increments over a four year period unless the required increase to the fixed rate would increase by more than $4 in any year, or if bill impacts are unusually large. In recognition of the potential impact on lower volume customers, the bill impacts of changes would be assessed for residential customer at the 10th percentile of consumption.

30 Horizon provided evidence that the annual increase in the fixed charge for the Residential class was $2.47[7] and

that for the 10th percentile customer, the impact of the change in distribution rate design was 4.95%, i.e. less than 10%[8].

31 OEB staff submitted that Horizon has correctly implemented the OEB policy on residential rate design and that mitigation is not required. AMPCO, CCC, Energy Probe and VECC submitted that Horizon should consider the total bill impact, incorporating all changes that affect the customer's bill on January 1, 2016 (i.e. Debt Retirement Charge, Ontario Clean Energy Benefit, and Ontario Electricity Support Program) in determining whether mitigation was required. AMPCO submitted that the total bill impact of all changes for a customer in the 10th percentile was 14.02%[9] and therefore mitigation was required.

32 CCC also submitted that Horizon must clearly define for its customers the nature of the new changes in this Application and how they will affect the bill going forward and the OEB should assess whether Horizon's customer communication materials are sufficient, especially for low volume customers.

Findings

33 The OEB finds that Horizon has correctly implemented the OEB's policy on distribution rate design for residential customers.

34 The OEB expects that all distributors will transition to fixed rates in equal increments over a four-year period. The OEB has established two main tests for considering whether a deviation from this expectation is warranted. The first is if the increase to the monthly fixed charge would need to be greater than $4 to achieve the transition within four years. Horizon's proposal to increase the fixed charge by $2.47 passes this test.

35 The second test is "if other rate changes being made as a result of other OEB decisions, which together with the policy change, could result in unusually large bill impacts".[10] Given that the impact of the change on individual customers will vary by consumption, the OEB established that acceptable bill impacts would be evaluated for a residential customer at the distributor's 10th percentile. Horizon's proposal also passes this second test.

36 As the policy paper notes, and the filing requirements echo, the assessment is designed to consider "the combined effects of the shift to fixed rates and other bill impacts associated with changes in the cost of distribution service"[11]. Changes to the bill resulting from the provincial government's decision to phase out the Ontario Clean Energy Benefit and the Debt Retirement Charge are not within the scope of the evaluation. While these impacts may be appreciable, the OEB's test recognizes that these changes neither are the OEB's decision nor of a magnitude that the OEB typically has tools to mitigate, especially in an Application with a scope as narrow as this annual update.

4.3 Regulatory Charges

37 On November 19, 2015, the OEB issued a decision approving three regulatory charges: the Rural or Remote Electricity Rate Protection charge (RRRP), wholesale market service rate (WMS) and the Ontario Electricity Support Program (OESP) charge of $0.0011/kWh effective January 1, 2016.

38 In anticipation of the OESP charge, Horizon also requested in its Application for approval to update the cost of power used for its working capital allowance to include the three regulatory charges approved by the OEB on November 19, 2015. OEB staff did not support the updating of the cost of power for the OESP, as it was not clear what the net effect of the OESP would be on the working capital allowance and it was not material. AMPCO supported the updating of the cost of power with the OESP. Horizon submitted that updating the cost of power for the OESP was consistent with the Settlement Proposal and related decision, which allowed annual adjustments to the cost of power for flow-through charges. Horizon also submitted that the materiality of the item is not sufficient reason to disallow the adjustment.

Findings

39 Horizon's draft Tariff of Rates and Charges flowing from this Decision should reflect these new charges, as well as the OESP credits to be provided to enrolled low income customers as per the Decision and Order issued November 19, 2015[12].

40 There is nothing in Horizon's Settlement Proposal and related decision that would restrict Horizon from updating the cost of power for the OESP charge, despite its immateriality. Since the update to the cost of power for the three regulatory charges approved on November 19, 2015 is consistent with the Settlement Proposal and related decision, the OEB accepts it.

5 ANNUAL ADJUSTMENTS

41 The parties to the Settlement Proposal and related decision in Horizon's Custom IR Application agreed that rates would be annually adjusted for a number of items. Each is addressed below.

5.1 Changes in the Cost of Capital

42 The Settlement Proposal and related decision included an update to the cost of capital parameters based on the OEB's annual update. On October 15, 2015, the OEB issued cost of capital parameters for 2016 Applications and Horizon appropriately updated its revenue requirement and stranded meter rate rider for the revised parameters. No parties objected to the updates.

Findings

43 Horizon has correctly updated its rates for the latest cost of capital parameters.

5.2 Changes in the Working Capital Allowance

44 Horizon updated the Working Capital Allowance to account for updates to:

* Retail Transmission Service Rates to incorporate 2014 demand and 2015 Uniform Transmission Rates;
* Smart Metering Entity Charge to incorporate 2014 Residential and GS [less than] 50 kW customer counts;
* Cost of Power incorporating the November 1, 2015 RPP prices, the ratio of RPP vs. non-RPP volumes for 2014 actuals and the November 19, 2015 update to the WMC, RRRP and the new OESP.

45 Except for the update related to the OESP, which is discussed under item 4.3, no parties objected to these annual updates.

46 In calculating its revenue requirement for 2016, Horizon used a Working Capital Allowance (WCA) percentage of 12%, which had been accepted as part of the Settlement Proposal and related decision in Horizon's Custom IR. Horizon stated that the percentage was based on a lead/lag study and no reopener or annual adjustment for the percentage was provided for in the Settlement Proposal and related decision. In response to Energy Probe Technical Conference Question 2-EP-11(b), Horizon estimated the change in the WCA percentage with the implementation of monthly billing at 8.7%.

47 On June 3, 2015, the OEB issued a letter announcing a new default working capital allowance of 7.5% in place of the previous 13%. Distributors who do not wish to use the default value could request approval for a distributor-specific working capital allowance supported by the appropriate evidence from a lead-lag study or equivalent analysis.

48 BOMA submitted that based on the June 3, 2015 letter and the recalculated 8.7% WCA percentage, Horizon should adjust its WCA as it qualified as a Z-factor event. AMPCO also submitted that Horizon should use the 8.7% WCA percentage on the basis that it was part of the annual adjustments in the Settlement Proposal and related decision.

49 Horizon states that the OEB's June 3, 2015 letter identified that adjustments to the WCA percentage would only be made in a rebasing Application unless otherwise provided for and no such provision exists in Horizon's case.

Findings

50 Horizon's updated Working Capital Allowance is accepted. Based on the OEB's letter of June 3, 2015, which stated that "[c]hanges to working capital allowances costs will be implemented only in cost of service and Custom IR Applications unless otherwise determined by the OEB in a prior decision", Horizon's continued use of a WCA percentage of 12% is accepted.

5.3 Changes in Other Third Party Pass Through Charges

51 The updates related to changes in other third party pass through charges are discussed above in section 3.3.2.

5.4 Earnings Sharing Mechanism (ESM)

52 The Settlement Proposal and related decision for Horizon's Custom IR included an ESM based on a year's financial results. Absent 2015 final results, Horizon submitted that the ESM was not applicable to this Annual Filing. No parties disagreed.

Findings

53 Horizon should report on the ESM for 2015 as part of its 2017 Annual Filing.

5.5 Capital Investment Variance Account (CIVA)

54 The Settlement Proposal and related decision included a CIVA base on a year's capital additions. Absent 2015 final results, Horizon submitted that the CIVA was not applicable to this Annual Filing. No parties disagreed.

Findings

55 Horizon should report on the CIVA for 2015 as part of its 2017 Annual Filing.

5.6 Efficiency Adjustment

56 The Settlement Proposal and related decision included an Efficiency Adjustment if the OEB's benchmarking analysis placed Horizon in a less efficient cohort. Horizon's starting point was Cohort III and the OEB's Empirical Research in Support of Incentive Rate-Setting: 2014 Benchmarking Update for Determination of Stretch Factor Assignments for 2016 issued on July 30, 2015, placed Horizon in Cohort III. As a result, Horizon submitted and no party disagreed, that an Efficiency Adjustment was not required.

Findings

57 No Efficiency Adjustment is required as part of this Annual Filing.

5.7 Off-ramps

58 The parties to the Settlement Proposal and related decision in Horizon's Custom IR Application agreed that the OEB's policy in relation to off-ramps, as stated in the Renewed Regulatory Framework for Electricity Distributors Report[13] would continue to apply to Horizon. In order to determine if an off-ramp should apply, final information from 2015 is required. No parties objected to Horizon's proposal to provide an update on its 2015 results in its 2017 Annual Filing.

Findings

59 The OEB accepts Horizon's proposal.

6 DISPOSITION OF GROUP 1 DEFERRAL AND VARIANCE ACCOUNTS

60 Horizon has proposed disposing of Group 1 Deferral and Variance Accounts (DVAs) balances of $9,527,458 over a one-year period. Horizon identified that the balance exceeds the disposition threshold of $0.001/kWh. OEB staff submitted that Horizon had correctly computed the rate riders to recover the balance.

61 In Undertaking JTC 11, Horizon indicated that it had revised the tariff sheets for the Large Use (1) and Large Use (2) customer class to clarify that only Class A customers as of December 31, 2014 will be exempt from the 2016 Global Adjustment Rate Rider.

Findings

62 Horizon's proposed rate riders for disposition of Group 1 DVAs, as shown in Horizon's Deferral and Variance Work Form filed on August 12, 2015, and as clarified in Undertaking JTC 11, are approved.

7 IMPLEMENTATION

63 New rates are to be effective January 1, 2016.

64 Horizon's draft rate order should reflect the findings of this Decision. The OEB expects Horizon to file detailed supporting material, including all relevant calculations showing the impact of the Decision on its proposed revenue requirement, the allocation of the approved revenue requirement to the classes, and the determination of the final rates, including bill impacts.

65 The draft rate order supporting documentation shall include, but not be limited to, filing a completed version of the revenue requirement work form and the cost allocation excel spreadsheets, which can be found on the OEB's website.

66 A Rate Order will be issued after the steps in Section 8 are completed.

7.1 Regulatory Charges

67 On November 19, 2015, the OEB issued a decision approving three regulatory charges. These regulatory charges are established annually by the OEB through a separate order. These charges are paid for by electricity consumers.

68 The charges include the Rural or Remote Electricity Rate Protection charge (RRRP), Wholesale market service rate (WMS) and the Ontario Electricity Support Program (OESP) charge.

69 The RRRP program is designed to provide financial assistance to eligible customers located in rural or remote areas where the costs of providing electricity service to these customers greatly exceeds the costs of providing

electricity to customers located elsewhere in the province of Ontario. The RRRP program cost is recovered from all electricity customers in the province through a charge that is reviewed annually and approved by the OEB.

70 WMS charges recover the cost of the services provided by the Independent Electricity System Operator (IESO) to operate the electricity system and administer the wholesale market. These charges may include costs associated with: operating reserve, system congestion and imports, and losses on the IESO-controlled grid. Individual electricity distributors recover the WMS charges from their customers through the WMS rate.

71 The OESP is a new rate assistance program for low-income electricity customers. Starting January 1, 2016, eligible low-income customers will receive a monthly credit on their bills. At the same time, all electricity customers in the province will begin paying a charge to fund the program, which will be referred to as the OESP charge.

72 The proposed Tariff of Rates and Charges flowing from this Decision should reflect these new charges as well as the OESP credits to be provided to enrolled low income customers.

8 ORDER

73 THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Horizon Utilities Corporation shall file with the OEB, and shall also forward to the intervenors, a draft rate order attaching a proposed Tariff of Rates and Charges reflecting the OEB's findings in this Decision and Order by December 16, 2015.
2. OEB Staff and intervenors shall file any comments on the draft rate order with the OEB, and forward the comments to Horizon on or before December 18, 2015.
3. Horizon shall file with the OEB and forward to the intervenors responses to any comments on its draft rate order within 7 days of the date of the receipt of the submission.

All filings to the Board must quote the file number, EB-2015-0075, be made through the Board's web portal at https://www.pes.ontarioenergyboard.ca/eserv ice/ and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at http://www.ontarioenergyboard.ca/OEB/Industry

If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Jane Scott at jane.scott@ontarioenergyboard.ca and Board Counsel, Maureen Helt at maureen.helt@ontarionenergyboard.ca.

DATED at Toronto December 10, 2015

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

1 EB-2014-0002, Decision and Order, December 11, 2014

2 Dunsmuir v. New Brunswick, 2008 SCR at paragraph 79

3 Issuance of New Cost Allocation Policy for Street Lighting Rate Class, EB-2012-0383, June 12, 2015

4 Horizon response to OEB staff Technical Question 13, October 23, 2015

5 EB-2014-0002, Decision and Order, December 11, 2014

6 OEB Letter to all Licensed Electricity Distributors, RE: Implementing a New Rate Design for Electricity Distributors, OEB File: 2012-0410, July 16, 2015

7 Horizon's Response to JTC 3(a), November 6, 2015

8 ibid

9 Horizon's Response to Technical Conference Question 5-VECC-7, October 23, 2015

10 A New Distribution Rate Design for Residential Electricity Customers, April 2, 2015 p26

11 Chapter 3 - Filing Requirements - Incentive Rate-Setting Applications, p9.

12 EB-2015-0294, Decision and Order, November 19, 2015

13 Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach, October 18, 2012, p. 11

End of Document

TAB 5

§2.05 COMMON LAW PROCEDURAL REQUIREMENTS: THE DUTY TO BE FAIR

Administrative Law in Canada, 7th Ed.

Sara Blake

PART I PROCEEDINGS BEFORE THE TRIBUNAL

Chapter 2 TRIBUNAL PROCEDURE

§2.05 COMMON LAW PROCEDURAL REQUIREMENTS: THE DUTY TO BE FAIR

In the absence of prescribed procedural rules, the courts require that a statutory decision that affects the rights of an individual person be made ***following fair procedures***.[1] This requirement is called the "doctrine of fairness" or the "duty to act fairly".[2]

At a minimum, the duty to act fairly requires that, before a decision adverse to a person's interests is made, the person should be told the case to be met and be given an opportunity to respond.[3] The purpose is twofold. First, it gives the person to be affected an opportunity to influence the decision. Second, the information received from that person may assist the decision maker to make a rational and informed decision.[4] A person is more willing to accept an adverse decision if the process has been fair.

The right to be heard is not a right to the most advantageous procedure[5] nor a right to have one's views accepted[6] nor a right to be granted the remedy sought.[7] It is only a right to have one's views heard and considered by the decision maker.

A variety of procedural options are available to meet the duty to be fair. What is "fair" in a given case depends on the circumstances.[8] The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations.[9] Sometimes, all that is required is that the person be advised verbally of the gist of the proposed decision and the reasons for it and be permitted to respond verbally.[10] In some cases written notice and an opportunity to make written submissions will suffice. Written submissions may take many forms including completion of a questionnaire,[11] a letter stating one's position, an exchange of correspondence in which the issues are discussed[12] or a formal application supported by documentary evidence and reports of experts. Sometimes a person cannot adequately answer the case without an oral hearing, which may be conducted in a variety of ways. It may be an informal interview with an agent of the decision maker, a round table discussion with the tribunal[13] or a formal proceeding similar to a civil trial or an inquisitorial process. A party may be entitled to see documents relied on by the decision maker and to cross-examine witnesses. Sometimes a decision maker may refer the fact-finding process to others for investigation and report. The main consideration in choosing the appropriate procedure is whether the procedure gives the persons affected a fair opportunity to be heard.

The same procedure is not expected of all tribunals. There is great variety in the types of tribunals and in the types of decisions made by them. The concept of procedural fairness is not a fixed concept. It varies with the context and the interests at stake.[14] "At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly." The Supreme Court of Canada has identified the following five factors to be considered in determining what is appropriate.[15]

TAB 6

Practice and Procedure Before Administrative Tribunals § 16:40

Practice and Procedure Before Administrative Tribunals
Lorne Sossin, Robert W. Macaulay, James L.H. Sprague

Chapter 16. The Conduct of the Hearing: Powers and Procedures

V. Interventions; Interrogatories

§ 16:40. Interventions

Interveners are generally individuals or groups who do not meet the criteria to be a party but who still have a sufficient interest, or some expertise or view which the agency feels will benefit the proceeding to have represented. As the Supreme Court of Canada commented in the *Canadian Council of Churches v. Canada* [1] "[T]he views of the public litigant who cannot obtain standing need not be lost. Public interest organizations are, as they should be, frequently granted intervenor status. *The views and submissions of intervenors on issues of public importance frequently provide great assistance to the courts."* [emphasis added.] [2]

A statute may expressly give an agency the authority to grant intervener status to a person or group. [3] Otherwise an agency's authority to grant intervener status flows implicitly from the power to conduct a hearing or to hold an inquiry. [4] It appears that, at least in the case of a public officer, in order for an agency to grant such status the person seeking intervenor status must have the ability himself to receive the grant. [5]

There is no common law *right* to be an intervenor. Statute may, of course, grant such a right but in the absence of such a statutory provision, intervenors are added at the discretion of the agency. Furthermore, unlike a party, who is given certain rights by natural justice and fairness, the extent of an intervenor's participation is fixed by the agency (subject to statutory direction, of course). The degree of participation will be determined by the extent the agency feels the intervener's participation will assist it in its mandate. [6]

In considering a request for intervention the agency should take into account the perceived value that might brought to the table by that participation against any harm or other downside that granting the application might cause. [7] Sometimes two or more individuals or groups may bring before the agency essentially the same expertise or views. In that case the agency may require that they pool their resources and appear through a single spokesman. [8] However, it must be remembered that an intervenor is there to bring a view or an expertise before the agency which will be useful in determining the matter which is before the agency. If the person seeking intervenor status is not bringing anything of potential use to the agency, or is simply repeating which will already be brought or could be brought to the agency by the other parties, the agency should not grant intervenor status out of concerns respecting the public (and the parties') interest in efficient and expeditious proceedings. [9]

An intervenor should not be given leave to speak to questions which are not raised by the underlying proceeding. [10]

The flip side of this coin is that, just as the role of intervenors is limited to bringing a view or expertise to the agency which would not otherwise be available to it the agency cannot at the end of the day treat the intervenor as a party capable of being made subject to the ultimate order or decision which is before the agency. In illustration, see the decision of the Quebec Court of Appeal in Collège d'enseignement general & professionnel A c. Flynn, 2012 CarswellQue 1841, 2012 QCCA 441. In that case the Quebec Court of Appeal noted that an intervenor in a harassment grievance could not be made the target of an order issued by the arbitrator as an outcome of the grievance. In the case in point a grievance had been brought against a college by an

TAB 7

Practice and Procedure Before Administrative Tribunals § 13:1

Practice and Procedure Before Administrative Tribunals
Lorne Sossin, Robert W. Macaulay, James L.H. Sprague

Chapter 13. The Duty of Fairness and Powers of an Agency to Control its Own Procedure

I. In General

§ 13:1. Mastery Over Their Own Procedure

You cannot be either a successful administrative agency or practitioner unless you grasp the essential fact that, subject to certain limitations which will be discussed below, an administrative agency is "master of its own procedure", [1] Some statutes expressly grant the agency a general power over procedure. [2] Even in the absence of an express grant of authority to that effect, the authority is implied in the grant of the agency's mandate. The authority to develop the necessary procedure to effect a mandate is implicit in the grant of that mandate. [3] What this means is that an agency is free to develop its procedures as required in order to accomplish its particular purposes. [4] In this text I shall refer to this implied authority as the agency's common law power over procedure.

In determining its procedures an agency is not bound by the manners and traditions of the courts. And, while it may be prudent, and even fruitful, to look at judicial procedure in the formulation of agency process, to do so without understanding the strengths, weaknesses and purposes of both is to invite problems. The uncritical adoption of judicial mores leads to unsuitable, and (I would argue) unsuccessful agency operations. This applies as much to the courts when they judge agency procedures in terms of judicial process, as it does to agencies or practitioners before them. I submit that in developing or urging a particular procedure upon an agency it is simply not sufficient to copy judicial practice in the expectation that this must be the best there is.

Very simply put, this is because agencies do not serve the same function as do courts. I doubt very much that anyone would like major surgery conducted upon themselves by doctors dedicated to do so in accordance with the very best judicial process. Even when the agency's function appears very close to a court function, disciplinary hearings for example, I suggest that it is incorrect to blindly pattern the agency essentially upon judicial process. After all there must be a reason the function has been mandated to an administrative agency and not to a court. [5]

> The procedural format adopted by the administrative tribunal must adhere to the provisions of the parent statute of the Board. The process of interpreting and applying statutory policy will be the dominant influence in the workings of such an administrative tribunal. Where the Board proceeds in the discharge of its mandate to determine the rights of the contending parties before it on the traditional basis wherein the onus falls upon the contender to introduce the facts and submissions upon which he will rely, the Board technique will take on something of the appearance of a traditional Court. Where, on the other hand, the Board, by its legislative mandate or the nature of the subject-matter assigned to its administration, is more concerned with community interests at large, and with technical policy aspects of a specialized subject, one cannot expect the tribunal to function in the manner of the traditional Court. This is particularly so where Board membership is drawn partly or entirely from persons experienced or trained in the sector of activity consigned to the administrative supervision of the Board. Again where the Board in its statutory role takes on the complexion of a department of the executive branch of Government concerned with the execution of a policy laid down in broad concept by the Legislature, and where the Board has the delegated authority to issue regulations or has a broad discretionary power to license persons or activities, the trappings and habits of the traditional Courts have long ago been discarded. [6]

TAB 8

2.3 CONTINUUM OF PROCEDURAL PROTECTION

Canadian Administrative Law, 3rd Ed.

Guy Régimbald

Canadian Administrative Law, 3rd Ed. (Régimbald) > Chapter VI Procedural Fairness/Audi Alteram Partem > 2. CONTENT OF PROCEDURAL FAIRNESS

Chapter VI Procedural Fairness/*Audi Alteram Partem*

2. CONTENT OF PROCEDURAL FAIRNESS

2.3 CONTINUUM OF PROCEDURAL PROTECTION

Once it has been determined that procedural fairness does apply, the determination of the exact content of procedural fairness remains elusive. The content of any procedural protection will depend on a host of factors, including the nature of the decision-making involved. Given the diversity of administrative action, the requirements to comply with procedural fairness can vary ranging from the full panoply of procedural justice comparable to normal court procedure, to the right simply to be notified and be allowed to defend one's case appropriately.[1]

The content of fair procedures is flexible, involving a continuum of procedural protections. It ranges from mere notice or consultation at the lower end, upwards through an entitlement to make written and oral representations, to a complete judicial procedure similar to other judicial hearings at the other extreme. What is required in any particular case is impossible to define in abstract terms.[2] In *Russell v. Duke of Norfolk*,[3] Lord Tucker opined that: "whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."[4] In *R. v. Secretary of State for the Home Department, ex parte Doody*,[5] Lord Mustill held that: "the principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects."[6] Closer to home, in *Nicholson*, it was held that as the decision-making function approaches the legislative end of the spectrum, the decision maker's procedural obligations decrease.

Within the confines of procedural fairness, the common law affords administrative decision makers significant autonomy in formulating the required procedural content of their decision-making. The content will thus vary from agency to agency and will differ depending on the circumstances of each case.[7] In *Homex Realty and Development Co. v. Wyoming (Village)*,[8] Dickson J., as he then was, opined in dissent that:

> Above all, flexibility is required in this analysis. There is, as it were, a spectrum. A purely ministerial decision, on broad grounds of public policy, will typically afford the individual little or no procedural protection … On the other hand, a function that approaches the judicial end of the spectrum will entail substantial procedural safe-guards, particularly when personal or property rights are targeted, directly, adversely and specifically.[9]

This balance must be done according to the protection needed by the individual, but must also consider the societal need for effective decision-making. The objective is to reach the appropriate balance between an adequate procedure which will allow the government to operate while at the same time protect the interests of the individual. In balancing those elements, courts must take into account the importance of the interest of the individual at stake as compared with that of the state.[10]

Although the procedural content of the duty to act fairly is variable, the courts have sometimes concluded that, at a minimum, it requires that parties to a controversy be given a fair opportunity to correct or contradict any relevant statement prejudicial to their view.[11] Decision makers that are subject to a duty of fairness must give sufficient notice of the hearing and its scope to allow the parties to benefit from their right to be heard. Therefore, affected